MORE MARTIAL THAN COURT:

FROM EXCEPTIONALISM TO FAIR TRIAL CONVERGENCE IN AUSTRALIAN COURTS MARTIAL

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The Australian military justice system has been reviewed by six separate inquiries since 1997, with each one recommending the adoption of fair trial standards of independent and impartial adjudication, as accepted in the civilian criminal justice system and required by the norms of public international law.

Yet, despite the numerous recommendations for civilianising reform, the Australian military has resisted change, consistently arguing that its separate system of justice was not only fair, but should remain in-house. Nevertheless, reform has occurred.

Thus, two competing propositions emerge: on one hand, the military is resistant to civilianising reform, yet, on the other, reform has and is occurring. The question then is, why.

Accordingly, the argument advanced in this thesis is: because of the nature of the military as a total institution, civilianising reforms to the Australian military justice system only occur when the military is coerced to do so by external forces.

This hypothesis is examined in a number of ways:

1. critically assessing the bodies of literature which argue for, or against the *separate* military justice system, as well as literature which assesses military justice from a human rights, fair trial perspective.
2. applying two separate sociological theories: 'total institutions', which assists in understanding *why* the military is resistant to civilianising reform of its justice system. 'Isomorphism' assists in understanding *how* reform occurs to an otherwise resistant entity.
3. identifying the fair trial flaws of the Australian military justice system, with particular emphasis on the right to an independent and impartial trial.
4. analysing the Australian military's response to the six inquiries held between 1997 and 2005,
5. identifying the motivators for civilianizing reform in comparative jurisdictions.

Consequently, the thesis draws upon these themes to identify the legal, social, and political contexts in which reform has occurred. The recognition of these factors also allows for the development of a predictive framework to identify the conditions precedent to fair trial civilianisation of the Australian military justice system.

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Table of contents

List of Tables

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List of Abbreviations

3RAR	3rd Battalion, Royal Australian Regiment
ACT	Australian Capital Territory
ADF	Australian Defence Force
AFP	Australian Federal Police
AMC	Australian Military Court
CDF	Chief of Defence Force
CO	Commanding Officer
Cth	Commonwealth
DFDA	*Defence Force Discipline Act* 1982 (Cth)
DFDAT	Defence Force Discipline Appeals Tribunal
DFM	Defence Force Magistrate
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
ECHR	*European Convention on Human Rights*
HMAS	Her Majesty's Australian Ship
HMNZS	Her Majesty's New Zealand Ship
ICCPR	*International Covenant on Civil and Political Rights*
JAG	Judge Advocate General
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence and Trade
MML	Manual of Military Law
NZBORA	*New Zealand Bill of Rights Act*
QC	Queen's Counsel
RAAF	Royal Australian Air Force
RAF	Royal Air Force
RAN	Royal Australian Navy
SC	Senior Counsel
UCMJ	*Uniform Code of Military Justice* (United States)
Vic.	Victoria

List of abbreviated citations to the Reports inquiring into the Australian Military Justice System (in chronological order)

The Abadee Report

Brigadier the Hon A.R. Abadee, *A Study into the Judicial System under the Defence Force Discipline Act,* (11 August 1997).

Ombudsman Report

Commonwealth Ombudsman, *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976*, (January 1998).

Military Justice Report 1999

Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice in the Australian Defence Force*, (21 June 1999).

Rough Justice Report

Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Rough Justice? An investigation into Allegations of Brutality in the Army's Parachute Battalion,* (11 April 2001).

Burchett Report

The Hon. James C. S. Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force,* (July 2001).

2005 Senate Report

Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *The effectiveness of Australia's military justice system,* (June 2005).

A note on the spelling of ‘court martial’

Some texts refer to the ‘court’ that tries charges under military law as a ‘court-martial’, but in others it is referred to as a ‘court martial’ without the hyphen. Both the Australian Macquarie Dictionary (2006 Ed) and Collins Dictionary (2000 Ed) list the word without hyphen, but note court-martial as a variation. The Collins Dictionary refers to ‘court-martial’ as a US spelling, an approach which is reflected in American texts.

The *Defence Force Discipline Act* 1985 refers to the entity without a hyphen, for example section 114 of the Act provides:

> **Section 114 - Types of court martial**
>
> (1) A court martial shall be either a general court martial or a restricted court martial.
> (2) A general court martial shall consist of a President and not less than 4 other members.
> (3) A restricted court martial shall consist of a President and not less than 2 other members.

Similarly, the reports arising from the various inquiries which have been conducted into the Australian military justice system since 1997 refer to “courts martial” without a hyphen.

Accordingly, given the approaches adopted in both Australian dictionaries, Commonwealth legislation, and the Reports concerning the Australian military justice system, the compound noun ‘court martial’ will be used in this text without a hyphen. The only exception to this is where a source is cited and that source uses the hyphen between court and martial.

INTRODUCTION

> As old as armies and navies is the idea of a special discipline and a special body of law applicable to the armed forces.[1]
>
> …where there is an army, there is military justice.[2]
>
> Military justice is to justice as military music is to music.[3]

Since Federation, the Australian Defence Force has been responsible for the administration of military justice through its own military justice system. This separate trial system has jurisdiction to hear a wide range of offences, including uniquely military offences such as desertion, as well as offences with close civilian counterparts, such as assaulting officials, and offences which are found in civilian criminal law, such as rape and murder. This separate system of military justice also has a broad jurisdictional reach, extending to all Australian defence force members[4] and defence civilians[5] (for example, the Salvation Army), both in and outside of

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[1] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice in the Australian Defence Force* (21 June 1999), 1.

[2] John Gilissen, 'Evolution actuelle de la justice militaire - Rapport général' in International Commission of Jurists, *Military Jurisdiction and International L*aw (2004), 154 ('ICJ Report').

[3] Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* (1970).

[4] *Defence Force Discipline Act* 1982 s 3 defines 'defence member' as:

> (a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or
> (b) a member of the Reserves who:
> (i) is rendering continuous full-time service; or
> (ii) is on duty or in uniform.

[5] *Defence Force Discipline Act* 1982 s 3 defines 'defence civilian' as a person (other than a defence member) who:

> (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
> (i) outside Australia; or
> (ii) on operations against the enemy; and
> (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

Australia.[6] It also applies to prisoners of war held by Australian forces as if they were members of the ADF. Further, the Act covers all of those personnel in times of peace and war, wherever they are posted, and irrespective of whether they are on or off duty.[7]

The Department of Defence *Annual Report 2009*[8] reveals that the jurisdictional reach of the *DFDA* covers an average strength of 55,068[9] permanent (full-time) members and 25,493 reserve (part-time) personnel, as well as 15,243 civilian members of the Australian Public Service employed by the ADF, and 620[10] professional service providers. The Federal Budget released in May 2010[11] provided for a defence workforce forecast of 96,084 personnel, comprising:

> Permanent forces (60 per cent) of:
>
> 14,238 Navy Personnel
> 28,811 Army Personnel
> 14,227 Air Force Personnel
> 22,018 Reserve forces (23 per cent)
> 16,043 APS staff (17 per cent)
> 747 Contractors (less than 1 per cent).

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[6] *Defence Force Discipline Act* 1982 s 9 provides:

> The provisions of this Act apply both in and outside Australia, but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian.

[7] See, for example, *Re Colonel Aird* (2004) 220 CLR 308 in which it was held that a rape alleged to have been committed in Thailand by an Australian soldier, Private Alpert, who was stationed at an air force base in Malaysia but on leave in Thailand at the time of the alleged rape, could be dealt with by a court martial rather than by the civil courts. By a 4-3 majority, the High Court held that it was within the defence power of the Commonwealth Constitution for Parliament to make Alpert's alleged conduct a 'service offence' and thus amenable to trial before a court martial.

[8] Australian Department of Defence, *Defence Annual Report 2008-09* (2009), Appendix 7, 195.

[9] Figures provided by the Department of Defence are average funded strengths; they are not a 'headcount'. Reservists undertaking fulltime service are included in the figures. Personnel on forms of leave without pay are not included.

[10] Australian Department of Defence, *Defence Annual Report 2007-08* (2008), 99-101.

[11] Commonwealth of Australia, *Federal Budget*, 24 May 2010, 30.

A. *The exceptional nature of military justice*

The Commonwealth of Australia is far from unique in having a separate justice system for its defence force personnel. The existence of a separate military justice system is not a new concept, with some military historians sourcing military justice to Roman history,[12] while other military historians trace its origins back to Alexander the Great of Ancient Greece.[13] Still other historians conclude that one cannot 'talk about military justice existing before the 15th and 16th centuries'.[14] Irrespective of the precise antecedents of military justice, it is beyond doubt that the practice of the military administering its own internal, military justice system, separate from the civilian justice system, is neither new nor novel.

It has long been argued by military historians and military leaders that this separate justice system is an absolute necessity for the proper functioning of defence forces:

> Given a standing army, military tribunals are a necessity … with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned, military men must determine them.[15]
>
> Civil courts cannot understand [the military offence of] conduct to the prejudice. There is no civil equivalent … .[16]
>
> The unique nature of ADF service demands a system that will work in both peace and in armed conflict. Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. Without an effective military justice system, the ADF would not function.[17]

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[12] Francisco Jiménez y Jiménez, 'Introducción al Derecho Penal Militar' in *ICJ Report*, above n 2, 153.
[13] Military Jurisdiction Seminar, 10-14 October 2001, Rhodos, in *ICJ Report*, above n 2, 153.
[14] Gilissen in *ICJ Report*, above n 2, 153.
[15] Charles M Clode, *The Administration of Justice under Military and Martial Law* (1872).
[16] First Australian ACC Conference (1952), 15.
[17] Defence submissions to *2005 Senate Inquiry*, 5.

Civilian courts in Australia, the United States of America and Canada have also accepted the proposition that a separate military justice system is imperative for the proper functioning of the defence force:

> The notion that civil courts are 'ill equipped' to establish policies regarding matters of military concern is substantiated by experience under the service connection approach.[18]
>
> The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. ... There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[19]
>
> ... as a matter of discipline, the proper administration of a defence force requires the observance by its members of the standards of behaviour demanded of ordinary citizens and the enforcement of those standards by military tribunals. To act in contravention of those standards is not only to break the law, but also to act to the prejudice of good order and military discipline.[20]

What is implicit in each of the six quotes above (three immediately preceding and the balance on the previous page) is the proposition that there is something unusual or extraordinary about the dispensation of justice by and within a defence force that warrants, dictates, and demands that military justice be meted out by a process exceptional to the civilian justice system.

This will be referred to as 'exceptionalism'.

However, while military justice has long held this separate status, the content and form of this exceptional justice system has been historically controversial.[21] The great English jurist Sir William Blackstone, in his

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[18] *Solorio v United States*, 483 U.S. 435 (1987).
[19] *R v Généreux* [1992] 1 SCR 259, 293; *R v MacKay* [1980] 2 SCR 370.
[20] *Re: Tracey; Ex parte Ryan* (1989) 166 CLR 518, 543 per Mason CJ, Wilson and Dawson JJ.
[21] Eugene Fidell and Dwight H Sullivan (eds), *Evolving Military Justice* (2002), 163.

influential *Commentaries on the Laws of England*, first published between 1765 and 1769, wrote that military justice

> is built upon no settled principles, but is entirely arbitrary in its decisions, [and] is, as Sir Matthew Hale observes, in truth and reality not law, but something indulged, rather than allowed as a law.[22]

Blackstone's reference to Sir Matthew Hale is a reference to Lord Chief Justice Hale, the Lord Chief Justice of England from 1671 to 1676, who spoke with similar opprobrium a century earlier:

> First, That in Truth and Reality, martial law[23] is not a Law, but something indulged, rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army is that only which can give those Laws a Countenance. [24]

Similarly, more than two centuries after Lord Chief Justice Hale's pronouncement and a century after *Blackstone's Commentaries*, French Socialist leader Jean Juares referred to military tribunals, in 1889, as a 'survival of medieval prejudices'.[25] In the same vein, but at an earlier point in time, French Emperor and military leader Napoléon Bonaparte is reported to have said:

> There is one justice in France: one is a French citizen before being a soldier. If a soldier kills another one in France, he has no doubt committed a military offence, but he has also committed a civilian crime. All crimes

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[22] William Blackstone*, Commentaries on the Laws of England*, (1978 ed) Vol 1, 413-414; *Reid v Covert,* 354 US 1 (1955) which recounts the historical controversies attached to this separate system of justice albeit from an American perspective but analogous to the Australian system.

[23] At the time of his writings, the term 'martial law' is to be understood as a reference to military law.

[24] Sir Matthew Hale, *History and Analysis of the Common Law of England* (1st ed, 1713) in *Reid v Covert,* 354 US 1 (1955).

[25] Michael I Spak, 'Military Justice: The Oxymoron of the 1980's' (1984) 20 *California West Law Review,* 662. Juares became leader of the French Socialist Party in 1902. He is perhaps best known for his diplomatic efforts to avert the happening of World War I. On 31 July 1914 he was assassinated prior to attending a conference where he would have tried to dissuade France and Germany from going to war. A decade later, his body was re-interred at the Panthéon.

> must first be dealt with by the civilian courts each time such a court is available.[26]

The criticisms of military justice are not, however, entirely European-centric. In the United States, General Samuel T Ansell spoke in 1919 of the US military justice system, 'that is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries'.[27] General Ansell, a Judge Advocate General during and after World War I, became an outspoken critic of the courts martial system as it existed at the time in the United States. In addition to calling courts martial 'archaic' he also called the institution an 'atrocity', 'cruel' and that 'for forty years the Army has been cursed with red tape ... terrible injustices have been inflicted upon small offenders. The whole system is wrong'.[28] The General's numerous statements against 'an institution to which I belong' were often reported in the news,[29] as was the equally robust defence of the existing system by General Enoch Crowder. Their exchanges became known as the 'Ansell-Crowder debates'.[30]

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[26] *R v Trépanier* (2008) CMAC 3, paragraph 21.

[27] General Samuel T Ansell, 'Military Justice' (1919) 5 *Cornell Law Quarterly* 1, 1, reprinted in Bicentennial Issue (1975) *Military Law Review* 53, 53; see also Edward F Sherman 'Justice in the Military' in James Finn (ed), *Conscience and Command* (1971), 24-25.

[28] 'Courts-Martial Called Atrocious', *The New York Times*, 14 February 1919, front page.

[29] *The New York Times* (online archives) chronicles the General's views of the court martial system, including for example the following http://query.nytimes.com/search/query?srchst=p at 8 February 2010

- 'Courts-Martial Called Atrocious' above n 28.
- 'Ansell Quits Army; Will Keep Up Fight; With Hands Free He Will Continue To Work For Change In Military', *The New York Times,* 20 July 1919, 4.
- 'Baker Welcomes Ansell's Reforms; Directs His Critic to Draft a Bill for the Modification of Court Martial', *The New York Times,* 8 April 1919, 1.
- 'Ansell Sends Reply to Crowder Charge', *The New York Times,* 12 March 1919.

[30] For a summary of this passage of US military history and the 'Ansell-Crowder debates' see Frederick I. Lederer and Barbara H. Zeliff, 'Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice' in Fidell and Sullivan (eds), above n 21, 31-32. Although General Ansell was ultimately forced to resign, his immediate legacy was to secure mandatory review of court martial hearings, in the nature of an appellate tribunal. His longer term

A half a century later, journalist and social commentator Robert Sherrill wrote in 1970 that the US military justice system 'was a justice system designed for a virtually non-existent Army and an actually non-existent Navy'.[31]

With the advent of human rights discourse, particularly after World War II, and the formulation of internationally recognised fair trial standards, a body of scholarly work has emerged which applies human rights frameworks to the military justice system, and in doing so, has created a modern body of voices arguing against exceptionalism.[32]

What we see in this brief overview is a polarisation of positions. On one hand, those primarily within or aligned to the military argue *for* the separate military justice system, and as a consequence, it will be seen in Chapter Two that these same proponents argue against efforts to reform its 'exceptional status'. On the other hand, mainly outsiders such as academics and social commentators argue *against* exceptionalism, and consequently, argue in favour of reform.[33]

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legacy was the introduction of the *Uniform Code of Military Justice* in 1950, a document which was eventually drafted by Major Edmund Morgan, who had served under Ansell and adopted his views that the court martial needed to be separated from the commanding officer. In 1950, the *Uniform Code of Military Justice* was considered a 'revolutionary', 'seismic' (John S. Cooke, 'Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition' (2000) 165 *Military Law Review* 3, 13 and 18) ground breaking instrument of reform, introducing 'a modern era of military justice' (Walter T Cox, 'The Army, the Courts and the Constitution' (1987) 118 *Military Law Review* 1). The *UCMJ* required the inclusion of legally trained members on the court, mandatory pre-trial investigation where the accused would be represented by counsel, and protections against self-incrimination amongst other reforms (Andew S Effron, 'The Fiftieth Anniversary of the *UCMJ*: the legacy of the 1948 Amendments' in Fidell and Sullivan (eds), above n 21, 169-172). That being said, that while the General railed against the system of courts martial as existed in the US in and immediately after World War I, he did not propose the system be located outside of the military structure.

[31] Sherrill, above n 3, 225.

[32] See for example, *ICJ Report*, above n 2.

[33] See Chapter Two, Part B.

Whether this separate system of military justice can be justified when measured against fair trial standards as accepted in human rights law forms the first of two key themes in this thesis. The second theme is to then examine the process of reform to this separate system of justice – a phenomenon known as "civilianisation".

B. *Civilianisation – a challenge to exceptionalism*

> The mere utterance of the C-word still makes the occasional senior military lawyer see red.[34]

Despite the arguments from those within the military justice system that it is not only a fair system, but that it ought remain exceptional in status, military justice systems in many countries have been the subject of significant scrutiny and, in some cases, substantial reform over recent decades. This is a process known as "civilianisation".

Civilianisation was a term first applied to military justice transformation in 1970.[35] The concept has since been described in a number of ways, including the quite general: '[c]ivilianisation means the incorporation of civilian values into military life'.[36] It has also been defined with a focus on the decision makers, 'in which civilians, and in particular civilian judges, have an increased role in the composition of military courts'.[37] The concept has also been defined more expansively to describe an evolutionary process whereby the military justice system was

> previously an autonomous legal system with little civilian input at the administrative, judicial and policy-making levels, military law became subject to a consensual policy of civilianisation from the early 1960s,

[34] Fidell and Sullivan (eds), above n 21, 163.
[35] Edward F Sherman, 'The Civilianisation of Military Law' (1970) 22(3) *Maine Law Review* 3.
[36] Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364, 365.
[37] Fidell and Sullivan (eds), above n 21, 168.

> reflected primarily in the adoption of civilian criminal law norms by the military justice system.[38]

Civilianisation can also be an outcome imposed on an otherwise unenthusiastic military:

> Others, particularly, those who are members of the military, refer to civilianisation in a pejorative manner, suggesting that it usually occurs against the objection of military officials or, at best, with their begrudging acquiescence to barely concealed resistance.[39]

With respect to civilianising reforms, the Australian military justice system has been reviewed by six separate inquiries since 1997.[40] Each inquiry resulted in recommendations that would have seen courts martial and the military justice system adopt fair trial standards of independent and impartial adjudication as accepted in the civilian criminal justice system and required by the norms of public international law. These inquiries, the ADF's submissions, and the record of implementing the civilianising recommendations, are the subject of detailed analysis in Chapter Five.

The Australian military justice system stands beside many other countries' military justice systems which have been similarly reviewed. For example, in the United Kingdom, the European Court of Human Rights has found courts martial to lack independence due to the multiple roles of the convening authority.[41] The phenomenon of the multiple roles of the convening authority is a concept just as relevant to the Australian armed forces as it is in the UK context. It refers to the one officer having the sole discretion to decide:

- Whether there should be a trial;

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[38] Gerry R Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65(1) *Modern Law Review* 36.
[39] Groves, above n 36, 367; Fidell and Sullivan (eds), above n 21, 164.
[40] See list of reports set out in the Preface.
[41] *Findlay v United Kingdom* (1997) 24 EHRR 221.

- Whether the charges referred from the accused person's commanding officer were adequate;
- If not, drafting and presenting new charges;
- What kind of tribunal would be convened;
- Who would be the prosecutor and defending officer; and
- Who would be the Defence Force Magistrate or Judge Advocate.

The Convening Authority would also:

- Secure attendance of the prosecution and defence witnesses
- Appoint members of the court martial panel (similar to the civilian jury panel); and
- Review the outcome of the proceedings at the end of the process, with the power to replace the determination of guilt or innocence, and sentence.[42]

By civilian legal standards, that one person had the sole discretion to make this series of substantive decisions along the prosecutorial and judicial paths has concerning implications for the fair trial standards of an impartial trial process. That is because, in the military environment, it gives rise to the perception of command influence; that the person making all these decisions can bring their influence to bear to ensure conviction. In the context of this thesis, the importance of the successful legal challenges to the multiple roles of the Convening Authority in the United Kingdom and Canada[43] is that the Australian military justice system largely mirrors that which has been held to be invalid in those jurisdictions.

[42] See for example, confirmation of these multiple roles in *Military Justice Report 1999,* Table 4.1. See also Major-General, the Hon Justice Len Roberts-Smith, 'A Nettle Grasped Lightly: the introduction of the Australian Military Court', (Speech delivered at the *Judicial Conference*, Washington DC, 17 May 2007, 7.
[43] *R v Généreux* [1992] 1 SCR 259.

Putting the multiple roles of the convening authority aside, other Canadian and European Court of Human Rights decisions have found problems with the independence and impartiality of the courts martial process. For example, the lack of tenure for military court judges, and the *ad hoc* creation of a court martial when and where needed, have also been found to offend the principles of independent and impartial judicial administration in both the United Kingdom and Canada.[44] These outcomes are apposite for the Australian military justice system where courts martial have long been bodies created on an *ad hoc* basis.

New Zealand too has very recently undertaken a restructuring of its military justice system with a view to ensuring that their Armed Forces personnel enjoy the same rights as civilians in the criminal justice system, 'to the greatest extent possible consistent with the efficient and disciplined operation of the Armed Forces'.[45] The United Kingdom, Canada and New Zealand are the jurisdictions with which Australia is commonly compared. However, the proliferation of civilianising military justice law reform extends beyond these obvious common-law relatives, to include the Scandinavian countries, many continental European countries, and a number of countries in South America.[46]

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[44] *Grieves v United Kingdom* (2004) 39 EHRR 2; *R v Généreux* [1992] 1 SCR 259. Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer PC, CC, CD, of the provisions of Bill C-25*, 2.

[45] New Zealand, *Parliamentary Debates*, House of Representatives, 'First Reading – Armed Forces Law Reform Bill', 15 March 2007, (637) 8063 (Phil Goff).

[46] See Chapter Six, Part A.

C. *Hypothesis*

The first substantive theme examined in this thesis is whether the separate system of military justice can be justified both by reference to an analysis of the arguments favouring exceptionalism, and when measured against civilian fair trial standards at common law and international principles. The second theme explored the process of "civilianisation", and in particular, will examine two competing phenomena: on one hand, that the military is resistant to civilianising reform, yet, on the other, such reform is actually occurring. The question then is, why and under what conditions the military justice system will be civilianised, despite the military's resistance to such change.

Accordingly, the argument put forward in this thesis is that

> because of the nature of the military as a total institution, civilianising reforms to the Australian Military Justice System only occur when the military is coerced to do so by external forces.

The concept of a 'total institution' comes from a sociological theory which describes certain types of organisations; it is summarised later in this Introduction and then critically analysed in Chapter Three. The concept of coerced change finds resonance in another sociological theory called 'isomorphism' which is also introduced later in this chapter and examined more fully in that later chapter.

Mindful of the two themes underlying this research and having regard to the hypothesis, this thesis seeks to understand the tension between the military's resistance to reform, and, its occurrence. More particularly, this thesis culminates in an identification of the social, political, policy and legal forces that have led to reform of the Australian military justice system, despite the resistance of the military.

D. *Importance and originality*

There is relatively little analysis in academic literature, or discussion in judicial decisions, concerning the Australian military justice system, and almost nothing assessing why it is civilianising despite the military's internal preference to maintain the status quo.[47] Little attention has been paid to the nature of the military and to the identification of its features which make it resistant to reform. Certainly, by comparative standards, much has been written, particularly in the United States, Canada and to a lesser degree the United Kingdom, arguing for or against separate military justice systems. Similarly, in those jurisdictions and in the international human rights community, attention has been given to evaluating whether courts martial offend civilian fair trial standards and human rights norms.[48]

Yet, there is scant comparative research and even fewer Australian scholarly works, seeking to understand and identify the social, political, policy and legal forces that have brought about civilianising reform to the Australian military justice system. Accordingly, this thesis seeks to add to the literature by addressing these important, but largely neglected issues.

In approaching these issues, this research draws upon and is informed by theories of organisational structure and change found in the discipline of sociology. Whilst sociology and law are hardly a new combination, the application of sociological theories to help understand and explain the degree of substantive military justice civilianisation (despite opposition from the military) is an original approach. Original too, is the use of two different sociological theories, total institutions and isomorphism, to analyse military civilianisation.[49]

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[47] Groves, above n 36, 364.
[48] See analysis of arguments in Chapter 2.
[49] Consideration was given to conducting interviews to ascertain service men and women's attitudes to the military justice system. However, in circumstances where this research had the benefit of the outcomes of Burchett's focus groups, and given this research is focused on the military's official responses to the

Ultimately, drawing on these theoretical frameworks, this thesis develops a framework to identify the factors that are conditions precedent to fair trial civilianisation of the Australian military justice system. At a practical level, the framework can be used by those who seek to cause or effect change by identifying the external factors that need to be manipulated or created. Equally, it could also be used by those who seek to thwart, resist or limit reform.

E. Scope of subject matter

The "Australian military justice system" is a broad term, encapsulating more than just the discipline processes of the Australian Defence Force. It also includes 'administrative action to support ADF policy, inquiries to establish facts relevant to operation and command of the ADF, and the provisions for review and management of complaints'.[50] Accordingly, the Australian military justice system is comprised of two branches:

a) The discipline system – being the range of offences created by the *Defence Force Discipline Act* 1982 (Cth). It is a system of justice analogous to, but separate from the civilian criminal law system; and
b) The administrative system – being matters affecting administration, command and control, including administrative inquires,[51] redress of grievances and complaints,[52] and adverse administrative action.[53]

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various inquiries into the military justice system, it was decided interviews would serve little additional purpose.

[50] Department of Defence, *The Military Justice System*, www.defence.gov.au/mjs/mjs.html, at 24 June 2008.

[51] Ibid:

> An administrative inquiry determines the facts of an event. By determining what went wrong, the ADF is able to initiate reforms that maintain operational effectiveness, prevent a reoccurrence and save lives.

The discipline system is comprised of seven different forums[54] before which a charge can be heard. These forum range from hearings before a discipline officer at the lowest end of severity, to the general court martial which concerns the most severe of charges. The various forums which can hear charges involving allegations of criminality at the lower end of the scale of severity are collectively called 'summary authorities'. The various summary authorities cannot sentence a person found guilty to imprisonment. The more severe allegations are heard before a Defence Force Magistrate, Restricted Court Martial or General Court Martial; these are the only entities within the military justice system that can sentence a convicted person to imprisonment. It is the previously introduced entity known as the 'convening authority' who decides which forum will hear charges.

With respect to the discipline system, it is accepted for the purposes of this thesis that minor disciplinary infringements heard before any of the summary authorities should be dealt with internally, much in the way an employer deals with an employee. Instead, this thesis concerns the convening of courts martial (be it restricted or general) and Defence Force Magistrate hearings. It is simply too large a topic to consider any of the many components of the administrative system or to consider allegations that are heard by summary authorities.

That is not to say that the administrative system and summary authority system are working well. To the contrary, the research conducted for this thesis indicates at least on a preliminary basis that the conduct of Boards

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[52] Ibid, 'redress of grievance provision[s] allows an individual to complain about any matter that affects his or her service'.
[53] Ibid:

> If professional conduct falls below standard, administrative action is taken. Administrative action includes counselling, formal warnings, censures, removal from command, and discharge from service.

[54] See Chapter 1, Part D which explains the different forum in greater detail.

of Inquiry within the administrative system can leave much to be desired, as does the often arbitrary and inconsistent mode of hearing by summary authority.[55] Both the administrative system and summary authorities systems warrant critical attention, but the topics are each too broad to be included in this research.

F. Methodology and framework

Whether and why the Australian Defence Force, as a total institution, is resistant to military justice civilianisation will be tested by employing a methodology of discourse analysis.

Discourse analysis[56] is a research technique that allows for the interpretation and analysis of words, documents, communications, debates, speeches and texts to determine the values being expressed, the belief system of those making the statements being analysed, and the political interplay between the participants to the dialogue.

Relevantly for this thesis, discourse analysis provides a framework for examining the idea of the military as a total institution and the values that are held out by such an institution. Discourse analysis also provides a methodology for interpreting the values and belief systems underlying the

[55] For a similar lament expressed in the US context, see, Elizabeth Lutes Hillman, *Defending America: Military Culture and the Cold War Court-Martial* (2005). For problems with the summary authorities see: Claire Newhouse, *Summary Proceedings within the Australian Military Justice System: How and Why are They Inherently Unjust?,* a paper submitted for her Honours Thesis Faculty of Law, Australian National University, 31 October 2005, 4, 23, 24 and 50. Newhouse concluded that summary authorities are 'inherently unjust' because due process is applied in a modified, less than satisfactory manner

[56] Discourse analysis has a range of different meanings depending upon the field in which it is employed. For example, for linguists, discourse analysis focuses on the words as being pivotal to dissecting a meaning. However, in political discourse analysis, the emphasis is on understanding the values being expressed in communications and in analysing the apportionment of power between different participants in the communication process.

Australian Defence Force's written and oral submissions made to the various inquiries into the Australian military justice system. Such a methodology will assist in developing an understanding of why the military is resistant to reform. Through the collecting, collating and analysis of information, this methodology assists in revealing the political, legal and social contexts in which reform has occurred.

With respect to legal frameworks, this thesis draws upon considerations of law and politics, and, of law and sociology. Such an approach is consistent with contemporary legal theories that look beyond traditional legal doctrine to assist in explaining the relationship between law, society, societal expectations and state control. For example, sociology of law scholars have 'rediscovered the sociologies of Durkheim, Weber, Marx and Tönnies'.[57] Contemporary normative jurisprudence, for example, as led by Dworkin,[58] has 'revived interest in the writings of Kant, Bentham and Mill and to a new emphasis on the concepts of liberty, justice and rights'.[59] The jurisprudential schools of Law in Context and Critical Legal Studies bring with them the idea of the 'politics of law'[60] and that the law can be shaped and affected by societal factors. Thus, this thesis sits within an existing and accepted jurisprudential framework of examining the law by reference to social and political factors.

G. Overview of thesis

Chapter One provides an introduction to the Australian military and its justice system. This Chapter surveys the history of the Australian military justice system, the kinds of bodies which can hear charges, the types of

[57] M D A Freeman (ed), *Lloyd's Introduction to Jurisprudence* (1994), 17.
[58] Ronald Dworkin, 'Taking Rights Seriously' in Freeman (ed), above n 57, 1308.
[59] Freeman (ed), above n 57, 18.
[60] David Kairys, 'The Politics of Law' in Freeman (ed), above n 57, 19 and fn 25.

offences created by the DFDA and the range of sentences which can be imposed upon conviction.

Chapter Two analyses whether exceptionalism may be justified by critically assessing and analysing the bodies of literature which argue for, or against a separate military justice system. This chapter also assesses the literature concerning military trials from a human rights perspective.

Chapter Three introduces two separate sociological theories, the first of which, 'total institutions', assists in understanding the nature of the military and its justice system and *why* the institution is resistant to civilianising reform of its justice system. The second theory, isomorphism, assists in understanding *how* change occurs to or within an entity that is otherwise resistant to it.

"Total institutions" is a term and concept first developed and published by sociologist Erving Goffman in 1961. He described total institutions as

> closed social worlds that are constituted by places of residence in which a single authority regulates all aspects of the life of the inmates. Institutions such as prisons, hospitals, boarding schools, old-age homes, monasteries, army barracks, jails, prisons, POW camps, ships, military bases and concentration camps … [61]

This theory supports an understanding of the nature of the military as an institution. When one conceives of the military as a total institution, it is not difficult to then extrapolate and begin to understand: (a) why the military argues for the retention of its own separate justice system, and (b) why it is resistant to externally recommended reform of a civilianising nature.

[61] Erving Goffman, 'Characteristics of Total Institutions' in Delos Kelly (ed), *Deviant Behaviour* (1984), 464-77 (emphasis added).

The second element of the theoretical analysis is devoted to explaining how and when reform occurs within a total institution such as the military. This inquiry is assisted by a different sociological theory - isomorphism. Isomorphism finds its derivation in the Greek: isos 'equal', and morphe 'shape'. In mathematics, it is a concept of mapping between two entities; in biology it is about characterizing relationships between organisms. In sociology, it is a tool allowing for the examination of organisational change, and in particular, understanding how one organisation comes to resemble another. Its application in sociology is often attributed to Professors Paul DiMaggio and Walter Powell, who explain isomorphism as 'the constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions'. [62]

While the theory of total institutions is perhaps best seen in this context as a tool of description, isomorphism is 'active' in the sense that it provides a framework to analyse why one organisation changes, or is changed, to look like another. In this case, it provides a framework to analyse why, and under what conditions, the military justice system is civilianising. In the analysis in Chapter Five, the two theoretical frameworks are employed together in a relational manner to examine how it is that a 'total institution' such as the military and its justice system changes, that is, isomorphs, in a civilianising way.

Chapter Four concerns the first theme addressed in this thesis, which asks whether the separate military justice system can be justified. This assessment (which is in addition to the analysis of the arguments favouring the separate system in Chapter Two) identifies the fair trial failings of courts martial and the discrepancies and inconsistencies between it and 'civilian' human rights at common law and international principles. In that analysis, particular weight is attached to the fair trial

[62] Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) *American Sociological Review*, 149.

right to a hearing before an independent and impartial court. This analysis is conducted by reference to international human rights standards, which provide for the minimum guarantees that all legal systems should provide. Regard is also had to common law tradition and fair trial principles both within Australia and in comparative jurisdictions such as the United Kingdom, Canada and New Zealand.

Chapter Five examines the six inquiries into the Australian military justice system held between 1997 and 2005. In particular, the chapter: identifies the motivator/s for each inquiry; analyses the military's submissions to each of the various inquiries; and, critiques the military's response to civilianising fair trial recommendations. As part of the analysis, the chapter applies the two theories of total institutions and isomorphism to analyse the military's submissions to the inquiries reviewing its justice system, as well as its responses to the ensuing recommendations. What is shown in this Chapter is that each inquiry made recommendations of a civilianising nature, the effect of which would have seen courts martial and the military justice system adopting fair trial standards of independent and impartial adjudication as accepted in the civilian criminal justice system and required by international human rights law. Chapter 6 continues the analysis of military justice reform but this time, by providing an overview of the experience of civilianisation in comparative jurisdictions.

The Conclusion returns to the overall argument (that, as a total institution, civilianising reforms to the Australian Military Justice System only occur when the military is coerced to do so by external forces) and the underlying two themes ((1) can the separate system be justified, and, (2) civilianisation despite resistance). In doing so, it brings together and draws upon the arguments and conclusions identified in the previous chapters. As a consequence, the conclusion identifies the legal, social, and political contexts in which reform has occurred. In addressing the

hypothesis, a predictive framework/matrix is developed to identify the conditions precedent to fair trial civilianisation.

H. Cut-off date

This thesis takes account of matters up to 31 August 2010. However, some updates have been made since that date, in particular, the outcome of the Federal Election in September 2010 and the progress of the *Momcilovic v The Queen*[63] matter due to be heard by the High Court of Australia. This case raises questions about the presumption of innocence and how Victorian courts are to interpret legislation in light of *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

It is also noted that at the end of September 2010, the Director of Military Prosecutions, Lyn McDade decided to charge three former commandos with the Special Operations Task Group with manslaughter and dangerous conduct. The charges arose out of a night-time raid of a compound in the province of Oruzgan, Afghanistan in February 2009 which resulted in the death of 6 civilians, five of whom were children.

The public debate which ensued highlights a critical aspect of this thesis – whether 'Discipline in the field should be left to military command',[64] or, whether 'soldiers are no more above the law than anyone else.'[65]

The debate over these charges also highlights another feature of this thesis – whether civilian judges could understand military discipline, or whether military discipline could only be understood and judged upon by those within the military (for example, Cochrane, above).

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[63] [2010] HCATrans 261 (8 October 2010).
[64] For example, Kathryn Cochrane, 'Discipline in the field should be left to military command', *The Australian*, 18 October 2010, 14.
[65] Gideon Boas, 'Soldiers' work is life or death, but they're not above the law', *Sydney Morning Herald*, 13 October 2010, 16.

In the context of these charges, the very recent arguments made for and against the charging of these troops, the arguments made for and against the existence of a statutorily independent Director of Military Prosecutions, and indeed, the argument made for and against the appropriateness of the in-house military discipline system all resonate with the themes and arguments developed and analysed in this thesis.

CHAPTER ONE

INTRODUCING THE AUSTRALIAN MILITARY JUSTICE SYSTEM

This Chapter provides an overview of the Australian military justice system by outlining the history of this separate justice system within Australia. It then identifies and explains the structures and scope of the trial mechanisms convened to hear the broad range of offences created by the *Defence Force Discipline Act*. The chapter also explains the concept of "chain of command". In the context of this thesis, the chain of command is a significant concept to comprehend because those who favour a separate military justice system often refer to protecting the integrity of the chain of command as a reason to justify the military's in-house justice system.[66]

A. An overview of the Australian Defence Force

The Australian Defence Force was created by the *Defence Act* 1903 (Cth), which was an Act 'to provide for the Naval and Military Defence and Protection of the Commonwealth and of the several States'.[67] The Defence Force consists of '3 arms, namely, the Australian Navy, the Australian Army and the Australian Air Force'.[68]

The *Defence Act* 1903 (Cth) also provides that the Minister for Defence is responsible for the general control and administration of the Force. The Act allows for the appointment of four different Chiefs: the Chief of the Defence Force (CDF) and a Chief for each of the three services.[69] The

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[66] See for example: Sam Nunn, 'The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases' in Fidell and Sullivan (eds), above n 21, 3; Robinson O. Everett, 'Military Justice in the Armed Forces of the United States' (1956) cited in James B. Roan and Cynthia Buxton, 'The American military justice system in the new millennium' (2002) 52 *Air Force Law Review* 185.
[67] *Defence Act* 1903, Long Title.
[68] *Defence Act* 1903 s 31.
[69] *Defence Act* 1903 s 9.

Act further provides that the powers exercisable by the Chiefs of the Forces are subject to the Minister's direction.[70]

The Chief of the Defence Force and Secretary of Defence are responsible for the administration of the Defence Forces[71] and both are answerable to the Minister. 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'.[72] 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 Chiefs of Navy, Army and Air Force answer to the CDF, but are also subject to Ministerial direction.

The Governor-General,[73] the Minister and the Chiefs sit at the apex of the chain of command. The chain of command is, essentially, 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. All personnel fit within that chain of command, and hence, 'all members of the ADF are under command of some nature'.[74]

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[70] *Defence Act* 1903 s 8.
[71] *Defence Act* 1903 s 9A.
[72] Department of Defence, *The Diarcy,* www.defence.gov.au/cdf/diarcy.htm, at 1 October 2009.
[73] Section 68 of the *Commonwealth Constitution* provides, 'The Commander-in-Chief of the Naval and Military Forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.
[74] General Peter Cosgrove, (then) Chief of Defence Force, Submission 16 at 2 to the 2005 Senate Inquiry, cited in the *2005 Senate Report*, paragraph 2.5.

The chain of command is a central feature of the military. It is an important concept to understand, because protecting and ensuring its integrity is often cited by those who argue *for* a separate military justice system.[75] The proponents of the separate military justice system assert 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.

A further feature of the chain of command is that orders can only be handed down one person at a time, and only to a specific class of subordinates. Thus, a commander in one unit does not give orders to subordinates in another unit, even though the commander is of higher rank than the subordinates in the other unit. This ensures that subordinates receive only one set of orders and avoids the possibility of conflicting orders being given.

The chain of command is a hierarchical system designed to ensure that orders will be followed, and followed without question. As a former Chief Judge of the United States Court of Military Appeals once said, 'modern war' is not 'a debating society'.[76] 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.

Thus, the in-house military justice system operates as a management tool. On the battlefield or in theatres of war, the requirement that lawful orders be obeyed is understandable. But, if a defence member is accused of say, rape when on leave, it is not immediately apparent that the threat of punishment needs to be from the in-house justice system. As will be seen, many of the arguments in favour of the separate military justice system are really concerned with coercing compliance with orders.

[75] See for example: Nunn, above n 66; Fidell and Sullivan (eds), above n 21, 3; Everett in Roan and Buxton, above n 66.
[76] Everett in Roan and Buxton, above n 66, 185.

However, the categories of crimes covered by the DFDA are much wider than those concerned with ensuring obedience to orders.

B. The Australian Military Justice System: a short history

The Australian military justice system finds its history in British military practice and procedure. Indeed, the applicable English statutes prevailed over Australian provisions until 1985.[77] The table below gives a brief summary of the phases of Australian military history and corresponding discipline arrangements.

Table 1
Historical Arrangements for Military Justice in Australia

Phase of history	**Military justice arrangements**
From colonisation in 1788 to the withdrawal of British troops in 1870	English soldiers and sailors provided a military presence in Australia, governed by the English *Mutiny Act* and *Articles of War*.[78]
From the withdrawal of British garrisons in 1870 to Federation in 1901	At this stage, each Colony had its own naval and military forces, governed by colonial legislation. These colonial statutes followed the British Mutiny Act and Articles of War.[79]

[77] Frank B. Healy, 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93.
[78] Arndell N. Lewis, *Australian Military Law* (1936) [Self-published: available at National Library of Australia: N 355.0994 LEW]; Healy, above n 77; Sarah Dawson (ed), *The Penguin Australian Encyclopaedia* (1990), 135; Jeffrey Grey, *A Military History of Australia* (1990), 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 & Peace* (1988), 44; Australian Bureau of Statistics, 'Military system in Australia prior to federation', *Year Book Australia 1909* (1909).
[79] Lewis, above n 78; Healy citing Dawson, above n 77; Grey, above n 78; Walsh, above n 78.
[80] Lewis, above n 78.

Phase of history	Military justice arrangements
	Colonial defence forces, including Colonial Volunteers and the Partly Paid Forces[80] convened in 1878 in NSW, and were raised and governed by Colonial legislation. This legislation provided for offences such as desertion and mutiny. These statutes were modelled on and incorporated English provisions, with English statutes prevailing where inconsistency between the two arose.
From Federation in 1901 to 1985	During this period, Commonwealth legislation provided for the three arms of the forces, but the 'administration of discipline in all three Services was effectively governed by the respective English legislation, by reference in the Australian law, until 1985'.[81] The *DFDA* 1982 was enacted but did not commence operation until 1985.
From 1985 – to the present	The *Defence Force Discipline* Act 1982 (Cth) commenced with matters of discipline becoming truly Australian (that is, independent of English statutes) only from this time.

This Table demonstrates that the Australian military justice system was effectively British until the introduction of the *Defence Force Discipline Act* 1982, although the Act did not actually commence operation until 1985. Thus, immediately prior to the commencement of the *DFDA* in 1985, the sources of Australian military law comprised

> three United Kingdom Acts; two of which had ceased to operate in the UK; four sets of United Kingdom rules or regulations, all of which had ceased to operate in the UK; three Australian Acts; and nine sets of regulations under the Australian Acts.[82]

[81] Healy, above n 77.
[82] *Military Justice Report 1999*, paragraph 1.4.

When moving the Second Reading of the *Defence Force Discipline Bill* in 1982, the then Minister for Defence, the late Hon. Sir James Killen, advised members that:

> Since World War II repeated efforts have been made to consolidate and modernise the disciplinary law of this country which applies to the Services. This Bill provides new disciplinary legislation for the Defence Force and contains, for the first time in one Act, the disciplinary law applicable to the three arms of the Defence Force.
>
> …
>
> The Bill deals with three principal matters and a number of ancillary matters. These may be briefly described as follows: It prescribes offences that apply to members of the Defence Force and certain civilians who accompany the Defence Force; it creates tribunals for the trial, conviction and punishment of such offences; it provides machinery for appeals against, and reviews of, convictions and punishments; it deals with ancillary matters such as investigation of offences, trial procedures, and serving of sentences. [83]

In the context of this thesis - which identifies resistance by the military to civilianising reform - it is interesting to reflect upon Sir James' opening comments extracted above, wherein he refers to 'repeated efforts' having been made to modernise military law 'since World War II'. Despite the efforts to which he refers, there was actually no substantive law reform to the military justice system between 1945 and 1982. Accordingly, whatever the efforts made to modernise Australian military law, those efforts did not come to fruition. One reason could of course be that the military resisted the 'repeated' attempts to reform. Some support for this idea is found in the observations of Major-General the Hon Justice Len Roberts-Smith, when he addressed the 2007 US Judicial Conference on military law, in his capacity as JAG. The Major-General observed that in the aftermath of World-War II, the mass mobilisation of citizen-soldiers both in the United States and Australia (and the same could be said of the UK too) saw the military justice system exposed to a much wider audience. As a result, the General spoke of a push for reform to the Australian and American

[83]Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 29 April 1982, 2083 (emphasis added).

systems once the War had ended. In the United States, the *Uniform Code of Military Justice* was the result in 1951. However, the General reported that in Australia:

> The same public pressure for change existed in Australia following World War II and although initially no less acute [than the US], it was effectively dispersed by the referrals of the question of reform to a seemingly endless series of inquiries and boards. ... It was not until the Vietnam War and the concomitant increase in the number of civilian draftees rendering compulsory temporary service that the question of disciplinary reform once again regained impetus.[84]

Some further support for the inference that reform was thwarted in the years after the end of the War in Australia - or at the least, the military's resistance to change - can be found in the military's subsequent objection to the *Defence Force Discipline Act* itself. At the time of its commencement, it was called 'inappropriate [and], time consuming'[85] by the Judge Advocate General of the time, who also described it as 'a serious mistake which already has had a significant negative impact on the discipline and good management of the service'.[86] Ironically, despite this foreboding in 1985, 20 years later the *DFDA* was referred to by General J Baker and Air Marshall E McCormack as an Act which 'has served us well'.[87]

[84] Roberts-Smith, above n 42, 3.
[85] Judge Advocate General-ADF, *Defence Force Discipline Act 1982 Report for the period 1 July to 31 December 1985* (1986), 29.
[86] Ibid, 31.
[87] *Military Justice Report 1999*, paragraph 4.24.

C. The current Australian Military Justice System: an overview

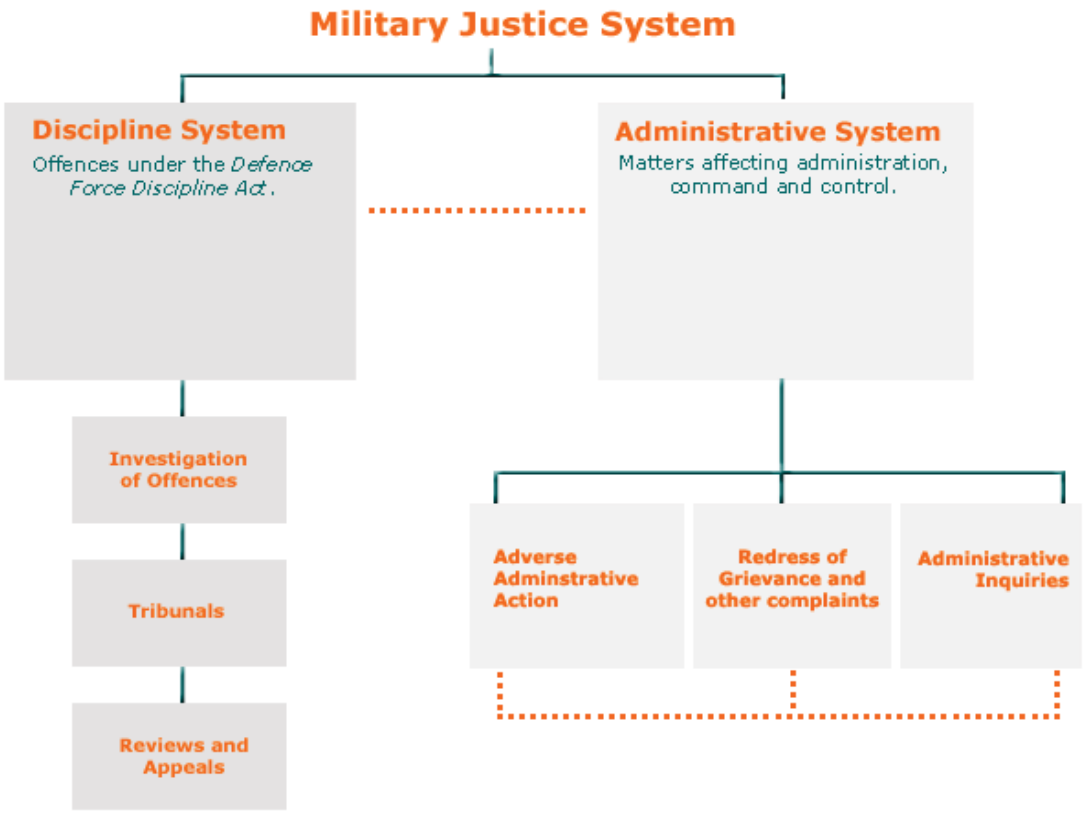
The *DFDA* divides the Australian military justice system into two sub-systems: the Discipline System, and the Administrative System. The Administrative System is a system enabling factual inquires to determine what went wrong in an incident, and thus hopefully prevent the same problem occurring again. For example, it may inquire into whether a Commander's negligence led to the grounding of a vessel, or it may inquire into the circumstances of a death. It is analogous to the civilian system's 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 which would be conducted in the civilian system by the police, DPP, a criminal court's judge and jury (or magistrate) and Corrective Services, respectively.

The following diagram from the Department of Defence illustrates the components of the military justice system:

Table 2
The Australian Military Justice System[88]

Key: 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.



[88] Department of Defence, *Military Justice System* (2009), http://www.defence.gov.au/mjs/mjs.html at 24 June 2009.

D. Forums within the Discipline System

From 1985 to October 2007, and again from September 2009 to the present (the reason for the interrupted coverage is explained shortly), the *DFDA* provided for the following actors or entities in the discipline system, listed in a descending order of jurisdictional reach:

1. General Courts Martial: *DFDA* s 114, consisting of a President and at least 4 other members.[89]
2. Restricted Courts Martial: *DFDA* s 114, consisting of a President and at least 2 other members.[90]
3. Defence Force Magistrates: *DFDA* s 127, an officer who must be on the judge advocate's panel.
4. Superior Summary Authorities: *DFDA* s 105(1), essentially an officer, appointed by the CDF or Service Chief, who hears the charge.
5. Commanding Officers: *DFDA* s 107, who may hear a matter against an accused member of the Defence Force who is 2 or

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[89] *DFDA* s 116 provides for the eligibility to be a member of court martial, as follows:

> (1) For the purposes of this Act, a person is eligible to be a member, or a reserve member, of a court martial if, and only if:
>
> (a) the person is an officer;
>
> (b) the person has been an officer for a continuous period of not less than 3 years or for periods amounting in the aggregate to not less than 3 years; and
>
> (c) the person holds a rank that is not lower than the rank held by the accused person (being a member of the Defence Force) or by any of the accused persons (being members of the Defence Force).
>
> (2) For the purposes of this Act, an officer is eligible to be President of a court martial if, and only if, the officer holds a rank that is not lower than:
>
> (a) in the case of a general court martial - the naval rank of captain or the rank of colonel or group captain; or
>
> (b) in the case of a restricted court martial - the rank of commander, lieutenant-colonel or wing commander.
>
> (2A) Subsection (2) does not apply in relation to a person who becomes President of a court martial in pursuance of:
>
> (a) an appointment made by virtue of paragraph 124(1)(e);
>
> (b) subsection 126(1).
>
> (3) The requirements set out in paragraph (1)(c) and subsection (2) apply only if, and to the extent that, the exigencies of service permit.

[90] Ibid.

more ranks junior to him or her,[91] or against a person who is not a member of the Defence Force.

6. Subordinate Summary Authorities: *DFDA* s 105(2), being an officer appointed by a Commanding Officer.
7. Discipline Officers: *DFDA* s 169B*,* who are officers or warrant officers appointed by the commander.

The forums listed at four to seven above are convened on an as needs basis within the unit of the accused person. In these hearings, the commanding officer hears the charge/s against a member of his command, with the accused represented by himself or herself or by another senior non-commissioned officer within the unit; the accused is able to seek legal advice. The prosecutor also comes from within the unit. It would be most unlikely for any of these participants to have formal legal training. Once the hearing concludes, the proceedings are separately reviewed by an officer higher up the chain of command.[92] Thus, these summary authorities are creatures of the chain of command.

In the period between October 2007 and September 2009, items one to three on the list above (being courts martial and Defence Force Magistrates), were replaced by the Australian Military Court. A recommendation from the 2005 Senate Inquiry report was the establishment of an independent and impartial court to hear military matters. Importantly, it was also recommended that the court be conferred the protections of constitutional independence as provided in s 72 of the *Commonwealth Constitution*. The Department did not accept this aspect of the recommendations, and instead established the Australian Military

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[91] *DFDA* s 107:

> being a member of or below the naval rank of lieutenant, the military rank of captain or the rank of flight lieutenant being a member of or below the naval rank of lieutenant, the military rank of captain or the rank of flight lieutenant'.

[92] For a general description of the operation of summary authorities, see Roberts-Smith, above n 42, 5.

Court, but without constitutionally guaranteed independence and impartiality.

On 26 August 2009, the High Court of Australia declared the provisions which created the Australian Military Court invalid.[93] The summary entities remained in place for trials of less serious offences. Pursuant to both schemes (that is, the courts martial system and the AMC process), matters at the minor end of the spectrum, for example, an untidy appearance, not saluting or not addressing superiors correctly, being late on parade, or arriving after curfew, were dealt with by specified, appointed individuals within the offender's unit – the Discipline Officer, the Subordinate Summary Authority, the Commanding Officer, or the Superior Summary Authority. What the civilian system would consider serious offences, for example assisting the enemy, were heard by the courts martial, a DFM, or the Australian Military Court during its brief existence. [94]

E. Range of offences

The crimes created by the *DFDA* include civilian criminal law offences, offences with close civilian counterparts, and uniquely military offences, for example, desertion or imperilling the success of operations. In 2006, the *DFDA* was amended[95] to restructure offences by reference to a class system based upon the severity of the alleged crime. No new offences were created under this class scheme, instead, the existing crimes were assigned to a specific Class. Under the Class system, Class 1 offences were the most serious.[96] Class 2 offences were primarily drug-related,

[93] *Lane v Morrison* [2009] HCA 29.
[94] Discussed at length in Chapter 5.
[95] *Defence Legislation Amendment Act* 2006.
[96] The *Explanatory Memorandum* to the 2006 Bill states:

> 34. These offences are the more serious military offences, comparable to civilian indictable offences, for which waiver of trial by jury is not possible. The Government response to the Senate report specifically identified some offences that require trial by a military judge and jury. These include, mutiny, desertion, commanding a

whilst Class 3 offences were in the nature of misdemeanours. However, when the High Court declared the Australian Military Court constitutionally invalid, the government introduced legislation which had the effect of returning to the previous courts martial system, without a Class categorization.[97]

The offences set out in Part III of the *DFDA* provide for jail as a maximum penalty for all but one of the 70 offences. The one exception is section 40D - driving without due care or attention - where the penalty is a fine equivalent to 7 days' pay for a Defence member, or a $100 fine for a non-member. For the other 69 offence provisions, jail is a maximum penalty. However, of the seven forums created to hear charges (refer sub-section D above), it is only general courts martial, restricted courts martial and Defence Force Magistrates who may impose a sentence of imprisonment. Even so, the restricted courts martial and DFMs cannot imprison a person for a period exceeding six months.[98]

Under the court martial system that existed both before and after the AMC scheme, it was the Convening Authority who determined where the person would be tried, with flow-on consequences for the sentencing options that were available. Anecdotal evidence suggests that once the commander decided that a person be charged, the commander could take advice from the formation legal adviser as to the appropriate mode and forum of

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service offence and offences committed with the intent of assisting the enemy. As these offences have a particular Service flavour, in that they go to the very core of maintaining discipline and morale, commission of any of these offences would result in a lessening of that discipline and morale. Trial by military judge and jury will therefore be mandatory.

[97] In its short existence, the Australian Military Court recorded the following convictions across the Classes of offences between January and December 2008 (Chief Military Judge, Australian Military Court, *Annual Report 2008*, Annexure F2):

Class 1 convictions	0
Class 2 convictions	459
Class 3 convictions	113

[98] *DFDA,* Schedule 2 (as at October 2009).

proceeding. No statistics are kept which reveal whether the commander accepted that advice or over ruled it. For the brief period that the AMC existed, the decision as to forum was made by the Director of Military Prosecutions who determined the matter by reference to the class and nature of offence charged.

F. Range and application of sentences

Section 68(1) of the *DFDA* sets out the following sentencing options 'in decreasing order of severity':

(a) imprisonment for life;
(b) imprisonment for a specific period;
(c) dismissal from the Defence Force;
(d) detention for a period not exceeding 2 years;
(e) reduction in rank;
(f) forfeiture of service for the purposes of promotion;
(g) forfeiture of seniority;
(h) fine, being a fine not exceeding:
  i. where the convicted person is a member of the Defence Force—the amount of his or her pay for 28 days; or
  ii. in any other case—$500;
(i) severe reprimand;
(j) restriction of privileges for a period not exceeding 14 days;
(k) stoppage of leave for a period not exceeding 21 days;
(l) extra duties for a period not exceeding 7 days;
(na) extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days; and
(p) reprimand.

Schedule 2 to the Act further defines sentencing options by providing what punishments may be imposed upon which ranks by the court martial, DFM or Australian Military Court (as the case may have been). Thus, an Officer may be imprisoned, dismissed, have his or her rank reduced, forfeiture of service for promotion purposes, forfeiture of seniority, be fined or reprimanded. A member of the ADF who is *not* an officer may be sentenced to any of these options, but not to forfeiture of service for the purposes of promotion. Unlike an officer, this class of prisoner may also be punished by detention for a period not exceeding 2 years. Persons

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

Table 3

Punishments that may be imposed by a court martial or a Defence Force magistrate by rank

Source: Sched 2, *DFDA* (as at Oct 2009)

Column 1 **Convicted Person**	**Column 2** **Punishment**
Officer	Imprisonment Dismissal from the Defence Force Reduction in rank Forfeiture of service for the purposes of promotion Forfeiture of seniority Fine of an amount not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand
Member of the Defence Force who is not an officer	Imprisonment Dismissal from the Defence Force Detention for a period not exceeding 2 years Reduction in rank Forfeiture of seniority Fine not exceeding the amount of the convicted person's pay for 28 days Severe reprimand Reprimand

Column 1 Convicted Person	Column 2 Punishment
Person who is not a member of the Defence Force	Imprisonment Fine of an amount not exceeding $500.

The kind of service tribunal hearing the matter also has an effect on what punishment may be imposed on the guilty person. Thus, a Superior Summary Authority may only impose a fine or reprimand. A Commanding Officer may fine or reprimand, but the Commanding Officer may also impose a reduction in rank, forfeiture of seniority, and/or prevent the convicted person from taking leave. Further, the Commanding Officer has quite wide sentencing options for members below non-commissioned ranks: the Commanding Officer may sentence the prisoner to detention, reduction in rank, forfeiture of seniority, fines, reprimands, restriction of privileges, extra duties, extra drill and stoppage of leave. A Subordinate Summary Authority may fine, reprimand, stop leave, restrict privileges, impose extra drill, or impose extra duties. Appendix 1 summarises the sentencing options for each of the summary authorities.

As shown in Appendix 1, Summary Authorities cannot imprison. That being said, a Commanding Officer may detain a convicted person, which has the same effect of curtailing the convicted person's freedoms of movement and association, just not in a prison environment *per se*. The power to detain is a power which could be abused.[99] However, the paucity

[99] Articles 9 and 10 of the *ICCPR* and Article 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contemplate that detention may be inhuman. In her discussion paper, 'Human rights: Australia versus the UN' *Democratic Audit of Australia* (Discussion Paper 22/06, August 2006), Professor Hilary Charlesworth highlights that the Human Rights Committee has found against Australia on this point a number of times. In *A v Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997), the Committee found that detention at the Port Hedland Detention Centre for over four years without access to legal advice or court review of his detention was arbitrary and a violation of article 9(1) of the *ICCPR*. In *Cabal and Bertran v Australia* UN Doc CCPR/C/78/D/1020/2001 (2003), the Committee found that the detention of two prisoners in a triangular cage the size of a telephone booth was inhumane. In

of Australian data with respect to the use of detention in the military does not allow the matter to be presently advanced. In any event, detention as a sentencing option is not the topic of this thesis. Rather, this thesis concerns the convening of courts martial and Defence Force Magistrate hearings.

The next chapter considers whether the separate military justice system can be justified by reviewing and analysing the literature that argues for the separateness of the military justice system, and against the separate military justice system, as well as reviewing the literature that considers courts martial from a human rights perspective.

Brough v Australia UN Doc CCPR/C/86/D/1184/2003 (2006), the detention of a disabled young Aboriginal man held in solitary confinement, deprived of clothing and blankets in a New South Wales adult prison, was found by the Human Rights Committee to constitute a violation of the right to humane treatment. In *D & E v Australia*, UN Doc CCPR/C/87/D/1050/2002 (2006), the Human Rights Committee found that the 'immigration detention' of an Iranian woman, together with her husband and two young children, for over three years, was 'arbitrary' and in breach of Article 9 (1) of the *ICCPR*.

CHAPTER TWO

WHAT DOES THE LITERATURE SAY: CAN EXCEPTIONALISM BE JUSTIFIED?

This Chapter asks whether the separate military justice system can be justified by conducting a detailed examination of the literature in this area. The relevant literature falls within three broad categories. First, much has been written by those within, associated with, or aligned to the military who argue *for* a separate military justice system. Second, there is *some* literature written by people predominantly outside the military, including academics and social commentators who argue *against* the need for the exceptional status of the military justice system. The third body of literature falls within human rights discourse, where fair trial principles and human rights norms are applied to the trials conducted by the military justice system. Much of the human rights literature concerns military trials where the state is controlled by the military, for example in some South American and sub-continental nation states. This body of literature has concentrated on phenomena such as forced disappearances, Star Chambers and the trial of civilians in military courts. Accordingly, while much of this human rights literature does not directly bear on the circumstances of the Australian military justice system, its general commentary about the content of what constitutes a fair trial pursuant to human rights norms is nonetheless pertinent.

A. Gaps in the literature

Before commencing the examination of the various arguments for and against a separate military justice system, two observations are made with respect to the literature.

First, when looking at the literature which is *critical* of the separate military justice system, it should be acknowledged that military justice systems – be it in Australia, or in comparable jurisdictions - have attracted little

academic attention.[100] The following observation made by Major General William Suter (and a clerk of the United States Supreme Court) in the Foreword to Eugene Fidell and Dwight Sullivan's *Evolving Military Justice* is just as apt to the Australian context as it is to the American:

> Notwithstanding its importance, military justice is seldom critically evaluated. It is ignored in all but a handful of law schools and is rarely examined in the media except in conjunction with sensational, headline grabbing events. The most frequent are sex ... or disastrous accidents.[101]

Chapter 5 of this thesis will demonstrate the appropriateness of this quote to the Australian setting. In that chapter it will be seen that a precursor to each of the Australian inquiries were those "sensational" media events involving sex, deaths and accidents.

It should not be thought that the lack of academic analysis of military justice or its justice system represents a tacit acceptance that the system does not warrant scrutiny. Rather, the relative lack of academic examination of military justice demonstrates a gap in the literature and as a consequence, highlights the importance and originality of this thesis.

Second, much of the literature arguing *for* the separate system of military justice is either of considerable age, or relies upon older works. For example, much of that literature raises the proposition that a separate military justice system is a pre-requisite for military discipline and morale.[102] This argument can be traced back to the views of General William T. Sherman, a General in the Union Army in the American Civil War (1861-65).[103] Sherman succeeded Ulysses S. Grant as Commanding

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[100] Fidell and Sullivan (eds), above n 21, 290; Hillman, above n 55; see also the special edition of the *University of New South Wales Law Journal* which was devoted to Australian Military Law: Vol 28(2) 2005.
[101] Fidell and Sullivan (eds), above n 21, ix-x.
[102] See sub-section B(1) below.
[103] For example, Christopher W Behan, 'Don't tug on superman's cape: In defense of convening authority selection and appointment of court-martial panel members' (2003) 176 *Military Law Review* 190. See also Fidell and Sullivan

General of the Army (1869-83), when Grant became President of the United States:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing civilian lawyers to inject into it the principles derived from their practice in the civilian courts, which belong to a totally different system of jurisprudence. ... an army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values and defeats the very objects of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold discussion, else armies will become demoralized by engrafting our code their deductions from civil practice.[104]

As will be expanded upon later in this Chapter, the problem with placing reliance upon Sherman's approach is that the military itself has changed, as have the ways in which wars are waged and expectations of justice.

As a consequence, the older literature or literature based on these older sources fails to question whether the justice system designed for forces of earlier eras meets, or is required by, present needs.[105]

This chapter now considers the various arguments for and against the separate military justice system.

B. The arguments for and against a separate system of military justice

The body of literature championing the separate military justice system argues that military justice cannot or should not be administered by the civilian courts for a range of reasons. Predominant in these arguments is the proposition – already mentioned above - that only an in-house justice system can ensure a disciplined service. Central to the argument that focuses on a disciplined service is the role of the commander and his or

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(eds), above n 21, 177, which illustrates the importance of the Sherman doctrine in US military law policy for more than 175 years.

[104] General William T Sherman in Cooke, above n 30, 3.

[105] Leonard B Boudin in Finn (ed), above n 27, 56.

her ability to mete out swift punishment against those who do not obey the commander's orders; to be able to punish is a means of ensuring discipline. Those favouring the separate military justice system also argue that the military is a special and separate community with unique features that cannot be appropriately accommodated by civilian court systems and structures. The arguments favouring the separate system are well summarised in the following passage:

> Common arguments for a separate system of military justice are the need to maintain morale, discipline and efficiency within the military, the conclusion that ordinary criminal courts are not suited to these "peculiar" demands of the military, and the need for an expedited trial process. The enforcement of command discipline, in particular, requires that command responsibility and power to adjudicate offences be vested in the military. If a force is not disciplined, it is a threat to a democratic society and to the members of its own ranks. … In addition, uniquely military offences, such as communicating with the enemy or leaving one's post, may require experience and knowledge not commonly possessed by civilian judges. [106]

Those who argue against the separate military justice system are largely academics or social commentators; for example, the title to Robert Sherrill's book *Military Justice is to Justice as Military Music is to Music*[107] and Michael Spak's *Military Justice: the oxymoron of the 1980's*[108] set the tenor of their respective arguments. Sherrill's *Military Justice is to Justice as Military Music is to Music*, is 'not a detached scholarly analysis of [the soldiers] but an effort to experience through them the ordeal of military justice'.[109] Sherrill was a journalist, formerly with the *Washington Post* and author of several texts in the pop-politics genre; as such the book is in the style of reporting and discussion, as opposed to analysis. The aim of the book is to demonstrate how conscription for the Vietnam War brought draftees to the services who were not prepared to unquestioningly obey

[106] Andrew D Mitchell and Tania Voon, 'Defense of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia', in Fidell and Sullivan (eds), above n 21, 246.
[107] Above n 3.
[108] Spak, above n 25, 436.
[109] Sherrill, above n 3, 3.

orders in deference to their individual beliefs, values and rights.[110] Relevantly though, Sherrill, like others,[111] questions why the donning of a uniform results in the diminution of rights which that person would have otherwise enjoyed.

Just as the arguments advanced in support of the separate system can be summarised as illustrated above, the arguments to the contrary can be similarly précised:

> First, the actual separateness of the traditional military community has ceased to exist. Second, the duties of most servicemen can be performed without the subordination of the traditional military community. Third, the majority has not proved that the norms of the traditional military community are necessary for the effectiveness of even combat personnel or, if so, legally justifiable. Fourth, nothing distinctive about the problem of the constitutional rights of individual servicemen places it beyond the competence of the courts. Finally, both military and civilian interests would be better served by integrating the armed forces into the civilian society.[112]

The next section of this Chapter examines each of the arguments for and against the separate military justice system.

1. Discipline, efficiency and morale require a separate military justice system – the arguments favouring the proposition

There can be no doubt that discipline is a fundamental feature of any armed service: 'Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army

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[110] Sherrill's idea of the individual-v-collective is also explored in Finn, above n 27, the more academic version of Sherrill's populist anti-Vietnam and anti-military justice book. See also, Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), 219.

[111] For example, Finn, above n 27, 18; Spak above n 25; James M Hirschhorn, 'The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights' (1970) 62 *North Carolina Law Review* 177; Rubson Ho, 'A World That Has Walls: A Charter Analysis of Military Tribunals' (1996) 54 *University Toronto Faculty Law Review* 149; Keith M Harrison, 'Seeking Equality through Evolving Constitutional Analysis: Be All You Can Be (Without The Protection Of The Constitution)', (1991) 8 *Harvard BlackLetter Journal* 221.

[112] Hirschhorn, above n 111, 204 and 207.

superiority over another'.[113] A disciplined force is a force where the lawful orders handed down through the chain of command are obeyed. A disciplined force is said to be an efficient force.[114]

In addition to providing for a disciplined force, the internal justice system is also said to create or ensure cohesion and where morale is maintained: 'military law is a vital element in maintaining a high state of morale and discipline'.[115] General Sherman, the 'grandfather' of these morale-and-discipline propositions,[116] asserted that the military must have a separate system of justice and eschew civilian standards. The General argued that the different aims of civilian and military justice systems meant that if the civilian traditions and objects of securing liberty and safety for all were injected into the military system, then armies would become demoralized.[117]

The argument that a separate justice system is required to ensure discipline and morale are really arguments more concerned with the management of members, than the delivery of justice - the separate military justice system is really a tool of human resource management. This emphasis on managing personnel is seen in the following statement from a former Australian Chief of the Defence Force when he advised a Senate Inquiry that

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[113] George Washington, 28 July 1759, in Roan and Buxton, above n 66, 185.
[114] John S Cooke, 'Manual for courts martial' in Fidell and Sullivan, above n 21, 176; Cooke (2000), above n 30; Nunn in Fidell and Sullivan (eds), above n 21, 3; Hyder Gulam, 'An Update on Military Discipline – the 20th Anniversary of the Defence Force Discipline Act', (2004) 9(1) *Deakin Law Review* 299
[115] General William T Sherman quoted by Edward F Sherman in Finn (ed), above n 27, 23-24; Cooke (2000), above n 30, 2; Nunn in Fidell and Sullivan (eds), above n 21, 3*;* Gulam, above n 114.
[116] See Fidell and Sullivan (eds), above n 21, 177, which illustrates the importance of the Sherman doctrine in US military law policy for more than 175 years.
[117] General Sherman quoted by Edward F Sherman in Finn (ed), above n 27, 23-24.

> The ADF has a military justice system to support commanders and to ensure effective command at all times. … Commanders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible. [118]

The punitive nature of this human resource management tool is explicitly stated in the following argument, which, despite its American origin, is equally applicable to the Australian military:

> In many military situations some one individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and of command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians, and those of many other lands for that matter, it is difficult to acquire habits of instantaneous obedience to another person's decisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized.[119]

The importance of discipline and following orders within the military context are contexts with which no one could sensibly take issue. However, the Australian military justice system, and the broad range of offences contained within its jurisdiction, covers a field much broader than the human resource management technique of maximising the prospect that orders will be followed by threat of punishment for failure to obey.

2. Discipline, efficiency and morale require a separate military justice system – the arguments against the proposition

The emphasis on obeying commands and consequent punishment for disobedience highlights two problems with the argument that an in-house *justice* system is required to maintain *discipline*. First, the Australian military justice system is a system much broader in scope than offences concerning or related to disobeying commands. Thus, the argument that a separate system of justice is required to ensure obedience to orders is an

[118] General Peter Cosgrove, (then) Chief of Defence Force, Submission No 16, 5-6 to the 2005 Senate Inquiry.
[119] Everett in Roan and Buxton, above n 66, 185 (emphasis added).

argument that fails to deal with the fact that many military justice systems have jurisdiction to deal with offences well beyond disobedience.[120]

Second, what also flows from the argument that a separate system of *military* law is vital to the maintenance of discipline and obedience to orders is that it fails to establish why it must be *military* law that performs this function. Certainly, if a commander lawfully orders his subordinates to do something and one refuses, the commander ought be able to *commence* a process which could lead to punishment proportionate to the disobedience. But, as a matter of common sense, it must be that the threat of a 5-year jail term (for example) will be just as effective, irrespective of whether the threat of that jail term is one that may be imposed by a civilian court or military one. If the maintenance of discipline requires the threat of punishment, it is difficult to accept that only a *separate* system of military justice can fulfil that goal. Those who champion and prioritise command integrity do not address why it is appropriate, or otherwise justified, that the power to discipline and punish military members can only come from military command as opposed to the judicial power of the State.[121]

The phenomenon of a *separate* military justice system, which is said to deliver a means of ensuring obedience, finds its roots in an era when penalties were designed to set an example and discipline was maintained through fear and displays of retribution.[122] Some of the authors who criticise the separate military justice system remind that this form of justice finds its roots in 'medieval prejudices',[123] is 'archaic'[124] and was based upon fear, as opposed to a system designed to provide equal justice.[125] As

[120] See for example, *DFDA* ss 15-65.
[121] See for example, General Samuel T. Ansell, above n 27; Edward F. Sherman, above n 35, 3.
[122] Edward F Sherman, above n 35, 95.
[123] Spak above n 25, 462.
[124] Ansell, above n 27; Edward F Sherman in Finn, above n 27, 24-25.
[125] Edward F Sherman in Finn, above n 27, 21.

Sherrill has observed of the historical justifications for the separate military justice system that 'if men could not be flogged, discipline would end; if men could not be put in irons, anarchy will prevail.'[126]

Significantly, the forces of these earlier eras long pre-dates human rights discourse with its emphasis on fair trials and prohibition against degrading, cruel and inhuman treatment. More so, the need to 'flog' and 'put in irons' must also be understood in the historical context that military units were once largely a band of retainers and mercenaries[127] where discipline was maintained by fear and retribution.[128] Now, military units, at least in Australia, are comprised of persons who volunteer for service. Again, when the historical purposes and context of the separate military justice system are understood, it must be doubted that a justice system designed to keep mercenaries and retainers in fear is appropriate for or required by present needs. More telling is the research which has examined soldiers' attitudes to obeying orders. That research reveals that soldiers are more motivated by peer or buddy pressure, by pride in their unit and faith in their commander, than by fear of severe punishment.[129]

An appreciation of the historical antecedents of the separate military justice system also has significance greater than mere observation, because it highlights the changing role of the commander. Sherman (the academic) has shown that historically, commanders controlled all aspects of the lives of their subordinates. In turn, the justice system was designed to empower the commander in exercising his all-encompassing power and

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[126] Sherrill, above n 3, 211-212.
[127] Ansell, above n 27; see also Table 1 above, which shows that our colonial military membership reflects that mercenary and retainer past.
[128] Edward F Sherman, above n 35, 21.
[129] Kenneth J Hodson, 'Military Justice: Abolish or Change' (Bicent. Issue 1975) *Military Law Review* 579, 587; see also Roberts-Smith, above n 42, 15, wherein the judge describes that perceptions of impartiality and fairness will give servicemen and women faith in the integrity of the military justice system and their commanders.

to arm the commander with tools to maintain discipline through fear.[130] Today, however, commanders no longer possess the authority to control all aspects of their subordinates' lives, yet the justice system remains largely of the form that supported the commander doing just that.

The argument about ensuring discipline through in-house justice also pre-dates the occurrence that fighting forces now make up a very small proportion of the military population. Thus, while the proponents of the separate military justice system tend to speak in generalised terms about 'The Military', Sherman (the academic) makes the point that only a small percentage of troops actually find themselves in combat, where, of course, obedience to orders, discipline and morale are of utmost importance. With the greater majority of military personnel performing trades or bureaucratic work, the proponents' argument that discipline on the field can only be maintained by this separate system loses some strength.

With respect to the proposition that discipline can only be maintained through an in-house justice system, those arguing *against* the separate military justice system have explored the experiences of those countries which have abolished their separate military justice systems or confined their operation to a very limited sphere when troops are deployed in time of war. Both Michael Spak[131] and Edward Sherman,[132] use comparative experiences to show that civilianising military justice reforms in jurisdictions such as Germany and France have had no adverse consequences for discipline and military operations.[133] In particular, Spak shows that neither military operations nor discipline have been adversely affected in France or in the Federal Republic of Germany as a consequence of those countries' military justice systems being reformed to have extremely limited application. Similarly, Edward Sherman has found

[130] Edward F Sherman, above n 35, 95.
[131] Spak, above n 25.
[132] Edward F Sherman, above n 35.
[133] See also Mitchell and Voon, above n 106.

that there is 'no concrete evidence on which to argue that removal of command control of court martial appointments and machinery would adversely affect military discipline'.[134]

Other critics of exceptionalism seek to diminish the force of the argument that orders will only be obeyed due to the threat of in-house justice by drawing an analogy with emergency service workers.[135] Emergency service workers are also charged with protecting society and in doing so will find themselves in life-threatening situations, yet they do not have their own justice system to enforce and ensure the discipline said to be required to place themselves in harm's way. Instead, they are subject to the civilian court structure.

The arguments favouring the separate justice system on the imperative-for-discipline basis, present no social science data, empirical investigation or sociological theories to demonstrate the constituent parts and features of military morale and discipline, and the concomitant need for those matters to be ensured through a separate system of military justice. Instead, the arguments favouring exceptionalism are expressed as positive and irreducibly connected truisms; for example, because law and order is the foundation of the military, and that discipline is the only way to preserve law and order, discipline must be in-house to preserve law and order.[136] The argument that in-house justice is an imperative for discipline is 'hardly articulated, much less demonstrated'.[137]

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[134] Edward F. Sherman, above n 35, 95.
[135] Rubin, above n 38, 43: 'the actions of New York fire and police services in the wake of the attack on the World Trade Centre on September 11, 2001'.
[136] Dennis R Hunt, 'Trimming Military Jurisdiction: an unrealistic solution to Reform Military Justice' (1972) 63(1) *Journal of Criminal Law, Criminology and Police Science*, 23*;* Hubert G. Oliver, 'Canadian Military Law' (1975) 23(4) *Chitty's Law Journal* 109, 123; Gulam, above n 114; Edward F. Sherman, in Finn (ed), above n 27, 21.
[137] Hirschhorn, above n 111, 207; see also Edward F. Sherman, above n 35, 95.

To be sure, it is not suggested that a commander have no power to commence action by reporting upon a person who fails to obey an order. But, the Australian military justice system covers a field much broader than that.

3. Command influence taints the separate system – an argument against the separate system

One kind of 'command influence' occurs when military personnel try to, or are perceived as trying to, influence court members, witnesses and/or other officers involved in the trial process. Command influence can be intended or unintended, but either way, it features a military member using their superior status in the chain of command to influence (or be perceived to be trying to influence) those lower in the chain. For example,[138] in *United States v Gleason*,[139] Gleason had been tried and convicted of trying to entice another soldier to kill an officer who had reported him (Gleason) for fraudulent use of travel vouchers. After hearing a tape of the accused seeking to commission the murder, Gleason's battalion commander made it clear to his subordinates that he thought the accused was guilty, the defence lawyer was an enemy and that no one should give evidence in favor of the accused (and no one did). The Court of Appeal held that command influence had infected the entire process, and overturned both the conviction and sentence.

Command influence is also said to occur, or is perceived to occur, because the commander has historically held multiple roles in the trial process, namely, to: convene the court martial; determine the charges; appoint the prosecutor, defence *and* jury from his own subordinate

[138] The Project to Enforce the Geneva Convention, 2001 Judge Advocate Officer Advanced Course Training Manual, Chapter 12 'Unlawful Command Influence', http://www.pegc.us/_LAW_/unlawful_command_inlfuence.pdf at 2 December 2010 provides a useful summary of command influence case law. See also Lederer and Zeliff in Fidell and Sullivan (eds) above n 21, 38-51.
[139] 43 MJ 69 (1995).

officers; and, to supervise the whole process from pre-trial investigation to post-sentence review.[140] The multiple roles of the Convening Authority are a phenomenon historically present in the Australian military justice system, with the 1999 Senate Committee noting that the Convening Authority in Australian military justice proceedings[141]

- determine[s] whether there should be a trial;
- determine[s] the nature of the tribunal and the charges;
- select[s] the trial judge and jury;
- select[s] the prosecutor; and
- review[s] the proceedings.

Some modifications to those multiple roles have since been made,[142] but it remains that the commander is in a position to influence – or be perceived to influence – the outcome of the proceedings. It is also the case that these multiple roles present a 'fundamental barrier to an independent and impartial trial'.[143]

It is generally accepted (even by those favouring the separate system[144]) that command influence, or the perception of command influence, taints the military justice system.[145] It must also be said that even most proponents of the separate system now acknowledge that for justice to be seen to be done, the commander's multiple roles require modification.[146] Some commentators propose wholesale change by abolishing the military justice system all together and locating the trial of defence personnel

[140] General Sherman, 'Congressional Proposals for Reforms of the Military' in Hodson, above n 129, 581.
[141] *Military Justice Report 1999*, paragraph 4.16.
[142] See Chapter Five, in particular Parts D and G.
[143] *Military Justice Report 1999*, paragraph 4.15.
[144] For example, David A. Schlueter, 'The 20th Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s – a legal system looking for respect' (1991) 133 *Military Law Review* 1, 12; Hodson, above n 129, 596.
[145] See also Finn, above n 27, 6; Sherman in Finn, above n 27, 35-48 for attacks on command influence.
[146] Of those cited as proponents of the separate system who argue for modification, see for example, Schlueter, above n 144, 12; Hodson, above n 129, 596.

within the civilian justice system.[147] Others argue that the implementation of a Director of Military Prosecutions (based on the civilian Office of Director of Public Prosecutions) is sufficient.[148]

The problem with keeping the military justice system in-house is that as long as the Convening Authority has multiple roles, command influence remains as a reasonable perception. As long as that perception can be reasonably entertained, that internal system of justice wants for respect and integrity when measured against internationally accepted norms of a fair trial.

Chapter 5 of this thesis traces the Australian military's response to the attacks on the multiple roles of the convening authority.

4. Special expertise is required to understand the separate military community and its offences – the argument for

There are two limbs to this argument. First, the military is a separate community, and second that outsiders could not understand the military context; the special expertise argument.

With respect to the separate community aspect of the argument, proponents claim that discipline will be jeopardised unless soldiers have a degree of isolation from 'secular temptations and material gratifications of contemporary society'[149] and that military honour requires isolation from civilian values which will otherwise corrupt military morale and

[147] See for example, *Military Justice Report 1999,* paragraph 4.15.
[148] See for example, The Hon Justice Len Robert-Smith, JAG Australian Defence Force, submission to the Senate Foreign Affairs, Defence and Trade References Committee, Inquiry, *Effectiveness of Australia's' Military Justice System*, Submission No 27, 16 February 2004, arguing for changes modelled on Canadian reforms. But see, Behan, above n 103, 190 defending the system.
[149] Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (2002), 26-27.

efficiency.[150] The idea that the military constitutes a separate community is also cited as a reason justifying why 'greater than usual restrictions on individual liberty are required'.[151] As a corollary, those who emphasise the separate community argue that military law is necessary because it creates a division between the military and civilian pressures.

Mathew Groves[152] recently dissected the separate community argument, wherein he identified various factors put forward to justify military differentiation. The first, says Groves of the special community argument,[153] is that the civilian, common law has evolved in a way which makes it (apparently[154]) inapplicable to military law. The second is that civilian lawyers would apply civilian legal principles to the military which would in turn constrain and constrict the military's proper functioning. Third, because the military says it is different, that difference (apparently) 'warrants different treatment'.[155] Further, summarises Groves, because the military is physically separate from civilian society, the military should also have separate rules.

Proponents of the separate military justice system argue that civilian judges, lacking combat or military experience, simply cannot understand the nature of military offences.[156] It is also said that civilian jurors would not understand the military context and nuance if required to acquit or convict an accused person: 'It takes a soldier to properly understand the subculture of soldiers'.[157]

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[150] Ibid, 27-29.
[151] Hirschhorn, above n 111, 178.
[152] Groves, above n 36, 368-377.
[153] Ibid, 368.
[154] Groves then deals with the deficiencies in this argument later in his analysis, ibid, 370.
[155] Ibid, 368.
[156] Joseph W Bishop, *Justice under Fire: A Study of Military Law* (1974), 24.
[157] Aifheli Enos Tshivhase, 'Military Courts in a Democratic South Africa: an assessment of their independence' (2006) 6 *The New Zealand Armed Forces Law Review* 96, 121.

Ultimately, what underlies this argument is a premise that the military is *so* separate and *so* different that outsiders simply could not understand it and particularly in relation to the conduct of military operations. As a corollary, those civilian outsiders could not be entrusted with the task of adjudicating a conviction or acquittal. This is a theme taken up in Chapter 3 which reviews the sociological theory of total institutions – institutions which seek to create themselves as impervious to outside influence, involvement and external scrutiny.

5. Special expertise is required to understand the separate military community and its offences – the argument against

Once, military units were no more than a band of retainers and mercenaries,[158] isolated from other units as well as the civilian population. In that era, there was probably justification for considering the military as a separate community and in need of its own transportable system of punishment.[159] However, that historical separateness has been replaced by a 'growing convergence between military and civilian sectors'.[160] This convergence is seen in modern military practice where the ideas of core business and outsourcing are evident:

> 3.112 However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of 'core business' and 'outsourcing' have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.[161]

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[158] Ansell, above n 27.
[159] Gross and Ni Aoláin, above n 110, 219-220. See also: Kirsten S Dodge, 'Countenancing Corruption: a civic Republican case against Judicial Deference to the Military' (1992) *Yale Journal of Law & Feminism* 1; Stephanie A Levin, 'The Deference that is Due: rethinking the jurisprudence of judicial deference to the military' (1990) 35 *Villanova Law Review* 1009.
[160] Gross, above n 110, 220.
[161] *2005 Senate Report*.

Hirschhorn argues that the idea of a separate community is based upon an 'historically obsolete model of the relation of the armed forces to society and the duties of modern military personnel.'[162] He adds:

> First, the actual separateness of the traditional military community has ceased to exist. Second, the duties of most servicemen can be performed without the subordination of the traditional military community. Third, the majority has not proved that the norms of the traditional military community are necessary for the effectiveness of even combat personnel or, if so, legally justifiable. Fourth, nothing distinctive about the problem of the constitutional rights of individual servicemen places it beyond the competence of the courts. Finally, both military and civilian interests would be better served by integrating the armed forces into the civilian society. [163]

If we look at Hirschhorn's first two points, the Australian military is composed of 55,000 full-time members, 25,000 part-time members and 15,000 defence public servants. Of those 95,000 personnel, 3,300[164] or 3.4% are deployed and thus living separate from civilian communities and civilian life. The vast majority of defence personnel are not isolated from civilian life in the manner suggested by the separate community doctrine. The idea of a separate community is an idea which finds resonance in General Sherman's era, but is out-dated for present debate.

Hirschhorn also takes issues with the argument that only those from within the supposedly separate community can judge its members:

> A more fundamental criticism is that the majority's approach [advocating for the separate community doctrine] is rhetorical and superficial and does not demonstrate that the judiciary is any less competent to consider individual rights in a military context than in connection with prisons, government employment, or national security. In this view, the armed forces have not been shown to be fundamentally different from other government agencies whose actions the courts review.[165]

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[162] Hirschhorn, above n 111, 179.
[163] Ibid, 204.
[164] Department of Defence, http://www.defence.gov.au/op/index.htm at 19 April 2010. Deployments include: Afghanistan, Middle East, Border Protection, East Timor, Egypt, Iraq, Solomon Island, Sudan.
[165] Hirschhorn, above n 111, 179.

With respect to the special expertise argument, the *Defence Legislation Amendment Act* 2006 divided military offences into three classes: Class 1 offences being the most serious, with Class 3 offences being akin to civilian misdemeanours. Upon the High Court's decision of September 2009 in *Lane v Morrison*,[166] the Class system was removed from the DFDA whilst the Government re-considered the Chapter III Constitutional status of the Australian Military Court. When the Class system was abolished, all of the individual offences that had been classified into the three Classes remained in the DFDA as individual offences, just not divided in to the three Classes. Nevertheless, the Class system provides a useful way to group the military offences for analysis.[167]

If the proposition that civilians could not understand military offences is to ring true, then it would be expected that there would be a multitude of offences in the *DFDA* with no equivalent, or relevantly similar offence, in civilian law. Accordingly, the following two tables and the longer table at Appendix 3, compare the *DFDA* offence provisions with civilian, criminal law provisions. This comparison assists in assessing the proposition that military law offences are so foreign to civilian law that civilian lawyers and juries could not possibly understand the elements.

The following Tables summarise what were the Class 1 and 2 offences in the *DFDA*. The Class 3 offences are set out in Appendix 3 because the list is too long for inclusion here, particularly in circumstances where the offences are the lower end of the spectrum of severity. In each of these three Tables, Commonwealth legislation is the first reference point for comparison because the *DFDA* is Commonwealth law. However, where an analogous Commonwealth offence could not be identified the criminal law of the Australian Capital Territory is drawn upon. It is appropriate to consider ACT criminal law because section 61 of the *DFDA* imports the

[166] [2009] HCA 29.
[167] Because the *DFDA* is currently under review, the suspended Schedule 7 to the 2006 *Defence Legislation Amendment Act* is set out in Appendix 2.

criminal law of the Australian Capital Territory into the *DFDA*. Section 61 of the *DFDA* creates 'Offences based on Territory offences'. A 'Territory offence' is defined by section 3 *DFDA* to mean an offence punishable under the *Crimes Act* of the Australian Capital Territory. As Gleeson CJ observed in *Re Colonel Aird; Ex parte Alpert:*

> Rape is such an offence. As was pointed out in Re Tracey; Ex parte Ryan, this is simply a drafting technique by which the Act, in creating service offences by reference to the content of Australian law, selects one out of the multiplicity of laws potentially available in a federation. It is a form of convenient legislative shorthand which removes the necessity to repeat, in the Act, all the provisions of an Australian criminal statute... .[168]

Thus, where the Commonwealth DFDA and Commonwealth law provide no comparisons, it is appropriate to turn to the laws of the Australian Capital Territory for comparative purposes.

Table 4
Class 1 Offences & their civilian equivalents[169]
[All civilian Act references are to Commonwealth Acts unless otherwise stated]

DFDA Section	Description	Max. Penalty	Civilian equivalent	Max. civilian Penalty
15(1)	Abandon or surrender post	15 years	*Public Service Act* 1999 - s 13(5) failing to comply with directions - s 3(2) failing to act with care and diligence *Fair Work Act* 2009, ss 43-45, 50 contravening terms and conditions of employment, including leave without approval	Termination of employment; reduction in classification; re-assignment of duties; fine; reprimand[170] S 539, up to 60 penalty units. (1 *pu* = $110, s 4AA Crimes Act 1914)

[168] (2004) 20 CLR 308.
[169] Schedule 7 to the *Defence Legislation Amendment Act* 2006 (Cth) is set out in Appendix 2.
[170] *Public Service Act 1999* (Cth) s 15.

DFDA Section	Description	Max. Penalty	Civilian equivalent	Max. civilian Penalty
15A(1)	Causing capture or destruction of service ship, craft or vehicle	15 years	*Crimes (Ships And Fixed Platforms) Act* 1992, s 10 Destroying or damaging a ship *Crimes (Aviation) Act 1991,* s 17 Destruction of aircraft	Life 14 years
15B(1)	Aiding the enemy when captured	Life	*Criminal Code* 1995, s 80.1(e),(f), (g), (h), engaging in conduct that assists an enemy, another country, or an organisation	Life
15C(1)	Providing the enemy with material assistance	Life		
15D(1)	Harbouring enemies	15 years		
15E(1)	Offences relating to signals and messages	15 years	*Crimes (Ships And Fixed Platforms) Act* 1992, - s 2 Destroying or damaging navigational facilities - s 13 Giving false information	15 years
15F(1)	Failing to carry out orders	15 years	*Public Service Act* 1999, s 13(5) failing to comply with directions *Fair Work Act* 2009, ss 43-45, 50 contravening terms and conditions of employment, including leave without approval	Termination of employment; reduction in classification; re-assignment of duties; fine; reprimand s.539, up to 60 penalty units. (1 *pu* = $110, s 4AA Crimes Act 1914)

DFDA Section	Description	Max. Penalty	Civilian equivalent	Max. civilian Penalty
15G(1)	Imperilling the success of operations	15 years	*Crimes (Aviation) Act* 1991, s 19 Prejudicing safe operation of aircraft	14 years
16(1)	Communi-cating with the enemy	15 years	*Criminal Code* 1995, s 80.1(e),(f), (g), (h), engaging in conduct that assists an enemy, another country, or an organisation	Life
16A(1)	Failing to report information received from the enemy	15 years		
16B(1)	Offence committed with intent to assist the enemy	Life		
20(1)	Mutiny	10 years	*Crimes (Ships and Fixed Platforms) Act* 1992, s 8 seizing a ship *Crimes (Aviation) Act* 1991, s 16 Taking control of aircraft *Crimes Act* 1914, s 25 Inciting mutiny	Life 20 years Life
20(2)	Mutiny to avoid duty	Life		
21(1)	Failing to suppress mutiny	2 years		
21(2)	Failing to suppress mutiny to avoid duty	5 years		
22(1)	Desertion when on duty	5 years	*Public Service Act* 1999, - s 13(5) failing to comply with directions - s 13(2) failing to act with care and diligence *Fair Work Act* 2009, ss 43-45, 50 contravening terms and conditions of employment, including leave without approval	Termination of employment; reduction in classification; re-assignment of duties; fine; reprimand S 539, up to 60 penalty units.
22(2)	Desertion when on leave	5 years		

DFDA Section	Description	Max. Penalty	Civilian equivalent	Max. civilian Penalty
59(1)	Dealing in or possession of narcotic goods when outside Australia	10 years	*Criminal Code* 2002 (ACT), s 603 trafficking in controlled drugs	3 years - Life
61(1), (2) & (3)	The Territory offences - if clause 2 of Sch. 7 is satisfied (see Annex. 5)	This provision imports ACT criminal law		
62(1)	Commanding or ordering a service offence be committed	The penalty relevant to the offence committed	*Criminal Code* 1995 - s 11.2 Complicity and common purpose - 11.4 urging the commission of an offence	The penalty relevant to the offence committed

What Table 4 shows is that all military offences previously labelled as Class 1 have equivalents, close counterparts, or broadly analogous parallels in civilian, criminal law. Certainly, the corresponding offences given in the *Public Service Act* for the military offences of abandoning or surrendering one's post and for desertion may not be the neatest of fits, but the references to that Act in Table 4 above are matters which also concern: hierarchies; potential waste of public resources; harm to the public, other workers or the entity; as well as setting out rules protecting the veracity of the organisation. Thus, the aspirations and values sought to be protected by the *Public Service Act* are precisely the values sought to be protected in the corresponding military offences.

Certainly, there are some offences in the *DFDA* which are military specific, but offences with particulars such as failing to salute, or, donning an ill-kempt uniform tend to be heard at the Summary Authority level. More importantly, however, is that offences such as desertion, as provided for in section 22 *DFDA* or abandoning/surrounding the post in section 15 *DFDA,*

are not so complex or context specific that a civilian judge would be unable to deal with the elements of the offence as clearly set out in the Act. When regard is had to those provisions, it is clear that the offences are not complicated in a legal sense (and www.austlii.edu.au lists no cases considering these offences), but dependent upon the facts of the case. As such, it is difficult to see how the elements of the DFDA offences or the factual matrixes would be beyond the competence of an experienced civilian judge.

The Class 2 offences were described as 'middle ground' offences;[171] something less serious than the Class 1 offences, but still more serious that the Class 3 offences. The Class 2 offences were primarily drug offences which have been deemed less serious than those prosecuted as Class 1 offences. A person accused of a Class 2 offence was to be tried by military judge and jury unless the accused elected to be tried by military judge alone. For a Class 1 offence, the accused could not elect the mode of trial, and was required to have a hearing before both military judge and jury. Whilst the Class system no longer exists, the offence provisions referred to below remain intact in the Act.

Table 5
Class 2 Offences & their civilian equivalents[172]
[All civilian Act references are to Commonwealth Acts unless otherwise stated]

DFDA Section	Description	Max. Penalty	Civilian equivalent	Civilian Penalty
36(1)	Dangerous conduct likely to cause death or GBH	10 years	*Crimes Act* 1900, s 27 Acts endangering life etc	10 years

[171] Nina Harvey, *The New Australian Military Justice System'* (Lecture given, date and location unknown), http://www.slidefinder.net/t/the_new_australian_military_justice/9374035 at 20 October 2008.
[172] Schedule 7 to the *Defence Legislation Amendment Act (Cth)* 2006 is set out in Appendix 2.

DFDA Section	Description	Max. Penalty	Civilian equivalent	Civilian Penalty
59(3)	Possession of narcotic goods or cannabis	If more than 25gm, 2 yrs	*Drugs of Dependence Act* 1989 (ACT), s 169 Possession and administration of drugs	2 years
		Less than 25gm cannabis, and 1st offence, a fine equal to 14 days' pay	*Drugs of Dependence Act* 1989 (ACT), s 171A	$100 fine
		Less than 25gm cannabis, and 2nd offence, dismissal	*Drugs of Dependence Act* 1989 (ACT), s 171A	$100 fine
59(5)	Use of narcotic or cannabis outside Australia	2 years	*Drugs of Dependence Act* 1989 (ACT), s 169 Possession and administration of drugs	2 years
59(6)	Use of cannabis in or outside of Australia	1st offence, a fine equal to 14 days' pay 2nd offence, dismissal	*Drugs of Dependence Act* 1989 (ACT), s 171A	$100 fine
59(7)	Possession of less than 25grms cannabis	1st offence, a fine equal to 14 days' pay 2nd offence, dismissal	*Drugs of Dependence Act* 1989 (ACT), s 171A Offence notices	$100 fine
61(1), (2) & (3)	Certain other Territory offences	This provision imports ACT criminal law		

What this comparison clearly shows is that each military offence in Table 5 has a civilian equivalent. As a consequence, it is difficult to sustain the argument that civilian courts could neither understand nor have the special expertise to hear cases involving drug offences created under the *DFDA*.

The long list of former Class 3 offences appears at Appendix 3 and includes all other offences known to military law and civilian law. As Class 3 offences, they were considered to be the least serious. Again, what can be seen from that annexed table is that a great many of the offences contained within the *DFDA* have equivalent offences in civilian law.

When military and civilian offences are actually compared, the special expertise argument fails to survive analysis. The special expertise argument also fails to acknowledge that civilian judges and juries hear a range of disparate matters covering divergent topics most days. In a sentiment expressed in a United States Court in 1972, but equally applicable to Australian civilian judges, proponents of the special expertise argument fail to acknowledge that 'civilian courts must deal with equally arcane matters in such areas as patent, admiralty, tax, antitrust, and bankruptcy law, on a daily basis'.[173]

The logical conclusion to the special expertise argument is that only doctors could hear medical negligence cases; only engineers could hear building and construction disputes; and only builders hear building disputes. The special expertise argument lacks weight when properly considered.

Even if it was accepted that a judicial officer hearing a military matter *did* need military experience in order to properly conduct a criminal trial, and then sentence on conviction, the "special expertise argument" presumes civilian judges do *not* have military experiences. This is simply not so. A

[173] *Parisi v Davidson*, 405 US 34, 52-53 (1972).

significant proportion of the Australian civilian judiciary serve, or have served, in the various branches of the military reserves; Appendix 4 provides an overview of these judicial officers, but is in no way an exhaustive list. Such is the link between the judiciary and active military service that the Queensland Supreme Court curated an exhibition in 2008 called 'Serving their Country: Military Service by [past] Queensland Judges'. The flyer from the exhibition is at Appendix 5 (reproduced with the permission of the Supreme Court of Queensland Library).

6. Courts martial can be convened quickly and deployed overseas – the argument for

A potentially plausible argument for a separate military justice system can be advanced when it is proposed for overseas wartime missions. In such cases, it may be that the local civilian courts are not functioning, or are hostile to the military mission or are not interested in the dispute.[174] Or, it may be logistically difficult or expensive to bring all witnesses back to the accused person's home State for trial.[175] The Australian military makes much of its need to have the capacity to deploy a court martial overseas as justification for the separate system.[176]

As a further argument that a separate military justice system is required for overseas proceedings, it is also said that the ability to convene trials overseas conserves personnel: 'it can frequently rehabilitate him [the accused] for further military service without interrupting his training during the pre-trial and trial phase of the case'.[177] This may be an appropriate approach for summary offences heard by summary authorities, but inappropriate for serious criminal offences such as drug trafficking, mutiny,

[174] For example, Hodson, above n 129, 588.
[175] Behan, above n 103, 298.
[176] Of the justice system, 'it must be deployable', Government Response to 2005 Senate Report, 14-15.
[177] Hodson, above n 129, 589.

or aiding the enemy. It is difficult to imagine how a unit would function with high morale and efficiency if in their midst was a member accused of a aiding the enemy or a serious crime of violence against another member of that unit. The argument that the accused can keep training until trial and then resume his/her place in the unit after the trial can only be realistically applied where the allegation/s are at the minor end of the spectrum of criminal offences, and where the accused, even on a finding of guilt, is only likely to receive a reprimand or other minor punishment. If this is so, then an outcome such as a reprimand can be handed down by a summary authority without the need to consider deploying a court martial overseas.

7. Courts martial can be convened quickly and deployed overseas – the argument against

The military justice system has evolved from the "drum head justice" where military units were tantamount to private armies,[178] isolated from other units and the civilian population. This isolation meant decentralized court martial authority could be justified in wartime to enable the immediate convening of a court martial to hear charges concerning allegations of offences committed in action. Now though, the purported need for a deployable court martial system does not take account of advances in technology where witnesses can give evidence by video link, as occurs in civilian courts on a regular basis. In that regard, s148C DFDA provides for the giving of evidence by video and audio link.

The approach of requiring instant judgment also sits at odds with the human rights jurisprudence according to which an accused is required to have sufficient time 'and facilities for the preparation of his defence and to communicate with counsel of his own choosing'.[179] Similarly, when the

[178] Ansell, above n 27.
[179] For example, *ICCPR* Article 14(3)(c).

matter of a speedy trial is considered, one would think that a commander's first priority would be the prosecution of the war and that that priority should 'trump his responsibility to prosecute the accused'.[180]

What is particularly telling about the apparent need for a deployable court martial system is the frequency with which extra-territorial courts have been operationalised. Between 2000 and the present, only six matters were conducted overseas, with all of these matters heard by a DFM sitting alone.[181] Thus, the emphasis placed on the need for deployable courts martial is not supported by the infrequency of their occurrence. Thus, the deployability argument falls into the category of "nice in theory" but almost irrelevant in practice. When regard is had to the infrequency of courts martial convened overseas, it becomes hard to accept the deployability argument, let alone justify the need, of this parallel system of justice.

8. Arguing for the separate system by attacking the critics

Arguments have been made *for* the separate system by attacking those who criticize it, especially those outside the military. Those outsiders have been said to 'lack information, use old data, rely on false data or assumptions, have no experience or are anti-military by inclination'.[182]

This kind of approach does little to promote rigour of debate and analysis. If anything, such demonising only tends to support the view that the

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[180] Behan, above n 103, 297.

[181] 2000-2004 statistics in *2005 Senate Report*, 85. 2005 statistics in Judge Advocate General, *DFDA Annual Report*, 1 January to 31 December 2005. 2006 statistics in Judge Advocate General, *DFDA Annual Report*, 1 January to 31 December 2006. 2007 statistics in Judge Advocate General, *DFDA Annual Report*, 1 January to 31 December 2007. 2007 statistics 2008 statistics in: Chief Military Judge, *Australian Military Court Annual Report January-December 2008* (2008) 6, paragraph 22. Confirmation of statistics received by email from Brig. Ian Westwood**,** Chief Judge Advocate, Office of Judge Advocate General, 18 December 2009.

[182] For example, Schlueter, above n 144, 5-8; *ICJ Report*, above n 2, 10.

separate community cannot be justified on any grounds other than the military's general desire to place itself beyond external scrutiny and fear of change. Such an attitude is one consistent with the military as a total institution, the theory which is examined in the following chapter.

9. The separate system is unconstitutional

A different critique of the separate system is found in a handful of texts and articles that consider the constitutionality of the separate military justice system. In Australian articles almost 15 years apart, Roger Brown[183] and then Andrew Mitchell and Tania Voon[184] take such an approach. In his analysis, Brown first asks whether service tribunals exercise judicial power, as referred to in section 71 of the *Commonwealth Constitution,* when exercising powers under the DFDA. To this question, his answer is in the affirmative.[185] Given the answer to this first question, Brown then seeks to identify the source of that judicial power - 'what or whose judicial power is it?'[186] Brown identifies the only three possible sources of power: extra-Constitutional; residual prerogative judicial power; or, the defence power in section 51(vi) of the Constitution.[187] He wastes no time on the possibility of extra-Constitutional power, as judicial power can only be derived from Chapter III of the *Constitution of the Commonwealth of Australia*. For similar reasons, he also disposes of the possibility that the source of power is residual prerogative power. That leaves the defence power. In this part of his analysis, Brown gives a timely and important reminder that when the leading High Court cases of *R v Bevan*[188] and *R v Cox*[189] were determined in 1942 and 1945 respectively, courts martial were *not* part of the *Australian* judicial system.

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[183] Roger A Brown, 'The Constitutionality of Service Tribunals under the Defence Force Discipline Act 1982' (1985) 59 *Australian Law Journal* 319.
[184] Mitchell and Voon, above n 106, 246.
[185] Brown, above n 183, 321-322.
[186] Ibid, 323.
[187] Ibid.
[188] *R v Bevan; ex parte Elias & Gordon* (1942) 66 CLR 452.
[189] *R v Cox; ex parte Smith* (1945) 71 CLR 1.

That was because they were still subjects of English statute and as a consequence, any conflict between Australian and English military laws had to be resolved in favour of English laws.

Brown then shows that once courts martial became 'Australian' in 1985, they became a part of our Australian court structure and as a corollary the *Bevan* and *Cox* authorities became distinguishable. Brown concludes that that military tribunals convened under the *DFDA* are not exercising power pursuant to the defence power of the Constitution, but exercising judicial power of the Commonwealth. Brown further concludes that because the exercise of power is judicial, it follows that these military tribunals violate section 72 of the Constitution[190] - section 72 of the Constitution provides the Commonwealth judiciary with independence and impartiality through its appointment, tenure and remuneration provisions.

This, however, was not the approach adopted by the High Court in 2007 when it declined to overturn these earlier cases, holding that *Bevan* and *Cox* were still 'good law'.[191] While Brown's argument that these earlier cases could be distinguished was not agitated before the Court,[192] nevertheless, the Court's reasoning was such that Brown's argument was implicitly rejected.[193]

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[190] Brown, above n 183, 325.

[191] *White v Director of Military Prosecutions* (2007) 231 CLR 570, 580; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 518 per Mason CJ, Wilson and Dawson JJ:

> 'Those decisions [*Bevan* and *Cox*] are authority for the proposition that the power to establish military tribunals lies not in Ch.III but under s.51(vi) of the Constitution'.

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

[193] In so far as the constitutionality of the Australian Military Court was concerned, the themes of Brown's argument with respect to *un*constitutionality met with success, although Brown's article was not cited in the judgment.

In 2007, the High Court of Australia considered the constitutionality of courts martial. In *White v Director of Military Prosecutions*,[194] a female Chief Petty Officer of the Royal Australian Navy had been charged with seven *DFDA* offences, involving acts of indecency or assault, upon five other female members of the ADF, all of whom were of lower rank to the accused. Before the trial occurred, the accused challenged the validity of the *DFDA*, arguing firstly that courts martial are beyond constitutional power, and secondly, that courts martial were invalid in so far as they purported to hear allegations which constituted offences against civilian law. But, to succeed, White needed the High Court to overturn its previous decisions in the trilogy *of cases - Re Nolan; Ex parte Young, Re Tyler; Ex parte Foley* and *Re Tracey; Ex parte Ryan* - which had held by different majorities for different reasons that courts martial exercised the defence power of the Constitution. The Court declined to overturn these earlier decisions.

With the return to courts martial in September 2009 following the High Court's decision in *Lane v Morrison*,[195] it is unlikely that their constitutionality will be invalidated. In a submission made to the High Court in *Alpert* in 2005, but equally relevant to the return of service tribunals in September 2009, Senior Counsel for *Alpert* in the High Court, Mr John Logan RFD SC (now of the Federal Court of Australia) conceded as much:

> KIRBY J: Has there ever been a head-on challenge to the constitutional validity of courts martial in Australia? I realise that the cases which you cited in your submissions accept their system and the system has a long history in the British military forces, but we work within our Constitution. Section 51(vi) is subject, in our Constitution, to Chapter III and it is at least a curiosity that you can have a system outside Chapter III for disposing of matters which arguably are matters of ordinary rights and duties and punishment. Now, you do not raise this in your case, but the logical starting point would seem to me to be how consistent with the scheme of our Constitution you can have a system of courts martial. Has this Court upheld

[194] *White v Director of Military Prosecutions* (2007) 231 CLR 570.
[195] [2009] HCA 29 (26 August 2009).

> the system on a confrontation directly challenging its compatibility with Chapter III?
>
> MR LOGAN: Your Honour, that we apprehend is a battle fought and lost, in terms of the ability to have courts martial with persons who are not like appointees, exercising what is, on any view, judicial power. But it is a battle which was fought, in our submission, and should be confined to a very narrow theatre of operations.[196]

Almost 15 years after Brown's article, Mitchell and Voon[197] argued that the trilogy of High Court cases[198] were examples of judicial deference to the military, which is a phenomenon whereby civilian judicial courts are loathe to interfere in military matters. It is a doctrine also acknowledged in writings from the United States[199] and a concept that makes sense of the High Court of Australia's many decisions finding service tribunals were constitutional.

The concept of judicial deference to the military finds its roots in the separation of powers created in our Constitution and the Constitution of the United States of America. In Australia, the military's commander-in-chief is the Governor-General (acting on advice from the Government), who, as the head of the Executive arm, is to have the final say with respect to the readiness of the Australian military. Equally, the legislature, with its power to legislate for the military and appropriate a budget ought be able to exercise its responsibilities to fund the military and make laws for its governance. 'In contrast, the courts have no such Constitutional mandate to make military policy; thus, they should yield to decisions' of the Commander in Chief and Legislature.[200] But as Fidell highlights, this policy of deference to the military allows *ad hoc* courts to proceed, largely

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[196] *Alpert, Ex parte - Re Aird & Ors* [2004] HCATrans 42 (3 March 2004).
[197] See also Roberts-Smith, above n 42, 12.
[198] *Re Tracey, Re Nolan* and *Re Tyler.*
[199] Nunn in Fidell and Sullivan (eds), above n 21, 3; Dodge, above n 159, 1; Levin, above n 159, 1009; Gross and Ní Aoláin, above n 110, 219.
[200] Phillip Carter, 'Judicial Deference to the Military: How It Will Affect Court Cases Involving Gay Rights, and War on Terrorism Policies', http://writ.news.findlaw.com/commentary/20030715_carter.html at 31 January 2009.

shielded from public scrutiny, with the arbiters' decision making and service at the pleasure of the Judge Advocate General.[201]

Mitchell and Voon's primary argument is that because service tribunals exercise judicial power, they are in breach of the Constitution. Whilst their argument is attractive at a theoretical level, it has not been accepted by the High Court in the earlier cases trilogy,[202] nor in the more recent decision in *White*,[203] where the court has consistently held (albeit by majorities, with differing reasons) that service tribunals are not Chapter III Constitutional Courts and thus the protections provided in that Chapter – tenure and judicial independence - were not required.

Usefully, Mitchell and Voon analyse the High Court's trilogy of authorities to identify what each judge in each case actually held, and find no binding *ratio decidendi*. Accordingly, they conclude that the validity of Australia courts martial has not been settled by those authorities. Indeed, this position has been accepted by the Court in a more recent case, with McHugh J of the High Court of Australia observing in the leading judgement:

> 35. As I explained in the third of the trilogy - *Re Tyler; Ex parte Foley* - the 'divergent reasoning of the majority judges in *Re Tracey* and *Re Nolan* means that neither of those cases has a ratio decidendi'. In *Re Tyler*, a majority of the Court held that a general court martial had jurisdiction to hear a charge against an Army officer that he had dishonestly appropriated property of the Commonwealth. *Re Tyler* also failed to obtain a majority of Justices in favour of any particular construction of the defence power in relation to offences by service personnel. [204]

A Judge Advocate General of the Australian Defence Force, Major-General the Hon. Justice Len Roberts-Smith has described the High

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[201] Fidell and Sullivan (eds), above n 21, 25; see also Groves, above n 36 for an examination of the concept of judicial deference in Australia.
[202] *Re Nolan, ex parte Young; Re Tyler; ex parte Foley;* and *Re Tracey, ex parte Ryan.*
[203] See also Gulam, above n 114 for criticism of Mitchell and Voon's view.
[204] *Re Colonel Aird* (2004) 220 CLR 308, 321.

Court's decisions as never actually rejecting the defence power as a basis for service tribunals in an absolute sense, but instead 'it has always seemed to offer it only qualified endorsement.'[205]

Mitchell and Voon argue, like some American counterparts,[206] that service tribunals should only have jurisdiction to hear matters that are 'exclusively disciplinary offences'.[207] Yet, it is difficult to identify what offences would affect military discipline and which ones would not; the military says all offences, be it rape, off-site theft and the like, impact upon discipline.[208] As Mason CJ, Wilson and Dawson JJ observed in *Re Tracey; Ex parte Ryan*[209] 'it is not possible to draw a clear and satisfactory line between

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[205] Roberts-Smith, above n 42, 24.

[206] In the United States, the United States Supreme Court has characterised United States military judges as Article I judges, not Article III judges (*Kurtz v Moffitt*, 115 US 487 (1885); *Dynes v Hoover*, 61 US 65 (1858)). As Article I judges, they do not have the independence conferred by the security of tenure and of compensation as provided for in Article III.

With respect to constitutionality, the author of a Note in the *Harvard Law Review* ('Note: Military Justice and Article III' (1990) 103 *Harvard Law Review* 1909) argued that when the jurisdiction of the military tribunals was confined very narrowly (under the *O'Callahan v Parker* 395 US 258 (1969) 'service connection test' which provided for jurisdiction where the allegations were sufficiently connected to military service*)* some deviation from Article III could be justified. However, the subsequent decision of *Solorio v United States* 483 US 435 (1987) overturned *O'Callahan* and its narrow conferral of jurisdiction upon courts martial, finding instead that just being a member of the forces was all that was required to enliven the jurisdiction of courts martial: 'the military status test'. Chief Justice Rehnquist for the *Solorio* court held at 4448 that *O'Callahan* was based on erroneous readings of English and American history. Thus, from *Solorio* the jurisdiction of military tribunals arose simply by reason of a person's military status irrespective of the type or nature of the crime. With such broad jurisdictional reach, the Note, at 1910, called for a 're-evaluation of the relationship between the military justice system and Article III requirements'.

The author of the Note also argued that the US military justice system failed to meet the fundamental values of independence and impartiality underlying Article III of the Constitution, and consequently, Article III protections should apply to the military justice system as a means of striking a better balance between the competing values of adjudicatory independence and operational needs. The author then urged the reconstitution of the appellate military courts as Article III courts to achieve this balance.

[207] Mitchell and Voon, above n 106, 270.

[208] Schlueter, above n 144, 12.

[209] (1989) 166 CLR 518, 544.

offences committed by defence members which are of a military character and those which are not'.

The following section of this Chapter moves away from arguments for and against the separate military justice system. It looks to and applies fair trial rights and human rights jurisprudence to military justice.

C. Rights analyses of the separate military justice system

Analyses which apply international human rights standards of a fair trial, as the tool by which to measure the fairness of military justice, are almost universally critical of separate military systems of justice. For example, the United Nations Human Rights Committee has observed that

> quite often the reason for the establishment of such courts [special and military courts] is to enable exceptional procedures to be applied which do not comply with normal standards of justice. … In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of Article 14 which are essential for the effective protection of human rights. [210]

Amnesty International (USA) concluded similarly in its *Fair Trial Manual*.[211] The Manual considered whether proceedings in military courts are fair by reference to: the competence, independence and impartiality of the tribunal of fact; whether the tribunal is free from interference by superiors or outside influence; whether the court has jurisdiction over the accused; and, whether the tribunal has the judicial capacity for the proper administration of justice. It concluded that on the whole, military courts failed the tests identified above.[212]

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[210] Human Rights Committee, *General Comment 13, Article 14,* 21st session, UN Doc. HRI\GEN\1\Rev.1 (1994), paragraph 4.
[211] Amnesty International, *Fair Trial Manual* (1998), Chapter 29.6.
[212] Ibid, Chapter 29.6.2.

The former UN Sub-Commission on Human Rights also examined the administration of justice through military tribunals. Special Rapporteur, Mr Louis Joinet[213] traced the civilianisation of military justice systems and identified the following successive stages of civilianising reform to military justice systems:

a) the inclusion of civilian judges on military tribunals;
b) increasing use of civilian lawyers;
c) transferring appeals to civilian courts;
d) abolishing military tribunals in peace time;
e) enshrining the right to a fair trial by military tribunals in war time; and
f) excluding the trial of serious human rights violations from military tribunals.

For the Australian military justice system and Department of Defence, this is an interesting chronology. Reservists, drawn from the civilian Bar, often fulfil the first two roles, yet, in doing so, they are acting in their military capacity and are subject to the chain of command. As for the third step, appeals from a military trial are also conducted in a special division of the Federal Court, the Australian Defence Force Discipline Appeal Tribunal. As for the fourth phase, there are many countries, including Austria, Denmark, France, Norway and Sweden, which have abolished military tribunals in peace time, making the idea not one of great novelty if Australia chose to follow suit. In that regard, the 2005 Senate inquiry report made a raft of recommendations 'based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF'[214] and recommended that allegations made in peace time be conducted by civilian authorities, and allegations

[213] Commission on Human Rights, *Issue of the administration of justice through military tribunals: report submitted by Mr Louis Joinet pursuant to Sub-Commission decision 2001/103*, UN Doc E/CN.4/Sub.2/2002/4, 9 July 2002.
[214] *2005 Senate Report*, paragraph 14.

arising in times of war be investigated by the Australian Federal Police. However, the military and the Howard Government chose not to implement these bipartisan recommendations.

The final step in Joinet's evolutionary process may or may not apply to Australia's military justice system. In Australia, offences pertaining to human rights violations are contained in the Commonwealth *Criminal Code*, and thus part of civilian law. Arguably however, and mindful of the High Court's observations in *Re Aird,*[215] if section 61 of the *DFDA* imports civilian, criminal law into the military justice regime, then it may be that these human rights violations could fall within the jurisdiction of courts martial. The point has not been argued in a court, Joinet's final point may still have application in Australia.

As for other strands of human rights discourse, in 2004, the International Commission of Jurists produced a weighty and comprehensive report called *Military Jurisdiction and International and National Law*.[216] This is a detailed two-volume examination of military justice. Part I identifies the international rules, principles and obligations relevant to the trial of a person accused of committing human rights violations. From there it examines whether the trial of such accused persons in military courts is compatible with the requirements of international human rights law. The report also provided an overview of the universal and regional human rights instruments and entities. Part II of the report sets out the provisions for military law in a variety of countries, but not Australia.

Part I is focused on the practices in countries where the line between the military and the executive is blurred or non-existent, and in developing countries with new charters of self-determination. It has little relevance for present purposes. In Volume II, the study examines the practice in first

[215] *Re Colonel Aird* (2004) 220 CLR 308.
[216] *ICJ Report*, Part II, above n 2.

world countries such as the United States, United Kingdom, Germany, Norway and France.

Ultimately, the ICJ did not accept the arguments advanced in support of the exceptional status for the military justice system. In doing so, the jurists argue that the attacks on the military justice system are inappropriately labelled as anti-militarist, and that

> [t]he question is not whether or not the existence of armies is justified. The crux of the matter is whether military justice can satisfy the requirements laid down in general principles and international standards that courts should be independent and impartial and guarantee due process as well as compliance with the State's international obligations with regard to human rights.
>
> The reality is that, on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to general principles and international standards and their procedures are in breach of due process. In many countries, so-called "military justice" is organizationally and operationally dependent on the executive. Military judges are often military personnel on active service who are subordinate to their respective commanders and subject to the principle of hierarchical obedience. The actions of "military justice" are all too often responsible for numerous injustices and denying human rights. Whether military courts can observe the right to be tried and judged by an independent and impartial tribunal with full respect for judicial guarantees remains open to question. [217]

Canada's *Charter of Rights and Freedoms* of 1982, the *European Convention on Human Rights* of 1950 and the *Human Rights Act* 1998 of the United Kingdom, have provided tools by which courts martial can be measured against the contents of rights contained in each instrument. [218]

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[217] *ICJ Report*, above n 2, Part II.

[218] For example:

- **Canada**: Janet Walker, 'Military Justice: from Oxymoron to aspiration' (1994) 32(1) *Osgoode Hall Law Journal* 1; Andrew D Heard, 'Military Law and the Charter of Rights' (1988) 11 *Dalhousie Law Journal* 514; Ho, above n 108.
- **United Kingdom**: Rubin, above n 38; Gerry R Rubin, 'Observations on Change in Military Law' submission to *Select Committee on Defence, Appendices to the Minutes of Evidence*, September 2000.
- **Europe**: Peter Rowe, *The Impact of Human Rights Law on Armed Conflict* (2006).

In 1994, Rubsun Ho[219] provided a detailed analysis of the jury provisions of Canadian General Courts Martial, and concluded that the *Canadian Charter of Rights and Freedoms* had put 'increasing pressure on the military to modify its judicial regime to conform with the values and guarantees advocated in the post-Charter era'. Further, he argued that certain procedures used by military tribunals violated the standards of fairness set out in the *Charter*, and that these violations could not be justified under it. Ho observes in relation to the reform of the Canadian military:

> The military as an institution is steeped in tradition and heritage, and, as a result, it has typically been averse to change and slow to react to modern realities. Any reformation that does take place is usually prompted by one event or another, such as a court case.[220]

An underlying theme in Ho's analysis was that the *Charter* applies to all Canadians, whether military or civilian. Further, he could find no cogent reason why Canadian military members should experience a diminution of the rights that were otherwise available to the Canadian citizenry: 'It would be ironic, indeed, if members of the military were not guaranteed the very rights and freedoms that they have dedicated their lives to defending'.[221]

An equally thorough and detailed post-*Charter* review of Canadian military justice was conducted by Janet Walker,[222] who traced the evolving process of what is said to constitute a fair military trial. In observations that are equally relevant and applicable to Australia, Walker shows that in the 1950s and 1960s, the creation of a civilian appellate body was a sufficient response to any calls to make the military justice system fairer. For Australia, the Defence Force Discipline Appeal Tribunal was established in 1955. Walker continues that in the 1970s and 1980s formal equality and parity between civilian and service personnel in their

[219] Ho, above n 111, 162.
[220] Ibid.
[221] Ibid, 183; see also Heard, above n 218 with respect to the balancing act.
[222] Walker, above n 218, 1.

employment was seen in the emphasis, for example on anti-discrimination and sexual harassment laws. In Australia, the *Human Rights and Equal Opportunity Act* was enacted in 1986 and the *Sex Discrimination Act* in 1984. Walker's timeline of reform continues into the 1990s (with the article being written in 1994) where she argued that the multiple roles of the convening authority would be the next issue warranting attention and calls for reform. In Australia, the first inquiry in to the military justice system questioned the multiple roles of the convening authority; the Report was dated 1997.

D. A summary of the themes in the literature

The primary argument said to warrant the separate system is its supposed inseparable relationship with discipline, morale and efficiency, but those arguments are presented as irreducibly connected truisms without the support of evidence-based data. The need to ensure compliance with orders reveals a further problem with the argument: the separate military justice system is not in place to deliver justice, but exists as a human resource tool bestowed upon commanders to ensure the obedience of their subordinates. However, the Australian military justice system does much more than just arm commanders with the means of threatening and punishing disobedience.

Among those writing about the military justice system from an external vantage point, there is a widespread view that the separate system of justice cannot be justified, and, that it is appropriate to consider whether a more modern military requires a more modern justice system.[223] When analysed, arguments favouring the separate system do not stand up to rigorous analysis; for example, the special expertise argument is

[223] See for example, Oliver, above n 136, 124. Ho, above n 111, 149. Rubin, above n 38 and n 218.

misguided when regard is had to civilian judges who deal with a range of diverse areas of law each day. It also fails to acknowledge that in reality there are very few military offences without a civilian counterpart. The proponents of the military justice system rely upon rhetoric, as opposed to data and/or research, to assert that military discipline and morale can only be ensured through the threat of punishment delivered through a *military* justice system. However, morale is more likely to be damaged where justice is imposed by means and methods that are, or are perceived to be, unfair. [224]

The literature essentially divides on one issue: whether rights matter. Those arguing *for* the separate system place the maintenance of discipline as a higher priority than the rights of its members to a fair trial. Those arguing *against* the system stand on the principle that human rights are inalienable, and thus of greater priority.

Underlying the proponents' argument in favour of the status quo, or at most permitting of a tinkering only at the edges[225] is:

a) a sense of tradition ("it has always been this way") coupled with a resistance to change[226] and defence of the status quo;[227]
b) a previously unchallenged "right" to be exceptionalist and different;[228] and,
c) predictions of "anarchy" if change is implemented.[229]

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[224] Hodson, above n 129, 587. Burchett Report, 101 and 157.
[225] Kenneth J Hodson, 'Perspective: the Manual for Courts-Martial 1984' (1984) *Military Law Review* 1; Schlueter, above n 144; Hodson, above n 129; Simon C Hetherington, *Law and Order: The Effectiveness Of The Canadian Military Justice System In The 21st Century,* http://wps.cfc.forces.gc.ca/papers/csc30/exnh/hetherington.doc at 29 May 2008.
[226] See for example, Rowe, above n 218; Finn (ed), above n 27, 7; Edward F Sherman in Finn (ed), above n 27, 22-29.
[227] Fidell and Sullivan (eds), above n 21, x.
[228] Rubin (2002), above n 218, 55; Titus K. Githiora, 'Military Criminal Procedure and Judicial Guarantees of Military Personnel Accountable for Military Offences', paragraph 9 (Speech delivered at the ICJ's forum, *Human Rights and the Administration of Justice through Military Tribunals*, Geneva 26-28 January 2004).

These are important values to have identified, because the following Chapter introduces the two sociological theories of total institutions and isomorphism. The former theory gives a theoretical basis to understand the military's positioning as a separate community. The latter theory gives a foundation to understanding the mechanism of change when an institution is resistant to the prospect.

[229] Sherrill, above n 3, 211-212: 'if men could not be flogged, discipline would end; if men could not be put in irons, anarchy will prevail'.

CHAPTER THREE

THE THEORIES OF RESISTANCE AND CHANGE: TOTAL INSTITUTIONS AND ISOMORPHISM

The previous Chapter, in particular, the section called 'The Arguments for a Separate Military Justice System' (Chapter Two, section B), revealed a perspective from those within or associated with the military that the military is an insular institution, protective of its internal operations and resistant to civilianising reform. Chapter Five, which analyses the ADF's responses to the six inquiries, will better amplify this proposition within the specific context of the Australian military justice system and the Australian military's attitude to civilianising reform. That Chapter will also show that despite the resistance, civilianisation of the military justice system has nevertheless occurred.

This Chapter provides the theoretical framework for understanding the two competing phenomena central to this research: the military's resistance to civilianising change on one hand, but its occurrence on the other. The former, resistance to change, can be understood by the theory of total institutions, and sociological theory, which explains:

a) why the military argues for the retention of its own separate justice system; and
b) why the military is resistant to externally driven reform that would have the effect of civilianizing those traditional, internal military justice structures.

The latter phenomenon, civilianisation, can be explained by the theory of institutional isomorphism. This is a sociological theory which assists in explaining when and why an organisation will be reformed.

A. *Why the resistance: total institutions*

"Total institutions" was a concept first coined by the Canadian sociologist, Professor Erving Goffman[230] in his book *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates.*[231] However, before looking at the theory of a total institution, it is important to appreciate Goffman's earlier works because the theory of total institutions in *Asylums* sits along a continuum of his research which commenced with Goffman's study of how individuals interact with each other when they are *free* to choose those interactions and *free* to interact in a range of social settings. His focus on the free individual then evolved to studying individuals who do not enjoy such freedoms: individuals who are constrained by their environment, unable to freely interact with whomever they choose, and unable to freely select the social settings they wish to experience. In addition to considering the effect of restraint upon the individual, Goffman also examined the features of the organisations that could impose those restraints, organisations he called 'total institutions'.

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[230] 11 June 1922-19 November 1982. Although born in Canada and receiving his bachelor/s degree from the University of Toronto, he studied both sociology and social anthropology through a master's degree and doctorate at the University of Chicago (graduating in 1949 and 1953 respectively). In his first book, *The Presentation of Self in Everyday Life*, (published in 1959, after revision and expansion from a doctoral monograph in 1956) Goffman coined the phrase "dramaturgy" to explain how we each 'stage manage' the images of ourselves for presentation in public. In 1958, Goffman joined the University of California at Berkeley, ultimately being promoted to professor in 1962. Six years later, he joined the University of Pennsylvania, as the Benjamin Franklin Professor of Anthropology and Sociology. In 1977 he was awarded a Guggenheim Fellowship. He also served as president of the American Sociological Association in 1981-1982. It has been said that the answer to the question, 'what do you think of Goffman's work' has become 'almost a litmus test question for the identification of sociological perspective': Nick Perry. 'The Two Cultures and the Total Institution' (1974) 25(3) *The British Journal of Sociology* 345-355. For a summary of the critiques of Goffman's work, see for example, Simon J. Williams, 'Appraising Goffman' (1986) 37(3) *The British Journal of Sociology* 348-369.

[231] *Asylums: Essays on the Social Situation of Mental patients and Other Inmates* (1961). For a thorough analysis of the research that emerged from Goffman's total institution concept, see Cheryl A McEwan, 'Continuities in the Study of Total and Nontotal Institutions' (1980) 6 *Annual Review of Sociology* 143-185.

In many of his works, including his publication, *The Presentation of Self in Everyday Life,*[232] Goffman observed human interactions.[233] Adopting a methodology of observation, Goffman developed an acting metaphor of "stage management" to investigate and explain how we interact with others in a variety of social settings. He concluded that we stage manage our different interactions for different social settings.[234] Goffman went on to develop the idea that we each compartmentalise our experiences of life according to the events occurring about us.[235] These studies concerning the stage management of human interactions all concerned settings where the individual was free to move across a variety of social settings and had the freedom to act according to that person's own internalised view of self.

However, and relevantly for this thesis, in *Asylums* Goffman then considered how individuals respond and manage their presentation when both their social setting and ability to interact is controlled. He concluded that individuals subjected to such control were stripped of their individualism by the atmosphere of the institution that imposed the restraints. Goffman called the process of de-individualisation, "mortification". In a military setting, Goffman's concept of 'mortification' can be seen in Sherrill's text on military justice[236] (although Sherrill did not actually call his description of the treatment of soldiers' 'mortification').

Sherrill examined the fate of Vietnam conscripts who declined to obey lawful orders as a means of protesting their opposition to that war. Sherrill tells the story of how the military imposed its weight upon these objectors,

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[232] *The Presentation of Self in Everyday Life*, *Encounters, Behaviour in Public Places*, *Interaction Ritual, Relations in Public* (1956).
[233] Whilst much of his work concentrates on the individual, he also considered how others, especially advertisers, use symbols of gender to shape masculine and feminine interactions (*Gender Advertisements* (1979)). Goffman also considered the concept of stigma as a means of explaining how 'we' deal with and interact with those who are unable to stage manage an acceptable presentation in social interactions (*Stigma* (1963)).
[234] Above n 232.
[235] *Frame Analysis* (1974).
[236] Sherrill, above n 3.

through the application of the range of punitive means such as detention in overcrowded stockades for months on end – 'discipline by any means, including debasement and vengeance'.[237] As described by Sherrill, it was a process designed to punish the soldiers for their conscientious stand against the Vietnam War, or for their peaceful protests against the conditions in which they were detained, and in doing so, as a means to try and force the objectors to abandon their individual views in favour of the military's goal.[238]

Goffman labelled the kinds of institutions/organisations that exerted control over individuals' interactions, as "total institutions" and he called the individuals who were members of the total institution, "inmates".

According to Goffman, a total institution is a particular form of social microcosm where a group of individuals is cut off from wider society and their life is administered and regulated by a higher authority: prisons are one example, psychiatric hospitals are another. Goffman described total institutions as

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[237] Sherrill, above n 3, at front flap.

[238] For example, at 4-61, Sherrill tells the story of the Presidio Mutiny wherein, in October 1968, after a prisoner was killed by a guard, 27 young soldiers detained in an Army stockade broke a work line-up, sang songs and demanded to see the press, lawyers and the stockade commandant about sadistic prison guards, very poor quality food and over-crowded quarters. For that peaceful protest (which the Commandant conceded it to be in cross-examination), twenty-two were found guilty of mutiny, two of disobeying an order and three escaped and fled to Canada. At 98-157, Sherill also tells the story of Captain Levy, an Army doctor who refused to train Green Berets on the basis that such training would be in conflict with his oath as a doctor, because the Green Berets were trained to murder in Vietnam. Dr Levy was court martialled for his conscientious objection to following an order that he train the berets, was found guilty and sentenced to three years imprisonment. Levy was released from jail on 4 August 1969. But two days later, on 6 August, the Pentagon announced one non-commissioned officer and six officers of the Green Berets in Vietnam had been arrested on the suspicion of murdering a Vietnam national – this kind of thing was effectively the basis upon which Levy had refused to train the Berets and for which he was jailed. At 157, Sherrill reports that when Dr Levy saw the headlines in a newspaper, Levy had the last word: 'As I was saying before I was so rudely interrupted.'

> closed social worlds that are constituted by places of residence in which a single authority regulates all aspects of the life of the inmates. Institutions such as prisons, hospitals, boarding schools, old-age homes, monasteries, army barracks, jails, prisons, POW camps, ships, military bases**,** boarding schools and concentration camps … .[239]

Looking at the examples provided, it becomes apparent that some total institutions are involuntary or coercive in the sense that the inmate has been placed in the institution, irrespective of the individual's consent and irrespective of his or her will, for example, concentration camps, prisons and involuntary patients in mental health facilities. Other total institutions are of the normative kind, where membership is not coerced, such as monasteries or boarding schools.[240] However, while some total institutions have voluntary entrance where the inmate becomes a member by choice, he or she cannot leave it at will. For example, if the military recruit passes the requisite entry tests, she or he then cannot leave prior to the agreed or stipulated end-date of their service, or, if she or he does desert, then it is with the opprobrium of a dishonourable discharge by the institution, as well as the financial penalty of loss of pay, and perhaps fines and other penalties too. Not surprisingly, a number of studies have found that the power to select and expel members increases the institution's ability to control those chosen.[241]

Goffman also found that within such institutions, two distinct groups exist: inmates and staff. By analogy, the military exhibits this class divide through the division between officers and defence members below non-commissioned rank. Goffman identified that the two groups of inmate and staff are also separated, with demarcations almost approaching those of a caste system,[242] and that symbols were employed to enshrine and

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[239] Goffman, above n 61, 464-77; see also McEwan, above n 231, at 145-146 for an examination of how the concept has been used and understood since Goffman first raised it (emphasis added).
[240] McEwan, above n 231, 151.
[241] Ibid, 155, and studies cited therein.
[242] Gerald L Klerman, Behaviour, 'Control and the Limits of Reform' (1975) 5(4) *Hastings Center Report* 40.

emphasise the classes. The salute, for example, would be one of Goffman's symbols that preserves and highlights the class structure of the military many times each day.[243]

The relevance and accuracy of labelling the military as a 'total institution' is found in Goffman's more detailed description of the concept:

> A basic social arrangement in modern society is that the individual tends to sleep, play and work in different places, with different co-participants, under different authorities and with an overall rational plan. The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life. First, all aspects of life are conducted at the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled, with one activity leading at a prearranged time into the next, the whole sequence of activities being imposed from above by a system of explicit rulings and a body of officials. Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfil the official aim of the institution.[244]

In describing these common characteristics, Goffman pointed out that not every total institution exhibits every one of the attributes, but, that they 'exhibit many items in this family of attributes to an intense degree'.[245]

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[243] For example, Rod Powers, *US Military Salute*, http://usmilitary.about.com/cs/generalinfo/a/salute.htm at 2 September 2008:

> When to Salute: The salute is a courteous exchange of greetings, with the junior member always saluting first. When returning or rendering an individual salute, the head and eyes are turned toward the Colors or person saluted. When in ranks, the position of attention is maintained unless otherwise directed. Military personnel in uniform are required to salute when they meet and recognize persons entitled (by grade) to a salute except when it is inappropriate or impractical (in public conveyances such as planes and buses, in public places such as inside theaters, or when driving a vehicle).

[244] Goffman, *Asylums*, above n 231, 5-6 (emphasis added). See also: Norman Conti & James J Nolan III, 'Policing the Platonic Cave: Ethics and Efficacy in Police Training' (2005) 15(2) *Policing & Society* 166-186; Howard S Becker, 'The Politics of Presentation: Goffman and Total Institutions' (2003) 26 *Symbolic Interaction* 4; Christie Davies, 'Goffman's concept of the total institution: criticism and revisions' (1989) 12(1-2) *Human Studies* 77-95; Perry, above n 230, 345-355.

[245] Goffman, *Asylums*, above n 231, 5. Also see Perry, above n 230, 345.

A variation on Goffman's "total institution" is Lewis Coser's "greedy institution".[246] Whereas Goffman's total institution featured a physical *and* mental separation of the individual from wider society, Coser examined situations where the separation was metaphysical. Using Jesuits and domestic servants as his examples, Coser argued that while the "greedy institution" does not literally incarcerate the inmates, it instead seeks the absolute dedication from its members while they continue a life in the wider societal surroundings:

> Yet the modern world, just like the world of tradition, also continues to spawn organisations and groups which, in contradistinction to the prevailing principle, make total claims on their members and which attempt to encompass within their circle the whole personality. These might be called greedy institutions, insofar as they seek exclusive and undivided loyalty and they attempt to reduce the claims of competing roles and status positions on those they wish to encompass within their boundaries. Their demands on the person are omnivorous.[247]

Coser recognised there were 'evident overlaps between "total" and "greedy" institutions',[248] but he emphasised the non-physical mechanisms and symbolic boundaries between the outsiders and the insiders, who have voluntarily committed to the institution without physical restraint enforcing that separation. Both terms have been applied to describe and understand entities as varied as police recruit training, a professional dance school, and even the American Communist Party.[249]

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[246] Lewis Coser, *Greedy Institutions: Patterns of Undivided Commitment*, (1974).
[247] Ibid, 4 (emphasis added).
[248] Ibid, 5.
[249] It is not unusual to see both concepts used together. For example, Conti and Nolan, above n 244, 168 categorized the police training process 'as a (near) total/greedy institution'. In 'The Conservatory as a Greedy Total Institution', Clyde Smith 'utilized the related sociological concepts of Coser's 'greedy institution' and Goffman's 'total institution' to consider implications for professional dance training more generally'. Clyde Smith, 'The Conservatory as a Greedy Total Institution', (1997) *30th Annual CORD Conference*, University of Arizona, Tucson. In 'The Military and the Family as Greedy Institutions' (1986) *Armed Forces & Society* 13, Mady Segal took Coser's concept and looked at the military and the family as both greedy institutions competing for the time and allegiance of the soldier they shared. See also Harvey Klehr, *The Heyday of American Communism: The Depression Decade*, (1984).

Looking at the military, we see elements of both the total and greedy institution – the physical separation from society, which is the hallmark of total institution, is seen when troops are deployed or on recruit training, or are living on base, in camp or on a boat. The mental aspect of a greedy institution is seen in the requirement of allegiance to the military goal and through the unquestioning obedience to lawful orders. When personnel are allowed to live in the wider community they still have the mental element of allegiance to the military goal. That being said, the clustering of off-base defence housing supplied by Defence Housing Australia (DHA)[250] sees military members and their families often living within an informal military community, even if not formally so as occurs in camp, on base or on a vessel.

Off-base defence housing is offered by DHA, which has properties 'located in most capital cities and major regional centres throughout Australia where the Defence Force has a presence.'[251] Not surprisingly, DHA selects locations for housing developments which are close to major Defence bases and establishments. For example, in August 2009, DHA announced plans to build 32 new townhouses on a 12,520 square meter housing site in the Brisbane suburb of Everton Park. Similarly, in 2009, construction of 54 houses in an estate in Ipswich commenced and 10 DHA houses in the Canberra suburb of Conder were opened. Likewise, in 2010, DHA's proposed development in Voyager Point, NSW was approved. The DHA Board Property Committee is also working on plans to develop a housing site in Ermington, NSW. DHA also provide on-base housing; for

[250] Defence Housing Australia (DHA) was established as a statutory authority under the *Defence Housing Australia Act* 1987. DHA '*manages around 18,000 residences in all states and territories of Australia, representing around $8 billion worth of housing stock*' (Defence Housing Australia, http://www.dha.gov.au/about.html at 16 November 2010). Further, DHA manages in the vicinity of 25,000 relocations each year (http://www.dha.gov.au/publications/dha-factsheet.pdf at 16 November 2010).
[251] www.invest.dha.gov.au/dha/home/info/properties.sok at 13 May 2011.

example, at Larrakeyah Barracks it is building 97 new homes for Defence families in Darwin.[252]

DHA also offers properties for sale to members of the public, with guaranteed leases to defence families. The location of the properties for sale again demonstrates the clustered effect of off-base defence housing. For example, as at 13 May 2011, DHA offered the following selection of properties for sale: eight units, all in the same building in Bayview, Darwin; 8 properties, all in the same estate in Bohle Plains, Townsville; 5 properties, all in the same estate in both Dee Why, Sydney, and again in Burdell, Townsville. Four properties within the same estates were available at both Queenscliff, Melbourne, and Carseldine, Brisbane.[253]

While defence families can live wherever they choose once posted, as DHA describes, DHA housing 'gives more Defence families the option of DHA housing instead of .. [the] private rental market.'[254] The consequence of this, though, is that the often clustered nature of DHA housing has the effect of keeping military members and their family close together and thus continues that sense of military community off-base.

We also see the theory of a total or greedy institution finding meaning in the military's own argument that it is a separate community; Chapter Two, Part B explores this idea. Despite the flaws in the argument that the military is a separate community, it is a proposition advanced by those within or aligned to the military as justification that this supposedly separate community requires a separate justice system. However, if the military is re-framed not in the language of a 'separate community' but as one of these total or greedy institutions, then, the separate community argument can be better understood as an argument that is really about exerting control over its inmates.

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[252] Ibid.
[253] Above n 251.
[254] DHA, *Annual Report 2009-2010* (2010).

Returning to the particulars of Goffman's theory, the *first* feature of a total institution is that all aspects of life are conducted at the same place and under the same single authority. As Perry highlights, this is a rather vague and ambiguous notion if taken literally.[255] However, Goffman wrote by way of metaphor, and when understood as such, the proposition becomes an analytical tool to examine the organisation under review. Hence, with respect to the military, the idea of the 'same single authority' finds articulation in the chain of command (Chapter 1 explains the chain of command). Equally, orders with respect to postings and deployment have the effect of requiring personnel to be in specific locations. This first feature has the effect of restricting military members' right to freedom of movement to a greater extent than would otherwise be the case if they were civilians.[256] It is thus a means by which the military as an institution can control its members.

The idea that all aspects of life are conducted at the same place and under the same single authority clearly applies to military personnel who are deployed or are in training camps, as it is generally the case that the restrictions imposed upon a military member are more restrictive when in training or on duty, than when not.[257] As at May 2010, approximately 3,300 personnel were deployed 'to 13 operations overseas and within Australia ... Additionally, approximately 500 ADF members [were] actively protecting Australia's borders and offshore maritime interests.'[258] Hence, of a full-time ADF strength of 55,068[259] (excluding the further 25,493 reserve (part-time) personnel for the moment), only 6.9% (including the 500 conducting border security) are on active, deployed service. For the

[255] Perry, above n 230, 346.
[256] For comparative examples, see: Georg Nolte (ed), *European Military Law* (2003), 88.
[257] Rowe, above n 218, 41 and fn 41.
[258] Department of Defence, *Global Operations*, http://www.defence.gov.au/opEx/global/index.htm at 12 May 2010.
[259] *Defence Annual Report 2008-09*, above n 8, 195.

2008-2009 year, 6,968 personnel were enlisted to the Training Forces,[260] but data is not available to understand how many recruits are actually in training camps at any one time. In any event, it is again a small percentage, in the vicinity of 12.6%, of the overall ADF population who find themselves in recruit training camps.

Thus, whilst Goffman's first feature of a "total institution" is readily apparent when it comes to the almost 20% who are deployed or in training, it is harder to make the same observation of physical isolation with respect to the balance. When considering those personnel, it might be thought that Goffman's first feature of the single authority controlling all aspects of an inmate's life cannot be applied to the great majority of ADF personnel not deployed or in training. However, this first feature of a total institution (like all features and the concept itself) ought not be taken literally, as Goffman used a metaphorical and descriptive approach to present his research and arguments.[261] Or, as Goffman explains, 'I have defined total institutions denotatively by listing them and then have tried to suggest some of their common characteristics'.[262] With that caveat in place, it does remain the case though that the balance of personnel who are not in training and not deployed are still subject to orders as to where they will be posted and are subject to the unifying force of the chain of command; 'All members of the ADF are under command of some nature'[263] wherein inmates must 'accept a lawful direction of authority without equivocation, and to forgo the right to withdraw labour or refuse to undertake a (lawful) task'.[264]

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[260] Ibid, 203.
[261] See for example, Becker, above n 244, 659-669.
[262] Erving Goffman, 'On the Characteristics of Total Institutions' in Goffman (ed) *Asylums*, above n 231, 123-124.
[263] *2005 Senate Report*, paragraph 2.5.
[264] *Serving Australia: The ADF in the Twenty First Century* (1995), 61, also cited in *Military Justice Report 1999*, 4.3.

"Batching" is the *second* feature of a total institution. It denotes that each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Batching thus restricts an inmate's freedom of movement and freedom of association.[265] In doing so, it has the effect of limiting individuality and deviation from expectations and/or orders:

> The structure does not leave the recruit much opportunity for individual variation. While sixty-nine other recruits are all diligently labouring away at the most recent ''make-work'' (Goffman, 1959) project, it is difficult to be the lone individual completing tasks at his or her own discretion.[266]

Batching also has the effect of 'ingraining an ethos related to unison of action'.[267] We see ample evidence of the culture of unison of action within the military, including for example, in the ADF's submissions to the various inquiries reviewed in the following chapter: '[t]he nature of military service demands teamwork, mutual support and personal reliability underpinned by both individual and collective discipline'.[268] Indeed, the importance of 'ingraining' teamwork commences with recruiting material. The Army's current recruiting material states:

> Today's Army carries on a tradition steeped in the core values of 'courage, initiative and teamwork'. ... The ethos of the Army is that of the soldier serving the nation: mentally and physically tough, and with the courage to win. We fight as part of a team ... We are respected for our professionalism, integrity, esprit de corps and initiative.[269]

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[265] Nolte (ed), above n 256, 88.
[266] Conti and Nolan, above n 244, 172.
[267] Ibid.
[268] Department of Defence, Private Briefing, Transcript, 5 cited in *Military Justice Report 1999,* paragraph 2.3.
[269] Department of Defence, *Army Traditions and Values,* http://www.defencejobs.gov.au/army/lifestyle/TraditionsAndValues.aspx at 12 July 2008.

The Royal Australian Navy's recruiting material speaks in similar tones, and is even discouraging of leadership and individuality in preference to teamwork:

> The Royal Australian Navy has a code of values which serve as a constant source of moral courage to take action. Don't think of them as rules, rather as a set of principles that guide our members, to be the best they can be and to get the most out of their time in the Navy. ... Although leadership qualities are positive and will be called on in certain situations, above all else we value team players, who enjoy working with others to make things happen.[270]

The recruiting material for the RAAF observes:

> The Air Force aims to: Be a professional, highly motivated and dedicated team. … The Air Force expects that its people will: ...; Strive for excellence as both leaders and followers; … Work together as a team.[271]

However, the batching and ingraining of tradition and ethos can scar those who have joined the total or greedy institution (or separate community in military language), but do not or cannot conform. In one of the submissions to the 2005 Senate Inquiry into the effectiveness of the Australian military justice system, a mother of a young recruit who committed suicide spoke about the effect of the military trying to maintain a separate community by everything being 'in-house':

> I think there should be someone separate who these young kids can go to … It is too in-house; everybody knows everybody or they have been through training with somebody years ago and know their bosses. If you do have a problem you need to go to someone, even off base or somewhere where they can go separately that is not connected with Defence.[272]

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[270] Department of Defence, *Navy Values,* http://www.defencejobs.gov.au/navy/Lifestyle/traditionsAndValues.aspx at 12 July 2008.

[271] Department of Defence, *Air Force Traditions and Values* http://www.defencejobs.gov.au/airforce/Lifestyle/traditionsAndValues.aspx at 12 July 2008.

[272] Commonwealth of Australia, *Official Committee Hansard*, Senate, Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, 'Effectiveness of Australia's military justice system' 1 March 2004 Canberra, 92.

To the same Senate inquiry, others gave evidence that the 'in-house' nature of the military gave rise to a loss of confidence, loss of employment, suicidal thoughts, attempted and actual suicide.[273] Such outcomes are not unexpected when regard is had to the studies[274] that have researched the fate of individuals within a total institution, as well as Goffman's own concept of 'mortification' described previously. Consistent with the findings of the 2005 Senate Committee, research concerning how inmates reacted to the learning or socialisation process of a total institution revealed that inmates became, in alternate measures, either alienated or committed, happy or dissatisfied, withdrawn or engaged, physically renewed or in physical decline.[275]

The third trait of a total institution is the scheduling of the day's activities, so that one activity leads at a prearranged time into the next, and with the whole sequence of activities being imposed from above by a system of explicit rules and a body of officials. Obviously, for personnel deployed on active duty, there would be no such thing as a typical day or for one activity to fold into the next at a prearranged time. Yet, the day is still scheduled to achieve an overall aim of victory, with all participants following orders. At the other end of the military spectrum, recruits undergo a training schedule that is a tightly organized series of lectures, assignments, practice and training; there are explicit rules and a training regime imposed from above.

A significant aspect of this third trait of a total institution is that it imports the notion of coercive authority through the imposition of explicit rules imposed by a body of officials. The military justice system is precisely the explicit rule system, imposed by officials within the organisation that this feature envisages. It is not a system that members can opt out of, but it is a system which does not apply to outsiders. So, not only are defence

[273] *2005 Senate Report*, xxii.
[274] McEwan, above n 231, 164 and studies cited therein.
[275] Ibid, 164-167 and studies cited therein.

members subject to civilian laws, but they also find themselves the subject of the rules, regulations and manuals of the Defence Force:

> Moreover, that system of discipline must impose an additional level of regulations on military personnel greatly exceeding those that apply to civilian employment. That is, a military disciplinary system which coexists with the civil system and provides for military personnel to be subject to a code of military disciplinary in addition to civil and criminal laws. The ADF asserts that without such a system of military discipline it cannot effectively perform its role: to fight and win wars.[276]

As a consequence, the military "inmates" are subjected to two justice systems, and in doing so, enjoy fewer rights than those on the outside.[277]

The *fourth* characteristic of a total institution is the bringing together of the various enforced activities into a single rational plan purportedly designed to fulfil the official aim of the institution - relevantly for the military, to fight and win wars.[278]

To achieve the organisational goal, the three earlier traits of a total institution unite to fashion the individual into the 'institution's ideal product';[279] for the military, this is to become a tough soldier ready to fight in battles and defeat the enemy.[280] Thus, for the military, through the process of training, batching, the class system, the indoctrination of the military tradition and ethos, and, the prioritization of 'the team' and subjugation of the individual, the institution of the military can mobilize a concerted effort to mould the individual in to what it requires.[281] For those

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[276] Department of Defence, *Submission*, 549 and Department of Defence, Private Briefing, Transcript, 5 cited in *Military Justice Report 1999*, paragraph 4.2

[277] *Military Justice Report 1999*, paragraph 4.3:

> The existence of a code of military discipline that coexists with the civilian justice system suggests that military personnel do not enjoy the same rights as other members of our society. This is certainly the case.

[278] Above n 269.

[279] Conti and Nolan, above n 244, 173.

[280] Rowe, above n 218, 68.

[281] Conti and Nolan, above n 244, 173.

in combat roles, that moulding process is to create a team of personnel skilled in 'the application of extreme violence in a controlled and humane fashion whilst accepting the risk of death or serious injury in the achievement of the mission'.[282]

Simply put, a total institution is a means of control.[283] In the case of the military, to operate as a total institution is to operate in a manner that controls the individual inmates so they can be moulded to play their part in fulfilling the official aim of the institution. However, unlike many of the examples of total institutions identified by Goffman, the military also has a formal system of punishment through which it can 'enforce compliance or ... punish unacceptable behaviour'. [284] The military can rely upon more than just, say, batching, a strict routine and the power to discharge to ensure its rules are complied with and its symbols of tradition and symbols of class differentiation are observed. It can also rely upon more than just training to mould individuals into its ideal type. While these informal pressures to conform must be extremely powerful, the military has the *actual* ability to punish, and even imprison, those who resist the moulding and those who do not conform. Through its justice system, the military can give symbolic and ritual expression, in retributive form to the value of rule-obedient behaviour.[285] Further, it has the ability to crush those who try to challenge perceived injustices of the institution[286] or fail to conform to the ingraining process. Because military personnel are the subjects of a total institution with its own punishment system, military personnel do not enjoy the same rights as other members of our society.[287] Not only does the total institution of the military de-individualise its members, but it also strips them of the full complement of human rights which are enjoyed by

[282] *Serving Australia*, above n 264, 61.
[283] Conti and Nolan, above n 244, 172.
[284] *Military Justice Report 1999*, paragraph 4.2.
[285] Adam Smith, *The Theory of Moral Sentiment* (1759) cited in Michael Ignatieff, 'State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment' (1981) 3 *Crime and Justice* 153, 184.
[286] *2005 Senate Report*, paragraph 19. See also Sherrill, above n 3.
[287] *Military Justice Report 1999*, paragraph 4.3.

outsiders and imposes an in-house punishment system to control its members.

B. Total institutions and change

As a total institution, the military is provided with the means by which its "inmates" can be shaped, controlled and moulded into the institution's ideal product. As a consequence, that "ideal product" is then used by the military to further and fulfil its official aim. It then comes as no surprise that the military would be reluctant to change what it perceives to be critical parts of the military justice system that provide it with an internal means of control and coercion. It also comes as little surprise that those within or aligned to the military posit the supposed separateness of the military to justify its method of operating and means of control.

Support for the conclusion that the military is opposed to change which will threaten its means of control is found in research that considers organisational change in total institutions. For example, Lynne Zucker[288] conducted a resistance-to-change experiment designed to test the hypothesis that total institutions are resistant to change. She found[289] that resistance-to-change is considerably affected by the degree to which an organisation is institutionalised, in the sense that the greater an organisation's institutionalisation, the greater the resistance to change. It therefore follows that if the military is accepted to be significantly institutionalised (which ought be accepted given the arguments about the chain of command, separate community and the need to provide in-house punishment), then its resistance to change and reform of its institutional structures will be considerable.

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[288] 'Institutionalisation and Cultural Persistence' in Walter Powell and Paul DiMaggio (eds) *The New Institutionalism in Organisational Analysis* (1991), 99.
[289] Ibid, 102.

Support for the conclusion that the military is a total institution and thus resistant to change is also found in the research of Ronald Jepperson,[290] who concluded that an institution that is highly institutionalised is less likely to be vulnerable to social intervention. Jefferson introduced the concept of "embedding", meaning that an institution is embedded if it has been in place for a long time and if it works within a framework based on common principles and rules. Further, the institution becomes even more embedded when the institution itself has moral authority or the ability to constrain its members, as does the military. Thus, he argues that the greater the embedding the less vulnerable the institution is to intervention. The characteristics of embedding as described by Jefferson are all ones identifiable within the military: it has been in place for a long time, has common principles and rules, promotes its own moral authority and has the ability to sanction. Accordingly, the corollary of Jepperson's research is that as a highly embedded institution, the military is not readily vulnerable to external intervention. This is an important research outcome for this thesis, as it moves beyond simply describing the military as a total institution by also explaining why the military as a total institution is resistant to change.

In another relevant study, Neil Fligstein[291] examined aspects of American industry as the context by which he could identify and assess the kinds of authority and motivators that would cause change. He concluded that an institution's internal structure included both formal and informal authority. However, when an institution had an hierarchical structure that provided formal authority, he found that that an organisation's goals would only change when either a new group of leaders took over those formal authority positions, or, when it was in the interests of those who held the formal authority to alter the organisation's goals. We saw in Chapter 1 that the chain of command is based upon a formal authority structure. We will

[290] Ibid, 151-152.
[291] Walter Powell, 'The Structural Transformation of American Industry' in Powell and DiMaggio (eds) (1991), above n 288, 312-317.

also see in Chapter Five that those in the formal authority positions within the ADF were most resistant to even accepting the need for reform when appearing before the various military justice inquiries held over the last 10 years, let alone that there were any particular flaws in the system.

Walter Powell considered the patterns of change within institutions.[292] It was Powell's analysis that institutionalised organisations are relatively inert, and in being so, resistant to efforts for change. However, when change does occur, he found it is likely to be 'episodic, highlighted by a brief period of crisis or critical intervention'. After such a crisis or critical intervention, Powell argued that the organisation tended to reconstitute itself and then shield itself from the intervention of further outside influences.

This idea of a crisis or critical intervention leading to change is a theme that will be developed in the next chapter when examining why reforms have occurred to the military justice system despite the military's resistance.

C. ***Total institutions: a summary***

We saw in Chapter Two, and will again in Chapter Five, that the military considers that its in-house military justice system is imperative to ensure discipline amongst the troops and that it has resisted recommendations for civilianising reform. Before the various external enquiries, the ADF essentially asserted that it was a "good" total institution[293] and needed to remain as a purportedly separate community. However, the evidence

[292] 'Expanding the Scope of Institutional Analysis' in Powell and DiMaggio (eds) (1991), above n 288, 197-199.
[293] Klerman, above n 242, 45 for the idea of a "good" total institution.

accepted by the inquiries found that the disciplinary system worked to the detriment of service members' rights.[294]

The theory of total institutions provides a framework for understanding and examining the structure and purpose of the military and its justice system. When the military is understood as a total institution, it is little wonder that it has repeatedly rejected recommendations that would civilianise its means of enforcing compliance through the threat of punishment. Or, as Nick Perry concludes rather bluntly with respect to total institutions and their coercive authority: '[they are] a symbolic presentation of organisational tyranny and a closed universe symbolizing the thwarting of human possibilities'.[295]

However, despite the military's resistance to reform and insistence that discipline remain in-house, the military justice system has undergone some civilianising changes. The next section of this chapter examines the theoretical basis of organisational change.

D. ***Isomorphism***

The theory of total institutions, explored above, provides a sociological basis to understand why: (a) the military argues for the retention of its own separate justice system, and (b) it is resistant to externally driven reform to its in-house punishment system. The balance of this chapter examines the tension between the two competing propositions of resistance to reform on one hand, but the occurrence of reform nevertheless on the other, by reference to a second sociological theory called isomorphism.

[294] For example, the *2005 Senate Report,* xxi.
[295] Perry, above n 230, 353.

'Isomorphism' is a sociological tool allowing for the examination of organisational change, and in particular, how and when one organisation comes to resemble another. For this thesis, it provides a framework to understand civilianisation - why the military has implemented some aspects of civilian fair trials, but not others. It also assists in understanding when civilianising reforms are more likely to be implemented.

Isomorphism is a description used in mathematics when mapping the relationship between two entities, and in particular to identify the similarities between them. In biology it is used to characterize relationships between organisms. Population ecologists use it to understand the interactions between separate communities. In sociology, it is a tool allowing for the examination of organisational change, and relevantly, the process/es which cause one organisation to resemble another.

Isomorphism, when applied to an organisation, finds its roots in the works of Max Weber, the German political economist and sociologist. In *Economy and Society,* Weber argued, amongst other things, that bureaucratization of organisations was a part of the process of rationalization, in which organisations moved from being value-oriented with traditional authority and charismatic authority, to becoming goal-oriented bureaucracies with legal-rational authority. Weber argued that the consequence of rationalisation and bureaucratization was a 'polar night of icy darkness', in which increased rationalization traps individuals in an 'iron cage' of rule-based, rational control.[296] According to Weber, organisations became bureaucratized and rationalised their operations as a consequence of, or response to, competition and market forces.

[296] George Ritzer, *Enchanting a Disenchanted World: Revolutionizing the Means of Consumption* (2004), 55.

Numerous studies[297] have since examined a range of organisations to identify what makes them efficient (or not), why organisations vary in their structure and behaviour, and, if the efficient ascertainment of the organisational goal is the purpose of any bureaucracy, why there are so many different kinds of organisations. Variation among organisations has been a significant part of modern organisational theory, as has the theory that competition drives the structural change in those organisations.[298]

A different strand of organisational theory considers neither the variations amongst organisational forms, nor competition as the driver of organisational change, and instead considers the homogeneity between organisations and argues that organisations change to look alike in order to acquire legitimacy[299] - if we're all doing it, we must be right.

In 1968, Amos Hawley[300] described the process of homogenisation between organisations as 'isomorphism', a term which, in turn, he described as 'the constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions'.[301] In 1977, Michael Hannan and John Freeman[302] developed Hawley's idea of isomorphism into the theory of competitive isomorphism, which described the similarities that emerge between organisations existing in an environment of free and open competition. Competitive isomorphism rests on the idea of rationality in the Weberian sense and shows how organisations move toward an optimal-form based upon 'a

[297] Above n 288, 64, citing: Weber (1978); Weber (1952); Woodward (1965); Child and Kieser (1981); Hannan and Freeman (1977); Coser, Kadushin and Powell (1982); Rothman (1980); Stam (1980).
[298] Above n 288, 64.
[299] Above n 288, 64.
[300] Amos Hawley in David L Sills (ed) 'Human Ecology' (1975) *International Encyclopedia of Social Sciences*, 328-37.
[301] Amos Hawley in Powell and DiMaggio (eds) (1991), above n 288, 66.
[302] 'The Population Ecology of Organisations' (1977) 82 *American Journal of Sociology,* 929-964.

system rationality that emphasizes market competition, niche changes and fitness measures'.[303]

Others, including Rosabeth Kanter,[304] Howard Aldrich,[305] John Meyer and Brian Rowan,[306] and Paul DiMaggio and Walter Powell[307] studied organisations that did not exist within a free and open marketplace. Kanter studied how organisations and communities could be pressed or forced into accommodating the outside world. Aldrich argued that organisations do not simply compete for market share, as some organisations compete for political power and institutional legitimacy instead. Meyer and Rowan proposed that organisations construct stories or myths about their functioning as a means of creating public legitimacy for their actions, irrespective of what the organisation actually did and how it achieved those goals. Creating an organisational myth for an organisation has the theme of not only creating organisational legitimacy for that organisation, but was also a means of (a) insulating the organisation from public scrutiny which might otherwise occur if the myth of legitimacy was not spread, and (b) a means of convincing the public that it is an entity worthy of support.

DiMaggio and Powell rejected the proposition that the homogeneity between organisations was solely attributable to market forces and competition. To answer the question as to why organisations were so similar, DiMaggio and Powell built upon Hawley's research and the themes of legitimacy as then developed by Meyers and Rowan, in particular. It was DiMaggio and Powell's view (and that of Meyer and Rowan too) that organisations changed not so much in response to market forces or competition, but in the pursuit of the perception of legitimacy for

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[303] DiMaggio and Powell (1983), above n 62, 149-150.
[304] *Commitment and Community* (1972).
[305] *Organisations and Environments* (1979).
[306] 'Institutionalised organisations: Formal structures as myth and ceremony' (1977) 83 *American Journal of Sociology*, 340-363.
[307] DiMaggio and Powell (1983), above n 62, 147.

the organisation within its larger environment. Thus, whereas *competitive* isomorphism assumed a system of rationality that emphasised market competition, DiMaggio and Powell developed a theory of *institutional* isomorphism which assumed a system of politics and ceremony through which organisations gain legitimacy.[308]

Certainly, DiMaggio and Powell[309] acknowledged the concept of competitive isomorphism, but concentrated on institutional isomorphism; 'The concept of institutional isomorphism is a useful tool for understanding the politics and ceremony that pervade much more than organisational life'.[310]

Institutional isomorphism considers how an institution interacts with the constructive, normative environment in which the organisation exists. It also places emphasis on examining an organisation's conformity with social rules and rituals and the pursuit of legitimacy. Unlike Weber's bureaucracy and the organisations exhibiting competitive isomorphic characteristics, institutional isomorphism is not driven by the pursuit of greater organisational efficiencies. Institutional isomorphism is 'a perspective concerned more with legitimacy than efficiency'.[311]

These studies of the late 1970s and early 1980s became known as "new institutional theory",[312] with the 1977 study by Meyer and Rowan and DiMaggio and Powel's 1983 work considered to be the foundational works of this school of thought. DiMaggio and Powell's research continues to

[308] Above n 288, 65.
[309] Ibid.
[310] Ibid.
[311] Mark Orrù, Nicole W Biggart and Gary G Hamilton, 'Organisational Isomorphism in East Asia' in Di Maggio and Powell (1991), above n 288, 361.
[312] Mark S Mizruchi and Lisa Fein, 'The social construction of organisational knowledge: A study of the uses of coercive, mimetic and normative isomorphism' (Dec 1999) 44(4) *Administrative Science Quarterly* 656.

have significant impact, with their 1983 paper cited as a classical article.[313] Institutional isomorphism has been broadly applied to a range of institutions, including an examination of the changes to military strategy, as well as the changes to the military's method of operating caused by technological development.[314]

E. ***Institutional Isomorphism and the military***

It would not be appropriate to apply principles of *competitive* isomorphism to the military, because it could not be said that the military, much less the military justice system, is subjected to market forces and competition in the manner contemplated by this typology. Rather, we see from the military's responses to the various inquiries referred to in Chapter Five, that the military is an institution that seeks legitimacy; for example, when making submissions to the various inquiries, it repeatedly maintained that its military justice system was 'sound'[315] and that 'none of the five inquiries conducted since 1998 has concluded that the Military Justice System or aspects of it are broken'.[316]

We will also see through the military's responses to the various inquiries, and through the theory of total institutions, that the military is an institution

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[313] For a history of the school and subsequent applications of Di Maggio and Powell's work, see Mizruchi and Fein, above n 312, 653-683. See also DiMaggio and Powell (1991), above n 288.

[314] All in Theo Farrell and Terry Terriff (eds) *The Sources of Military Change: Culture, politics, technology* (2003):

- Emily O Goldman, 'The spread of western military models to Ottoman Turkey and Meiji Japan', 43;
- Theo Farrell, 'World Culture and the Irish Army, 1922-1942', 70;
- Terry Terriff, 'US Ideas and Military Change in NATO 1989-1994', 94.

[315] Evidence to Senate, Foreign Affairs, Defence and Trade Committee, Canberra, Monday 1 March 2004, 13 (Cosgrove); also see the *2005 Senate Report*, xxvi paragraph 7, with contrary views expressed by Committee at paragraph 8.

[316] Evidence to Senate, Foreign Affairs, Defence and Trade Committee, Canberra, Monday 1 March 2004, 12 (Cosgrove).

that is resistant to civilianising organisational change to its military justice system; the drawn out process of creating a statutorily, independent DMP is one example which will be examined. Yet, notwithstanding the resistance, the military justice system has civilianised in some respects. Thus, the term civilianisation describes an outcome; institutional isomorphism explains the mechanism of change.

After identifying the institutional form of isomorphism, Powell and DiMaggio identified three methods through which institutional isomorphic change occurs:[317]

- *normative* isomorphism is associated with the transmission of norms via a professional, decision-making class with similar education/training, cross-organisational networking opportunities, fluid employment and/or secondment opportunities;
- *mimetic* isomorphism arises when one organisation models or mimics another apparently successful entity when confronted with uncertainty – 'follow the leader';[318] and
- *coercive* isomorphism, which occurs when organisational change is brought about by either external imposition, external pressure, and/or, external pressure to conform with societal expectations.

These three mechanisms of change may, of course, overlap and should not be considered in isolation or as discrete sub-sets.[319]

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[317] DiMaggio and Powell (1991), above n 288, 67.
[318] Heather A Haveman, 'Follow the leader: Mimetic Isomorphism and Entry into New Markets' (1993) 38 *Administrative Science Quarterly* 593.
[319] DiMaggio and Powell (1983), above n 62, 150. For an examination of the potential flaws in perceiving each process as separate from the others, see, Mizruchi and Fein, above n 312, 657 and 666-67.

1. Normative isomorphism[320]

Normative isomorphism is a process of organisational change brought about primarily through the sharing of values, norms and cognitive bases among a class of professionals, irrespective of the organisation to which they belong. For example, a conference of chartered accountants, or a Law Society's annual conference will bring together a group of people with shared qualifications who can hear conference papers, exchange ideas and practices, and thus exchange values. Many then return to their individual work places having learned something from the shared exchanges, taking those new experiences with them.

By virtue of their training, these professionals have credentialed legitimacy, are interchangeable across various organisations, and, are members of cross-organisational networks. When they move from one organisation to the next they take with them a shared understanding of the normative rules about organisational and professional behaviour. Similarly, the professionalisation of management and the exchanges of information amongst professionals through professional groupings, associations and publications assist in not only creating shared norms and values, but in disseminating those norms and values through the relevant professional ranks across different organisations. By its nature, organisation change caused by normative isomorphism is unlikely to be the product of a direct and targeted strategy; rather it refers to organisations indirectly adopting the norms and values of other organisations[321] through the interchangeable pool of professional managers.

An example of normative isomorphism within in the military context is found with the establishment in 1616 of Europe's first military academy,

[320] See generally, DiMaggio and Powell (1991), above n 288, 70-74.
[321] Gareth R Jones, *Organisational Theory, Design and Change* (2004).

the *Schola Militaris*,[322] to train young men in the art of war. The course took six months to complete[323] and during that time, the trainees would come to share a 'cognitive base'.[324] Trainees came from predominantly Protestant European nations,[325] and when they concluded their course, they would return to their different armies with a shared knowledge base, which they would then in turn, impart to others within their entity.

For the modern Australian military, normative isomorphism could not be solely or significantly responsible for the civilianisation of the military justice system. Primarily, as a total institution, it does not have the interchangeable full-time professional members in leadership roles. Certainly, engineers, doctors and nurses may move between the military and the private sectors, but they are not in the kinds of decision making and policy roles that could cause military justice reform. However, it will be seen in Chapter Five that in 1997 Justice Abadee and then Justice Burchett in 2001 were both commissioned to inquire in to the Australian military justice system. While Justice Abadee had a long history of reserve military service, they were both, first and foremost, civilian lawyers,[326]

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[322] Geoffrey Parker, *The Cambridge Illustrated History of Warfare: the triumph of the West* (2nd ed 2008), 155.
[323] Ibid.
[324] Theo Farrell, 'World Culture and the Irish Army, 1922-1942' in Farrell and Terriff (eds), above n 314, 74.
[325] Ibid; Parker above n 322, 155.
[326] According to *Who's Who in Australia* (2006), 111, Alan Richard Abadee was educated at Randwick Boys High School and the University of Sydney. He was admitted to the NSW Bar in 1964, obtained Articles then became a Solicitor with Hunt and Hunt, and was appointed a Queen's Counsel in 1984. He was a member of the Legal Aid Review Committee from 1987-90, and was a Judge of the Supreme Court from 1990-2000. In 1996 he was appointed an Additional Judge of Appeal, and also held the position of Brigadier and Deputy Judge Advocate-General of the Australian Defence Force from 1996-2000. He was Chair of the NSW Sentencing Council between 2003-2006.

Who's Who in Australia (2009), 358 says James Burchett QC was admitted to the Bar in New South Wales in 1959, taking Silk in 1974. He was elevated to the Federal Court on 3 June 1985 and retired on 10 October 2000, having also served in a range of other capacities, including: Judge, Court of Appeal of Tonga, since 1994; Chair, Australian Electoral Commission since 2003; Acting Justice

where the concept of a fair trial is a cornerstone of the civilian legal system and a notion zealously guarded by civilian lawyers. While not speaking in the language of normative isomorphism, Groves[327] nevertheless describes a process of voluntary change to military justice where civilian lawyers and their values are introduced in to the military justice system.[328] The idea is that there is a transfer of values from the civilian lawyers to the military context, which can cause change.

The recommendations made by both Justices Abadee and Burchett (refer Appendices 6 and 10 respectively) indicate that they both drew upon their long and distinguished experience as civilian lawyers, along with the norms and values of the civilian fair trial system, when making recommendations. Both justices' recommendations for civilianising reform can be explained, in part, by their internalised civilian norms as to what constituted a fair trial. Yet, the military largely resisted their recommendations. As Lynne Zucker concluded when examining resistance to change and cultural persistence, the greater the degree of institutionalisation, the greater the resistance to change sought to be brought about by personal influence.[329] The judges' fair trial recommendations concerning impartiality and independence and the recommendations which would have abolished the multiple roles of the convening authority and central role of the commander in the prosecution process, were largely ignored.

Supreme Courts of NSW and WA 2001-05; Visiting Fellow Wolfson College, Cambridge 1999, 1992 and 1976; President Copyright Tribunal 1997-2000.

[327] Groves, above n 36, 366 et seq.

[328] See also Rubin, above n 38, 38.

[329] DiMaggio and Powell (1991) above n 288, 99.

2. Mimetic isomorphism

Mimetic isomorphism is a process where an organisation is unsure about how to respond to a challenge. That organisation may look to other organisations that have faced similar challenges and adopt those structures which it perceives to be causative of a successful negotiation through the difficulty; it is a process of modelling what is thought to be best practice when an organisation is unsure how to proceed or respond.[330]

DiMaggio and Powell illustrate the concept as follows: in the late 19th century the Japanese Imperial government, looking to modernise, sent officers to study and then model the government initiatives in apparently successful Western prototypes. Officers were sent to France to study the courts, army and police; to Great Britain to study the Navy and postal system; and to the United States to study banking and art education.[331] Mimetic isomorphism does not, however, always end so well. Theo Farrell argues that while the Irish Army initially had good reason to model itself on the British Army, the vast disparity in resources and different strategic aims meant the ambition was not ultimately successful for the Irish.[332]

Best practice modelling as a response to uncertainty are the keys to this kind of organisational change. By way of further example, the Clark Government in New Zealand undertook reforms to its military justice system after two court decisions. The first held that the *New Zealand Bill of Rights Act* applied to the military.[333] The second concerned the prison discipline system, 'a regime of prison discipline that is separate from the

[330] Martin Lodge and Kai Wegrich, 'Control over government: Institutional Isomorphism and governance dynamics in German public administration' (2005) 33(2) *Policy Studies Journal*, 213.
[331] DiMaggio and Powell (1991) above n 288, 69.
[332] Farrell, above n 314, 69-90.
[333] *R v Jack* [1999] 3 NZLR 331, 339.

criminal justice system',[334] and found, in *obiter*,[335] that the common law principles of natural justice and the *NZBORA* applied to that separate system of prison justice. As a consequence, the military could have been under no doubt that if its military justice system was challenged on a fair trial/human rights basis, the outcome was unlikely to favour the military's status quo. Indeed, after the second decision was handed down, the Minister for Defence commissioned a Military Justice Review in 2002 to develop amendments to the military justice system which would bring it in-line with the *NZBORA*. The Review team considered international experiences, ultimately modelling its proposals for courts martial on the Royal Air Force (UK) model which had met with the approval of the European Court of Human Rights in the matter of *Cooper*.[336] When introducing the Bill to Parliament in 2007, the Minister spoke of 'the experiences of other states such as Australia, Canada and the United Kingdom, which have gone through a similar process in recent times'.[337]

What is seen in the New Zealand experience is while its military justice system did not suffer a *direct* challenge to its validity or consistency with the *NZBORA*, the two court decisions identified above made it clear that if a challenge occurred such a challenge was more likely than not to be successful. Thus, with the status of its justice system uncertain, the New Zealand Department of Defence looked to adopt other, comparable models of military justice which had found favour elsewhere. This is a process of mimetic isomorphism – when one entity is uncertain about its

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[334] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA), para 85.
[335] *Drew v Attorney-General* [2000] 3 NZLR 750 (HC), para 67:

> We have been able to reach this conclusion applying common law principles of construction, guided by the principles of natural justice. We have found no need to refer to the guarantee of the observance of those principles in s27 of the Bill of Rights, although that guarantee necessarily affirms and strengthens the appellant's case on the *ultra vires* ground.

[336] *Cooper v United Kingdom* (2004) 39 EHRR 8; Chris Griggs, 'A New Military Justice System for New Zealand' (2006) 6 *The New Zealand Armed Forces Law Review* 62, 82.
[337] Goff, above n 45, 8063.

organisational status, it copies or re-models itself on a successful entity in response.

While acknowledging there is no *NZBORA*-equivalent (or European Court for that matter) to which the military must answer in Australia, the Australian military took a different approach to its counterparts across the Tasman; when asked to consider the reforms implemented in Canada and the findings of the European Court of Human Rights, our ADF concluded it need not follow those leads, as their application was only a 'remote theoretical possibility' which did not warrant overturning 'a system which is practical, efficient and effective'.[338] Furthermore, in the submissions before the various inquiries that will be analysed in Chapter Five, it becomes clear that the Australian military did not consider itself to be in a position of uncertainty with respect to the status or standing of its military justice system in the manner contemplated by mimetic isomorphism. To the contrary, the military consistently told the various inquires that its justice system was sound, solid and fair.

3. Coercive isomorphism

Coercive isomorphism exists when an organisation adopts certain norms, structures and values because of pressures exerted by other organisations or by society in general.[339] Organisational change of the coerced kind may occur as a response to government regulation, for example, manufacturers adopting new pollution control technologies to conform to a government's environmental regulations.[340] However, the coercion need not be as explicit or compulsory as that found in legislation. For example, the annual budget cycle at each level of government has the

[338] Department of Defence, Submission, 1043, in *Military Justice Report 1999*, 4.14.
[339] Jones, above n 321.
[340] DiMaggio and Powell (1991), above n 288, 67.

effect of making all institutions dependent upon the budget allocations that represent the Government's priorities. Thus, a government has the ability to determine what an entity will do through its control of finances.

There is more to coercive isomorphism than just resource dependency and the imposition of legislation; coerced organisational change may also occur as a result of the exercise of political and/or legal powers,[341] or, as a result of informal pressures based upon 'cultural expectations in the society within which organisations function'.[342] Unlike mimetic and normative isomorphism, coercive isomorphism is more concerned with the environment in which the organisation finds itself and the external pressures that are brought to bear upon it. However, such outside scrutiny is not usually welcomed. Rather, when an organisation is subject to outside evaluation and scrutiny with potentially coercive outcomes, such as Senate inquiries and recommendations for example, the organisation tends to react defensively. If the external pressure to change continues to increase, the organisation will

> find ways to either diffuse or eliminate this pressure by changing [its] practices. One of the easiest ways to change is to adopt those routines and structures that are defined by law or government agencies as legitimate.[343]

If an organisation is to change by coerced means, then it must be the case that the organisation can be required to act by the actions of other, more powerful forces.[344]

For the Australian military and its justice system, coercive isomorphism provides an explanation for, or at least a framework to understand aspects of the reform process. A recurrent theme in the reasons for establishing

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[341] Lodge and Wegrich, above n 330, 213.
[342] DiMaggio and Powell (1991), above n 288, 67.
[343] Peter Frumkin and Joseph Galaskiewicz 'Institutional isomorphism and public sector organisations' (2004) 14(3) *Journal of Public Administration Research and Theory* 283.
[344] Mizruchi and Fein, above n 312, 665.

the various inquiries into the military justice system was public outcry and media attention about certain conduct in the military; for example the allegations of extrajudicial punishment and bastardisation within the 3RAR battalion, or the suicides of young soldiers, the death or disappearance of other soldiers and a fire on a Royal Australian Navy ship. In the language of institutional isomorphism, the military justice system's legitimacy was called into question when these allegations and tragedies were publically raised. Further, the submissions to and evidence before the various inquiries showed that there was a community expectation that those who serve our country would be treated with compassion, humanity, decency and fairness.[345] When it was perceived that this was not so, and that perception was given a voice through media exposure, the various inquiries were established and all made recommendations, the essential effect of which was to impose civilian fair trial standards upon the court martial system. Yet, the military, as a total institution, declined to implement certain recommendations such as an office of DMP as recommended by Justice Abadee in 1997 (it eventually did much later and after further inquiries recommendations) or a Chapter III Constitutional military court as recommended by the 2005 Senate Inquiry.

We see then, that public pressure was sufficient to question the military justice system's legitimacy and thus commence a process of external inquiry. Each of the inquiries, in turn, made recommendations for civilianising organisational change through the imposition of civilian fair trial standards. However, as expanded upon in Chapter Five, the significant recommendations were not implemented (for example creating a Chapter III military court), or were eventually implemented only after inordinate delay (for example the statutorily independent Office of DMP).

[345] For example, *2005 Senate Report*, paragraphs 3.82, 6.38.

F. Summary

Goffman's theory of total institutions gives a framework to understand the Australian military's submissions to the various official inquiries, its responses to those inquiry recommendations, and most importantly, its resistance to civilianisation. As a total institution, the military can control its members; in turn, its military justice system is the means by which that control can be achieved.

In turn, isomorphism assists as a means of identifying why the military, as total institution, has implemented some fair trial reforms to its military justice system but not others. Having identified (a) the theory of total institutions and (b) the process of institutional isomorphism, and, coerced isomorphism in particular, it is then possible to not only understand, but to also predict when civilianisation is more likely to occur.

The next Chapter develops the idea that there are fair trial flaws with the court martial system. This is a necessary next step to establish that the system cannot be justified from the fair trial perspective, and thus that there is justification to the reforms which have been recommended. That then provides the basis to examine the military's resistance to these justifiable reforms. It is all very well to say the military, as a total institution, is resistant to reform – but for that observation to have weight, it must be established that there are fair trial flaws with the current military justice system and that the reforms were warranted.

Chapter Four

THE FAIR TRIAL FLAWS OF THE AUSTRALIAN MILITARY JUSTICE SYSTEM: INDEPENDENCE AND IMPARTIALITY UNDER DOMESTIC AND INTERNATIONAL LAW

This Chapter examines whether Australian military courts operate in a manner consistent with domestic civilian law and international human rights fair trial principles, in particular, the principle that an accused will be judged by an independent and impartial tribunal. The Chapter begins by looking at the concept of a fair trial under international law and at common law, and then moves on to a more focused consideration of the hallmarks of an independent and impartial court at common law, and in international human rights jurisprudence. The Chapter then summarises what constitutes an independent and impartial trial in comparative common law jurisdictions. Ultimately, the chapter identifies whether, and if so where, Australian military courts offend the international human rights requirements of a fair trial; again, with particular emphasis on the principle that an accused will be judged by an independent and impartial tribunal.

The analysis relies upon an international human rights law perspective in assessing the independence and impartiality of the structures and actors that constitute the military justice system. That being said, it will also be shown that there is a large measure of correspondence between common law fair trial guarantees and international expectations. It is appropriate in a thesis such as this to place primacy upon international human rights standards because the *Universal Declaration of Human Rights* 1948 and the consequent international and regional human rights treaties recognise 'the basic rights of the human person'.[346] One of those basic rights of the human person is the right to a fair trial. Amongst others, Article 10 of the *Universal Declaration of Human Rights*, Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 6 of the *European Convention of Human Rights* provide content to what

[346] *Barcelona Traction, Light and Power Company Limited,* [1970] ICJ Rep (1970) 3, paragraphs 33-34.

constitutes a fair trial, and a clear set of criteria[347] against which courts martial may be measured and assessed.[348]

The fair trial standards codified in international human rights instruments provide for the minimum guarantees that all legal systems should provide. To that end, Australia prides itself on having an

> approach to human rights and freedoms [that] reflects its liberal democratic ideals and a belief in the inherent dignity and the equal and inalienable rights of all people, as set out in the *Universal Declaration of Human Rights*.[349]

Similarly, a recent Prime Minister, the Hon. John Howard, was quick to respond to a United Nations Human Rights Committee finding concerning

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[347] Such as:

- the right to be presumed innocent until proven guilty;
- the right to be informed of charges promptly, in detail, and in one's own language;
- the right to remain silent;
- the right to legal counsel of one's choice;
- the right to adequate time and facilities to prepare for trial;
- the right to equal access to, and equality before, the courts;
- the right to a speedy trial;
- the right to be present at one's trial;
- the right to a public hearing;
- the right to present witnesses;
- the right to examine witnesses;
- the right to an interpreter or to translation;
- the right to humane conditions of detention and freedom from torture
- the right to be tried before a competent, independent and impartial tribunal established by law;
- the prohibition of retroactive application of criminal laws and of double jeopardy; and
- the right to appeal.

[348] There is nothing novel in such an approach; see for example, Charlesworth, above n 99.

[349] Department of Foreign Affairs and Trade, *About Australia: Democratic rights and freedoms,* http://www.dfat.gov.au/facts/democratic_rights_freedoms.html at 7 January 2009.

racial discrimination in Australia with an all-encompassing, general assertion that 'Australia's human rights reputation compared to the rest of the world is quite magnificent'.[350] With such plaudits, albeit expressed as political rhetoric or puffery, it becomes difficult to argue that our defence members and defence civilians are entitled to *fewer* guaranteed rights than the internationally recognised minimum. If a purpose of the Australian military justice system is to defend our way of life, and that way of life includes these fundamental freedoms and rights, it seems incongruous to accept that the donning of khaki and camouflage paint[351] stripped one class of Australians of the very rights they are required to defend.

A. The status of International human rights law in Australian domestic law

Australia takes a dualist approach[352] to domestic and international law, meaning international law is a separate system of law operating outside the domestic field.[353] Further, unless the rules of international law are specifically incorporated into domestic law, usually by an Act of Parliament, they are generally not regarded as binding within our domestic jurisdiction.[354] An example of Australia importing specific principles of

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[350] ABC Radio, 'The Hon. John Howard MP, Radio Interview with Sally Sara', *AM Programme*, 18 February 2000, also in Charlesworth, above n 99.
[351] For example, Sherrill above n 3, Finn, above n 27, 18; Spak above n 25; Hirschhorn above n 111; Ho, above n 111; Harrison, above n 111.
[352] Rosalyn Higgins, *Problems and Process - International Law and How We Use It*, (1994), 205.
[353] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 425; *Bradley v The Commonwealth* (1973) 128 CLR 557, 582; *Simsek v MacPhee* (1982) 148 CLR 636, 641-644; *Kioa v West* (1985) 159 CLR 550, 570-571.
[354] See for example: *US Free Trade Agreement Implementation Act* 2004 (Cth); *Stevens v Kabushiki Kaisha Sony* (2005) 225 CLR 193, 250; the definition of 'refugee' in the *Migration Act* 1958 (Cth) adopted from the definition contained in

international law is found in the *Sex Discrimination Act* 1984 (Cth) of which section 3 provides:

> The objects of this Act are:
>
> (a)to give effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women*;

The international law norms of a fair trial, for example Article 14 of the ICCPR, as considered in this chapter have not been explicitly incorporated into Australian Commonwealth statutory law.

As for the States and Territories, both Victoria and the Australian Capital Territory have enacted human rights statutes: the *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic). The ACT Act provides for equality before the law in section 8, whilst section 21 provides for the right to a fair trial in the following terms:

> **Section 21 Fair trial**
> (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
> (2) However, the press and public may be excluded from all or part of a trial—
> (a) to protect morals, public order or national security in a democratic society; or
> (b) if the interest of the private lives of the parties require the exclusion; or
> (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
> (3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

An interesting aspect of the *Human Rights Act* 2006 (ACT) is that its scope appears to be wider than the ICCPR and European Convention which both limit fair trial rights to *criminal* trials and to either the

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the *Refugees Convention and Protocol;* the Regulations under the *Family Law Act* 1975 (Cth) giving effect to the *Child Abduction Convention*.

determination of civil rights (for the ECHR) or rights and obligations in a suit at law (for the ICCPR):

> 38. It is clear that the right expressed in s 21of the *Human Rights Act 2004* (ACT) applies to civil proceedings and is not limited to criminal proceedings: SI bhnf CC v KS bhnf IS [2005] ACTSC 125; (2005) 195 FLR 151 at 164, König v Germany (1978) 2 EHRR 170 at [90]. Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, however, the word 'civil' is not used to modify 'the rights and obligations' referred to in s 21. This means that the kinds of civil litigation to which the right applies is wider than in Europe where it applies only to dispute in private law and not public law: Ringeisen v Austria (1971) 1 EHRR 455 at [94]. This has to be borne in mind when considering European (including UK) jurisprudence on the subject.[355]

The Victorian *Charter* applies to Parliament, the courts' administrative functions, tribunals and all Victorian public authorities.[356] The Charter

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[355] *Capital Property Projects (ACT) Pty Limited v Australian Capital Territory Planning & Land Authority* [2008] ACTCA 9 (21 May 2008).

[356] Section 6 of the *Charter.* As at December 2010, the High Court of Australia is yet to hear argument in the matter of *Momcilovic v The Queen* [2010] HCATrans 261 (8 October 2010) (at this hearing, the dates set down for oral argument on 30 November and 1 December 2010 were vacated on the application of the Victorian Government Solicitor's Office pending state election. It is due to be heard in February 2011).

As neatly summarized in *Re Momcilovic* [2008] VSCA 183 (22 September 2008) (a bail application):

> 2 The applicant was convicted in the County Court, at Melbourne, on 23 July 2008, on one count of trafficking in a drug of dependence. On 20 August 2008 she was sentenced to a term of two years and three months' imprisonment with a non-parole period of 18 months. A period of 28 days was declared as having been served. The applicant then sought bail from this Court pending applications for leave to appeal against both conviction and sentence.
>
> 3 The circumstances surrounding the commission of this offence can be briefly stated. The applicant was the owner and occupier of a unit in Regency Towers in Exhibition Street, Melbourne. She lived there together with one Velimir Markovski who was, at the relevant time, her boyfriend. The evidence was that he trafficked regularly in amphetamines, using the unit as a base for his business. When a search warrant was executed upon the premises, a quantity of just under 400 grams of methylamphetamine was located, mainly in the kitchen, and particularly in a bar fridge and freezer.
>
> 4 The applicant claimed that she was unaware of the presence of drugs in her unit. She was faced with the difficulty of having to overcome a deeming provision in relation to knowledge by reason of the operation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, as well as a presumption of trafficking by reason of the quantum of the drugs found. The jury's verdict makes it clear that they were

provides for a right to equality before the law in section 8[357] and the right to a fair hearing in section 24:[358]

> not persuaded by her evidence that she knew nothing of her boyfriend's drug related activities in her unit.

As observed in *R v Momcilovic* [2010] VSCA 50 (17 March 2010)

> 9 The combined operation of these provisions is potentially very powerful, as the present case illustrates. The finding of drugs on premises occupied by the applicant meant that she was deemed (by s 5) to be in possession of the drugs unless she satisfied the court to the contrary. When she failed to discharge that burden, her deemed possession constituted (because of the quantity involved) prima facie evidence of trafficking by force of s 73(2).

From a fair trial and human rights perspective, the matter raises the right to be presumed innocent, because of the statutory reversal of the burden of proof with respect to possession of drugs. Further, that reversal affected both possession and trafficking offences. It will be for the High Court to finally determine: whether it is possible to interpret the relevant provisions compatibly with the presumption of innocence; whether the limit on the presumption is demonstrably justified; and, whether a declaration is warranted if the inconsistent interpretation prevails. The High Court will also be asked to consider whether the Victorian courts are required to interpret statutory provisions 'so far as it is possible to do so consistently with their purpose, ... in a way that is compatible with human rights'

[357] Section 8 of the Charter has been the subject of some judicial consideration, but primarily where entities such as schools, leisure centres, and health/fitness clubs have sought exemptions from the Victorian *Equal Opportunity Act* 1995 (*Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009); *Members of Owners Corporation on Plan of Subdivision No. 441923W (Anti-Discrimination Exemption)* [2010] VCAT 1111 (28 June 2010); *Wesley College (Anti-Discrimination Exemption)* [2010] VCAT 247 (3 March 2010); *Hobsons Bay City Council & Anor (Anti-Discrimination Exemption)* [2009] VCAT 1198 (17 July 2009); *Carey Baptist Grammar School Ltd (Anti-Discrimination Exemption)* [2009] VCAT 2221 (23 October 2009); *YMCA - Ascot Vale Leisure Centre (Anti-Discrimination Exemption)* [2009] VCAT 765 (4 May 2009); *Middle Park Bowling Club Inc & Anor (Anti-Discrimination Exemption)* [2010] VCAT 1500 (10 September 2010); *Be in Shape Studio Pty Ltd (Anti-Discrimination Exemption)* [2010] VCAT 1681 (1 October 2010); *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116 (29 June 2010); *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010)).

[358] Section 24 has also been the subject of some judicial consideration, including, for example, whether an accused has a s 24 right to a counsel of choice (they do not, R v Williams [2007] VSC 2 (15 January 2007)); whether the failure of the Mental Health Review Board to conduct the reviews of the complainant's involuntary and community treatment orders under the *Mental Health Act 1986* within a reasonable time, was a breach of his s 24 rights (it was held to be, *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) but overruled on a point of statutory interpretation in *R v Momcilovic* [2010] VSCA 50 (17 March 2010, paragraph 74)); whether an

24. Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

Note For example, section 19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also section 80AA of the County Court Act 1958 and section 126 of the Magistrates' Court Act 1989.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

Even though the civil right to a fair trial as recognised in international law is not explicitly stated in Commonwealth statutes, these fair trial principles do not exist in a vacuum, without common law equivalents. To the contrary, even though the emphasis in this thesis is on international human rights, it will be shown that these principles have common law, domestic counterparts.[359] Further, as to the philosophies or values underpinning the international principles, former High Court judge, the Hon. Michael Kirby QC, speaking extra-curially, has contended:

> It is my thesis that these objectives and principles are not simply writing on paper. They are rules to inform our conduct as human beings, citizens and professionals. Judges, including Australian judges, do not leave these principles outside the courtroom when they perform their professional duties. The principles are not, as such, part of our Australian domestic law. They have not, as such, been enacted by an Australian Parliament. But they are an undoubted part of the reality of the world which judges and other citizens live in. They inform our perceptions of that world.

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unrepresented litigant facing a summary dismissal application from Telstra, who was 'represented by a high powered legal firm', was a breach of s 24 (it was not, *Drummond v Telstra Corporation Limited (Anti-Discrimination)* [2008] VCAT 2630 (23 December 2008) at paragraph 53).

[359] Justice Chris Maxwell, 'The Victorian Charter of Human Rights and Responsibilities so far: A Judge's Perspective' (Speech delivered to the 2009 Annual Castan Centre Conference, 17 July 2009), 2.

> Increasingly, they influence our perceptions of legal problems, legal values and of the solutions that conform to those values.[360]

Justice Kirby's thesis is neither an example of judicial activism (of which he has been accused from time to time[361]), nor is it an example of his well-known status as a human rights champion. A century earlier in 1908, Justice O'Connor of the High Court observed that a basic principle of the common law was that:

> Every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity of nations, or with the established rules of international law.[362]

More recently, Chief Justice Mason and Justice Deane of the High Court of Australian observed in 1995:

> If the language of legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[363]

Perhaps the most famous (and controversial) application of or reliance upon international human rights principles within the Australian domestic court system is found in the decision of the High Court in *Mabo v Queensland [No 2].*[364] In particular, Justice Brennan (with whom Chief

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[360] The Hon Justice Michael Kirby AC CMG, 'The Growing Impact of International Law on Australian Constitutional Values' (Speech delivered at the Australian Red Cross National Oration, University of Tasmania, Hobart, Thursday, 8 May 2008) http://www.hcourt.gov.au/publications_05.html at 8 January 2008 (footnotes omitted).

[361] See for example:

- 'If you want to make laws, Justice Kirby, be an MP', *Sydney Morning Herald* (on-line), 21 November 2003, at 9 January 2009 http://www.smh.com.au/articles/2003/11/20/1069027267653.html?from=storyrhs
- Mark Willacy, 'Justice Kirby angers the Howard Government', *The World Today Archive* (on-line) 1 May 2001 www.abc.net.au/worldtoday/stories/s286728.htm at 9 January 2009.

[362] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

[363] *Minister for Immigration and Ethics Affairs v Teoh* (1995) 183 CLR 273, 287.

[364] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

Justice Mason and Justice McHugh concurred) explained how the principles of international human rights law could overcome that previously settled common law principle of *terra nullius*. His Honour explained:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights bring to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

It would be incorrect to conclude that just because Australia has not directly incorporated the *ICCPR* Article 14 into our domestic law that it has no bearing on domestic jurisprudence. Rather, Article 14 not only informs our values, but it is also a useful tool by which our domestic courts martial may be measured. While not explicitly incorporated into domestic law, we will see that the values represented by and policies contained within Article 14 are reflected in our domestic common law.

B. Fair trial principles: common law

Judicial officers in Australia have, rather wisely, not sought to provide an exhaustive list of the attributes of a fair trial.[365] Apart from being a difficult task, it would be unusual for a trial or appeal to provide the appropriate background for such wide-ranging findings. Instead, trials and appeals concern the specific facts and law relevant to the case before it - as law students learn *ad infinitum* from their earliest lectures, each case turns on its own individual facts and circumstances. For criminal proceedings, the

[365] *Dietrich v R* (1992) 177 CLR 292, 300 Mason CJ and McHugh J.

jury makes findings of fact relevant to the specific indictment and the judge makes rulings of law, again relevant to the particulars of the indictment. In turn, should the conviction and/or sentence be appealed, the criminal appellate court will be called upon to uphold or dismiss a specific point or points arising from the trial at first instance. In so far as the fairness of the trial at first instance is concerned, an appeal court will usually be asked to find that something done, for example the admission of objectionable and prejudicial evidence, or something said, for example the admission of hearsay, in the course of the trial resulted in the accused being denied a fair trial, such that justice has miscarried and the verdict and/or sentence is unsafe.

Thus, the development of fair trial principles at common law has been a piecemeal evolution dependent upon the presentation of a case squarely raising a specific point for submissions and ultimately reasons. As a consequence, one cannot find a single domestic judgment that comprehensively and authoritatively sets out what constitutes a fair trial at common law. Instead, regard must be had to a long list of cases for guidance.

Conversely, various international instruments and express declarations of rights in other countries have sought to define, even if in a broad way, some of the attributes of a fair trial. For example, Article 14 of the *International Covenant on Civil and Political Rights*, to which Australia is a party,[366] provides for such basic, minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence, the right to the free assistance of an interpreter when required and that the matter be heard by an independent and impartial tribunal

[366] Australia signed the *ICCPR* on 18 December 1972 and ratified it on 13 August 1980. Australia acceded to the First Optional Protocol to the *ICCPR*, effective as of 25 December 1991 – thus Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights.

established by law. Article 6 of the *European Convention of Human Rights* contains similar minimum rights, as does section 11 of the *Canadian Charter of Rights and Freedoms 1982*.[367] Comparable rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the *United States Constitution.*[368] The *New Zealand Bill of Rights Act*, the Victorian *Charter of Human Rights and Responsibilities* 2006 and Australian Capital Territory's *Human Rights Act* 2004 also codify a set of human rights, including fair trial rights similar to those provided in the *European Convention* and *ICCPR*.

While Australian domestic courts have not attempted to exhaustively list the indicia of a fair trial,[369] the right to a fair trial is nevertheless considered a fundamental element of our domestic criminal justice system.[370] Indeed, with the provisions of the *Magna Carta* in 1215 and the *Act of Settlement* of 1701, the right to a fair trial was well accepted in English law before our federation. It was therefore a principle of common law that was received into Australian law upon our federation in 1901.

The common law history of the right to a fair trial finds early articulation in the *Magna Carta* 1215 Ch 29, 'We will sell to no-one, we will not deny or defer to anyone either justice or right' – in other words, the right to be tried without undue delay. This principle finds expression in Article 14(3)(c) of the ICCPR which requires that a person shall be tried 'without undue delay'. Similarly, the presumption of innocence and concomitant onus upon the prosecution to prove guilt is set out in Article 14(2) of the ICCPR, but the principle itself is the subject of the following famous statement:

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[367] Enacted as Schedule B to the *Canada Act 1982* (UK) 1982, clause 11, which came into force on April 17, 1982.
[368] *Dietrich v R* (1992) 177 CLR 292, 300 Mason CJ and McHugh J.
[369] Ibid, 300 per Mason CJ and McHugh J, 353 per Toohey J.
[370] Ibid, 298-300 per Mason CJ and McHugh J, 326 per Deane J, 353 per Toohey J, 363, 371-72 per Gaudron J; *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518.

> Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. [371]

Australian case law demonstrates that although one must look to a range of cases to find the authorities supporting the various components of a fair trial right, the principles and values contained in Article 14 of the ICCPR are far from unfamiliar to our municipal laws and courts. Justice Maxwell, President of the Victorian Court of Appeal recently observed

> we have been able to dispose of human rights arguments without recourse to the Charter precisely because there is already, in the common law, a well-developed human rights jurisprudence – most notably in the criminal law.
>
> The common law of Australia has a rich tradition, mostly inherited from England but in part developed domestically, of recognising and protecting human rights. This has two important consequences, as follows.
> ...
> Let there be no misunderstanding. I am not dealing here with the question of whether the common law's protection of rights is adequate. Opponents of legislative protection of human rights do, of course, assert that the common law gives adequate protection. Supporters of legislative protection highlight the common law's deficiencies.
>
> I am not entering that debate. My point is a quite different one. I am dealing with the character of human rights adjudication – at least in the civil and political rights field. I am making the point, which seems too often to be overlooked, that there is nothing novel about judges adjudicating on human rights.[372]

The following Table compares common law fair trial authorities with their ICCPR equivalents. That being said, it should be understood that when citing an authority of a certain date, for example, *Robinson v R* in 1994, is not to say that the right was first held to apply only from that date. Each of the authorities cited in Table 6, apart from *Dietrich* (which is explained below), is simply judicial confirmation that the right is one that is an integral part of our common law.

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[371] *Woolmington v DPP* [1935] AC 462, 481 per Viscount Sankey LC.
[372] Maxwell, above n 359.

Table 6
Fair trial principles in the ICCPR and at Australian common law

ICCPR fair trial components (by article number)	Australian common law authority recognising the substance of the corresponding principle
14(1) All persons shall be equal before the courts and tribunals	*Baume v Commonwealth* (1906) 4 CLR 97
14(1) - everyone shall be entitled to a fair and public hearing	*R v Hamilton* (1930) 30 SR (NSW) 277
14(1) hearing by a competent, independent and impartial tribunal established by law	s.72 Commonwealth of Australia Constitution Act (only applicable, though, to Chapter III federal courts)
14(1) any judgement rendered in a criminal case or in a suit at law shall be made public	*Brittingham v Williams* [1932] VLR 237
14(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law	*Robinson v R* (1994) 180 CLR 531
14(3)(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him	*R v Willie* (1885) 7 QLJ (NC) 108
14(3)(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing	*Cameron v Cole* (1944) 68 CLR 571; *R v Van Beelen* (1973) 4 SASR 353, SC(SA), Full Court; *R v Jones* [1971] VR; *R v McGill* [1967] VR 683 *Dietrich v R* (1992) 177 CLR 292: a qualified right to representation for indictable offences discussed below
14(3)(c) To be tried without undue delay;	The argument that there is a common law right to a speedy trial was not accepted by the High Court in *Jago v District Court of New South Wales* (1989) 168 CLR 23, 33 per Mason CJ, 70 per Toohey J, 78 per Gaudron J and 44 by Brennan J, but, it is a different question whether delay in proceeding ought be grounds for a stay; *Freeman v McKenzie* (1988) 82 ALR 461

ICCPR fair trial components (by article number)	Australian common law authority recognising the substance of the corresponding principle
14(3)(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing	*O'Donnell v Dawe* [1905] VLR 538 *Dietrich v R* (1992) 177 CLR 292: a qualified right to representation for indictable offences discussed below
14(3)(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him	*Prentice v Cummins* (No 6) (2003) 203 ALR 449
14(3)(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court	*Re East; Ex parte Nguyen* (1998) 196 CLR 354
14(3)(g) Not to be compelled to testify against himself or to confess guilt	Rochfort v Trade Practices Commission (1982) 153 CLR 134

Prior to *Dietrich* (refer to Articles 14(3)(b) and (d) above), in all states but Queensland, there was no common law right for the accused to have publicly funded legal representation where the charges included an indictable offence.

Olaf Dietrich was an unfortunate character; a career criminal who sought to import 70 grams of heroin into Australia, smuggled in swallowed condoms. He was caught. Dietrich was tried for trafficking offences, and after a 40-day trial was found guilty. At the start of his trial and at various stages, Dietrich asked for an adjournment to access legal assistance. All applications were dismissed and he was forced to act for himself. The matter found its way to the High Court. Counsel for Dietrich submitted (he was at least represented before the High Court) that there were three sources in law for the right to counsel, one of which was Article 14(3)(d) of the ICCPR. The majority members of the Court observed:

> 9. The primary argument of the applicant relies in part on the explications of the right to a fair trial in the instruments to which we have referred [ECHR, ICCPR, Canadian Charter, Amendments IV & XV United States Constitution]. The argument is that, at least in any indictable matter to be tried before a judge with or without a jury that may result in imprisonment upon conviction, the interests of justice require that an indigent accused who wishes to have legal representation be provided with such representation at public expense. The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed.

The *Dietrich* High Court, however, by a majority of five to two, modified this principle to find that in some cases, representation was appropriate to ensure a fair trial. The High Court majority held that if an indigent person wanted representation[373] and the lack of representation was likely to lead to an unfair trial, then the trial judge should adjourn the case in order to encourage the relevant legal aid agency to provide counsel. Deane and Gaudron JJ went further than merely stating a fair trial required representation in some circumstances by finding an implied right to legal representation in Chapter III of the *Constitution*.

It is certainly the case that not all the requirements of the ICCPR are legally or effectively guaranteed under existing Australian law. The decision in *Jago v District Court of New South Wales*[374] confirms there is no right to a speedy trial in Australia, and the *Dietrich* judgment falls short of Article 14 because encouraging legal aid to provide representation is not the same as *guaranteed* representation. Equally, in some instances, for example, discovery, codified time limits and statutory bars, and search and seizure limitations, domestic common law/statute provides more extensive protections than in international, human rights law. However, it could hardly be said that the rights provided for in the ICCPR are anything but an articulation of that which our common law also recognises. This is not surprising given the *Universal Declaration of Human Rights* emerged

[373] To be contrasted to an accused who elects to represent him or herself.
[374] (1989) 168 CLR 23.

in an era when the UN and its secretariat were 'profoundly influenced by personnel trained in the Anglo-American legal tradition'.[375] That is why

> when we read the *Universal Declaration of Human Rights*, prepared by the committee under the chairmanship of Mrs Eleanor Roosevelt, people in English-speaking countries feel generally comfortable with its notions. It talks to us of universal principles that we recognise. It expresses such principles in a language which is familiar to our legal, moral and cultural tradition.[376]

C. Fair trial principles: international human rights law

This sub-section provides an overview of and context for the more detailed analysis of the right to an independent and impartial trial under international law, and the consequent measuring of Australian military trials against those standards. It is not intended to be an in-depth analysis of the content and substance of a fair trial as set out in various international and regional instruments, and the corresponding case law that elaborates upon the minimum guarantees.

1. The ICCPR

Article 14 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') provides a skeleton of rights that the international community have recognized as minimal guarantees that all legal systems ought offer their constituents:

[375] Kirby, above n 360.
[376] Ibid.

Article 14[377]

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ….

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

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[377] See Manfred Nowak, *UN Covenant on Civil and Politics Rights: CCPR Commentary*, (2nd ed 2005), 302-357 for an excellent discussion of Article 14.

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

In 1984, the Human Rights Committee published a *General Comment* concerning Article 14,[378] wherein the Committee made comments about the meaning of each of the paragraphs in the Article. However, the General Comment was framed so broadly as to be, frankly, unhelpful in trying to discern the substance of these minimum guarantees. (Its generality was no doubt due to the newness of the Optional Protocol which enabled aggrieved individuals to bring complaints to the Committee and a consequent lack of case law.) What was clear, however, was that the Committee considered that the aim or rationale of the Article was to ensure procedural fairness and equality and the proper administration of justice through the series of rights set out in the Article.[379] The Committee's *General Comment* further concluded that the Article applied to civilian and specialist courts alike, and in particular, it noted the existence of military courts in many member countries, and foreshadowed that such courts could present 'serious problems as far as the equitable, impartial and independent administration of justice is concerned'.[380]

General Comment No 13 was replaced by *General Comment* No 32 in July 2007.[381] It is a far more expansive document than its predecessor *General Comment* No 13. Again, this is not surprising because by July 2007, the Committee had had the benefit of receiving and adjudicating upon numerous complaints. It also had the benefit of the extensive European Human Rights jurisprudence.

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[378] General Comment No 13, above n 210.
[379] Ibid, paragraph 1.
[380] Ibid, paragraph 4.
[381] Human Rights Committee, *General Comment No 32, Article 14,* 90th session, UN Doc. CCPR/C/GC/32 (2007).

The 2007 General Comment highlighted the considerable reach of this Article, reminding States parties that the requirement for a fair trial by an independent and impartial court or tribunal was not limited just to courts and tribunals as referred to on the face of the second sentence of Article 14(1), but that the guarantees contained in Article 14 'must also be respected whenever domestic law entrusts a judicial body with a judicial task'[382] no matter what the entity is actually called. That begs the question as to what is a judicial body and what is a judicial task; these issues are considered later (refer Chapter 4 Part 5), and in particular, whether it could be argued that because courts martial (and the Australian Military Court during its short life) were not Chapter III Constitutional courts and did not exercise judicial power, then, as a corollary, Article 14 did not apply.

Equally, lest it also be argued that charges brought under the *Defence Force Discipline Act* 1985 are not "criminal charges" within the meaning of Article 14, the Human Rights Committee made it clear that Article 14 applies to acts that are criminal in nature 'with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity'.[383] Where the courts martial (and the AMC) have power to jail a person upon conviction, it would be difficult to characterise the purpose, character and severity of the *DFDA* as anything but penal. In a 2003 High Court matter, the Chief Executive Officer of Customs sought to argue that customs prosecutions were not criminal proceedings and thus the civil standard of proof applied. In a remarkably concise and succinct judgment, the then Gleeson CJ held:

> As to the question of standard of proof, the statutory provisions invoked by the appellant in these proceedings refer to offences, guilt, conviction and punishment. To paraphrase what was said by McTiernan J in *Mallan v Lee*, the legislative description of the conduct alleged, and of the orders which the appellant seeks, should be accepted at face value. That being so, the

[382] *Perterer v Austria,* UN Doc CCPR/C/81/D/1015/2001 (2004), paragraph 9.2 (disciplinary proceedings against a civil servant); *Everett v Spain*, UN Doc CCPR/C/81/D/961/2000(2004), paragraph 6.4 (extradition).
[383] *Perterer v Austria,* UN Doc CCPR/C/81/D/1015/2001 (2004), paragraph 9.2.

common law requires that the appellant should establish the elements of the alleged offences beyond reasonable doubt.[384]

2. The ECHR

Of course, the European Convention on Human Rights has no place in Australian domestic law. However, given the similarities between the ECHR fair trial Article 6 and the ICCPR Article 14, the Strasbourg Court's jurisdiction provides a useful source of comparative material. It is also informative within the context of this thesis to review the European Convention's Article 6, because it will be later seen (Chapter 5, Part B) that the Abadee Report into the Australian military justice system of 1997 was prompted, in part, by ECHR and Canadian decisions concerning their respective military justice systems.

Article 6[385] of the European Convention provides:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly ...
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
>   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>   (b) to have adequate time and the facilities for the preparation of his defence;
>   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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[384] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 166.

[385] See Clare Ovey and Robin C White, *Jacobs and White: The European Convention on Human Rights*, (4th ed, 2006), 158-191 for an excellent consideration of Article 6.

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Accordingly, Article 6 of the European Convention on Human Rights contains similar principles, rights, obligations and values as the ICCPR. Like the Human Rights Committee, the European Commission and then the European Court386 has also taken an expansive view of the rights contained in Article 6, aligning the necessity of a fair trial with the operation of democracy. In Delcourt v Belgium, the Court stated that:

> In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision.[387]

Also, like Article 14 of the ICCPR, the text of Article 6 is but the bare bones of what constitutes a fair trial, with the European Commission and then the Court creating extensive case law to the interpretation of these rights and guarantees.[388]

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[386] The Commission was abolished when Protocol No. 11 to the Convention came into force in 1998. All decisions and judgments on individual applications alleging violations of the Convention are now those of the European Court of Human Rights.
[387] *Delcourt v Belgium* (1970) 1 EHRR 335, paragraph 25.
[388] As to the importance of case law, see, Nuala Mole and Catharina Harby 'The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights' (2006) *Human Rights Handbooks, No. 3*, Directorate General of Human Rights, Council of Europe 6.

D. Independence and impartiality

That judicial independence and impartially are fundamental cornerstones of our common law court system is beyond doubt;[389] indeed, it is a feature in all developed legal systems.[390] In Australia, we see it made out in the federal level through the separation of powers between the judiciary, the executive and legislature, as required by the *Constitution of the Commonwealth of Australia* and section 72 of that constituent document. The separation of powers can be traced back to the *Magna Carta*, with its declaration that justice shall not be sold,[391] and to the *Act of Settlement* 1701,[392] with its provisions for judicial independence in England.[393]

Independence and impartiality are concepts that overlap and are often considered together. This is not surprising given the terms 'independence and impartiality' are usually used conjunctively in common law authorities and international instruments. However, it is possible to consider the two items separately.[394]

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[389] *North Australian Legal Aid v Bradley* [2004] 218 CLR 146; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343.

[390] See Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges', in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985), 630-631. Also cited by Gaudron J with approval in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362 per Gaudron J. *South African Commercial Catering and Allied Workers Union and others v Irvin and Johnson Limited, Seafoods Division, Fish Processing* [1999] ZALAC 17; *Valente v The Queen* [1985] 2 SCR 673, 689 per Justice LeDain. *Wikio and Anor v Attorney General* [2008] NZHC 1104.

[391] Holdsworth, *A History of English Law*, (6th ed, 1938), vol 1, 57-58.

[392] 12 and 13 Wm 3, c 2. For reference to the full text, see, http://australianpolitics.com/democracy/documents/act-of-settlement.shtml.

[393] It is a principle underlying the confrontation in 1607 between Chief Justice Coke and King James I about the supremacy of law.

[394] *Valente v The Queen* [1985] 2 SCR 673, paragraph 15, in which Le Dain J for the Court observed:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' ... connotes absence of bias, actual or perceived. The word 'independent' ... reflects or embodies the traditional constitutional value of judicial independence. As such, it

Independence is essentially whether the judiciary is autonomous and free from Executive and Legislative influence, free from the influence of the parties and free from other sources of potential interests such as the private interests of third parties.

Impartiality has two aspects to it. First, it concerns a judicial officer's absence of bias or prejudice when hearing and deciding cases; this is known as actual bias and has been described as a general principle of law, whereby the judicial officer exercises decision making powers

> according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself . [395]

The second aspect of impartiality refers to whether there is an appearance of bias, even where none actually exists.

Nowak highlights the difference between the two concepts as follows: independence relates to the appointment and removal processes for decision makers, whilst impartiality refers to how a judge or juror conducts him or herself in the trial proceedings.[396]

> connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

See also J E S Fawcett, *The Application of the European Convention on Human Rights* (1969), 156, commenting on the requirement of an 'independent and impartial tribunal established by law' in Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

> The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.

[395] *R v Anderson; Ex parte Ipec-Air Pty Ltd*, Kitto J (1965) 113 CLR 177, 189.
[396] Nowak, above n 377, 321.

The combined requirements of independence and impartiality 'give effect to the requirement that justice should both be done and be seen to be done'.[397]

1. Independence – Australian and comparative law

In a useful summary, the High Court of Australia held that the following non-exhaustive list of matters assists in deciding whether a court or tribunal may be considered independent:[398]

- the manner of the appointment of its members;
- their terms of office;
- the existence of effective guarantees against outside pressure;
- whether the body presents an appearance of independence and impartiality;[399]
- security of tenure; financial security; and institutional independence.[400]

The kinds of safeguards identified above provide for independent decision making that is free from the actual and perceived influence of the Executive and/or the Legislature, and free from the influence of the private interests of the judge or third parties. Conversely, a judicial officer beholden to the Executive for the length of his or her appointment, reappointment or remuneration could be perceived as indebted to that Executive and unlikely to make decisions contrary to the interests of those

[397] *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.
[398] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 127 per Kirby J.
[399] *Langborger v Sweden* (1989) 12 EHRR 416; *Bryan v United Kingdom* (1995) 21 EHRR 342; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.
[400] *Valente v The Queen* [1985] 2 SCR 673, 687; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 127 per Kirby J.

who could terminate his or her appointment, not reappoint, or reduce his or her pay. Judicial officers need to be able to make their decisions without fear and without favour.

Thus, in so far as remuneration is concerned, section 72(iii) of the *Constitution of the Commonwealth of Australia* provides that a judicial officer's pay shall not be diminished during continuance in office. The reference to 'remuneration' includes the non-contributory pension plan entitlements which accrue under the federal, judicial pension statute.[401] The judicial pension is seen by some as a perk of the office.[402] However, it should be better understood as an important safeguard for securing the independence of judicial officers:

> One not insignificant reason is to reduce, if not eliminate, the financial incentive for a judge to seek to establish some new career after retirement from office. As was pointed out in argument, it may otherwise be possible to construe what a judge does while in office as being affected by later employment prospects.[403]

As for tenure, section 72 of the *Constitution* once provided Commonwealth judicial officers with tenure for life. However, by the Referendum of 1977, one of the few successful referenda questions supported by a majority of people in a majority of states, federal judicial officers now have tenure until

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

[402] Nick Grimm, 'Latham targets judicial perks' *The World Today Archive,* (on-line) Friday, 13 February 2004, http://www.abc.net.au/worldtoday/content/2004/s1044485.htm at 13 January 2009:

> HAMISH ROBERTSON: Meanwhile Opposition leader Mark Latham has vowed that he'll continue to pursue the super perks enjoyed by members of the judiciary as well, however the Prime Minister has indicated that's one area where he's not keen to follow his Labor opponent.
>
> He's called Mr Latham's suggestion to slash judges' super as a 'crazy idea', but John Howard does support a review of arrangements which judges and lawyers argue are vital to maintaining the independence of the judiciary.

[403] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

the age of 70, or his or her earlier retirement.[404] Federal judges are also appointed pursuant to the *Constitution* and cannot be removed from Office 'except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'. A further factor which safeguards the independence of the judiciary is that the Legislature cannot unilaterally amend these Constitutional provisions. Instead, its provisions are entrenched, meaning the *Constitution* cannot be changed other than by passage of the Bill through both Houses by an absolute majority and then to a referendum of the people, which requires a double majority for success.[405]

The removal of judges deserves some attention as that is a significant threat the Executive holds over the judiciary. In Australia, the Constitution allows for removal of a judge for misbehaviour or incapacity.[406] The idea of 'misbehaviour' has been defined to include judicial or criminal misbehaviour - for example the allegations made in the cases of Lionel Murphy (former Attorney General of Australia and High Court Justice) and Judge Foord.[407] Justice Murphy died before the matter was finalized. It has also been said to include conduct rendering a judge unfit for office by

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[404] *Constitution Alteration (Retirement of Judges)Act* 1977 (Cth).

[405] *Commonwealth of Australia Constitution Act 1900* s 128.

[406] The Hon J P Hamilton (Judge, Equity Div., Supreme Court of New South Wales), 'Judicial Independence and Impartiality: Old Principles, New Developments' (Speech delivered at the 13th South Pacific Judicial Conference, Apia, Samoa, 28 June to 2 July 1999) at which he spoke:

> In Australia, only a small number of Judges were removed in the colonial days of the 19th century, before the modern constitutional provisions were fully in force. One was Mr Justice Willis, the Port Phillip District Judge of the Supreme Court of New South Wales, in 1843, who was removed by the Governor without legislative address. A second was Mr Justice Montague who was removed from the Supreme Court of Van Dieman's Land for impecuniosity and his actions in avoiding his creditors. A third was Mr Justice Boothby, of the Supreme Court of South Australia, who was removed by the Governor in 1865, upon address of both the South Australian houses, although he could probably have been removed, without any form of Parliamentary address.

[407] *R v Murphy* (1985) 63 ALR 53; *Foord v Whiddett* (1985) 60 ALR 269.

his or her conduct[408] - for example, the allegations made against Justice Vasta formerly of the Supreme Court of Queensland, who was removed in 1989 on an address of that State's unicameral Parliament.[409] In both cases, special legislation[410] appointed commissions of judges or retired judges to inquire into whether the allegations were substantiated.

Yet, no matter the substance of the allegation, a federal judge cannot be dismissed unless he or she is brought before the Bar of the Parliament, and then both Houses of Parliament agree to advise the Governor-General in Council that the judge be dismissed, and s/he accepts that advice.

Independence from the executive is, however, only one feature of this principle. The judiciary must also be independent (and also *perceived* to be so) from other sources of influence, including for example, threat of suit for judicial acts or omissions. Accordingly, our federal judges' immunity from suit for judicial acts is a further aspect of securing or safeguarding a court's independence from sources of influence including, but not limited to, the Executive:[411]

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

[409] Hamilton, above n 406 again advises:

> Recently in New South Wales, in circumstances mentioned below, proceedings were brought in Parliament against Justice Vince Bruce of the Supreme Court, but failed, after a written defence and a spirited speech by the Judge, to gain an affirmative vote (16-24) in the upper house (the Legislative Council), where the motion for the address was first moved.

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

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

> That a judge is immune from suit serves a number of purposes, not least the need for finality of judicial decisions. But it is also a principle which forecloses the assertion that the prospect of suit may have had some conscious or unconscious effect on the decision-making process or its outcome. [412]

The question as to what constitutes an independent court or tribunal is a question that has been argued in other comparable jurisdictions. For example, the Supreme Court of Canada,[413] and the Constitutional Court of South Africa,[414] have both been required to explore the philosophical foundations of judicial independence in order to decide whether the relevant courts satisfied the minimum standards of that concept.

In Canada, the common law of an independent and impartial trial is one that has been codified by section 11(d) of the Canadian *Charter of Rights and Freedoms,* which states:

> 11. Any person charged with an offence has the right:
> …
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In the Canadian Supreme Court decision of *Valente*,[415] LeDain J, speaking for the Court, held:

> The word "independent" in s.11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

In that matter, the Court held that the adjudicative function of a court, included matters such as the assignment of judges, sittings of the court

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[412] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 80 per Gummow, Hayne and Crennan JJ.
[413] *Valente v The Queen* [1985] 2 SCR 673; *R v Genereux* [1992] 1 SCR 259; *Reference re: Public Sector Pay Reduction Act* [1997] 3 SCR 3; *Fingleton v R* (2005) 227 CLR 166.
[414] *Van Rooyen v The State,* 2002 (5) SA 246.
[415] *Valente v The Queen* [1985] 2 SCR 673*,* paragraph 15.

and the drawing up of court lists, as well as related matters of the allocation of court rooms and direction of the administrative staff engaged in carrying out those functions. Judicial control over such matters was held to be an essential requirement for institutional independence. This explanation was referred to and adopted by Justice Kirby then of the High Court of Australia in the decision of *Fingleton v R.*[416] This was a decision itself ultimately concerning Queensland's former Chief Stipendiary Magistrate's immunity from suit,[417] which is a feature of independence to which reference has been previously made.

The South African Constitutional Court has found[418] the following to be at the heart of judicial independence:

- the absolute freedom of each judicial officer to hear and decide the case before him or her;
- that judicial officers, when hearing a case, be free from outside interference or any attempts to interfere with the way they conduct their cases and make their decisions;
- the freedom of each judicial officer to act independently and impartially in dealing with the cases they hear; and,
- at an institutional level, structures to protect courts and judicial officers against external interference, including security of tenure and financial security.

In *Porter v Magill*,[419] the House of Lords looked to European Court jurisprudence to assist it in considering whether a tribunal is independent. In the matter, Dame Shirley Porter argued that she was entitled under

[416] *Fingleton v R* (2005) 227 CLR 166, 214-231 per Kirby J.
[417] "ultimately" being the operative word here, as the Chief Stipendiary Magistrate's immunity from suit was not a matter raised by Ms Fingleton in her defence or upon Appeal to the Queensland Court of Appeal. It was a matter raised by Kirby J just prior to the hearing before the High Court.
[418] *Van Rooyen v The State,* 2002 (5) SA 246 cited in *Fingleton v R* (2005) 227 CLR 166, 191 fn 41 per Gleeson CJ.
[419] [2002] 2 AC 357, 489 paragraph 88 per Lord Hope of Craighead.

section 22(4) of the *Human Rights Act (UK)* 1998 to rely on an alleged infringement of her Convention rights to an independent and impartial adjudication without undue delay (this was more popularly known as the Homes for Votes scandal and hence not related to military matters; the relevance though is the principles of independence and impartiality identified by the Lords). The Lords held that such an assessment must include considerations as to the manner of appointment of its members, their term of office, and the existence of guarantees against outside pressures.

Section 25 of the *New Zealand Bill of Rights Act* 1990 (*NZBORA*) provides for the 'minimum standards of criminal procedure' with one of those standards being: '(a) The right to a fair and public hearing by an independent and impartial court'. Notably, this right is limited to persons charged with an offence. The Act is silent on the right to a fair, civilian trial, although section 27 of the Act requires the observance of natural justice when a tribunal or other public authority is to determine a person's rights, obligations, or interests.

A potential problem with the *New Zealand Bill of Rights Act* is that the legislation is neither entrenched nor supreme law; thus, it can be changed by a simple majority of Parliament, and other laws can be enacted to specifically override the rights set out in the Act. In that respect a Ministry of Justice Discussion Paper has acknowledged that:

> … it was recently put by Lord Cooke of Thorndon, the Bill of Rights Act 'is regarded internationally as one of the weakest affirmations of human rights'. One element of this weakness is s 4, whereby an ordinary statute may prevail over fundamental civil and political rights which are guaranteed under international law. The UN Human Rights Committee, which monitors New Zealand's implementation of ICCPR, has criticised New Zealand for this feature of its domestic legislation. [420]

[420] Discussion Paper, 'Re-evaluation of the Human Rights Protections in New Zealand Ministry of Justice' (2000) *Te Manatu Ture,* paragraph 51. See also: Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 *Victoria University of Wellington Law Review,* 341; Andrew Butler and

In similar vein, when New Zealand submitted its Third Periodic Report to the Human Rights Committee, it commented:

> The Committee regrets that the provisions of the Covenant have not been fully incorporated into domestic law and given an overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires States parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it does not repeal earlier inconsistent legislation, and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.[421]

However, by its Fourth Review

> The Committee welcomes the examination by the New Zealand Human Rights Commission of all New Zealand Acts, Regulations, government policies and administrative practices with a view to determining their consistency with the anti-discrimination provisions of the Human Rights Act, known as *Consistency 2000*. It further welcomes the audit process undertaken by the Government to identify and resolve the inconsistencies between the Human Rights Act and legislation, regulations, government policies and practices, known as *Compliance 2001*.[422]

But the Committee also expressed various concerns, including:

> Article 2, paragraph 2, of the Covenant requires States parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it has no higher status than ordinary legislation. The Committee notes with concern that it is possible, under the terms of the Bill of Rights, to enact legislation incompatible with its provisions and regrets

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Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005), paragraph 6.6.25; Andrew Butler, 'Limiting Rights' (2002) *Victoria University of Wellington Law Review*, 22; James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 *Otago Law Review*, 613.

[421] Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand,* UN Doc CCPR/C/79/Add.47 A/50/40 (1995), paragraph 176.

[422] Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand.* UN Doc CCPR/CO/75/NZL (2002), paragraph 4.

> that this appears to have been done in a few cases, thus depriving victims of any remedy under domestic law.[423]

While New Zealand courts cannot, on the face of the Act, make a declaration of invalidity with respect to primary legislation that it finds to be incompatible with provisions in the *NZBORA*, the New Zealand Court of Appeal has developed the controversial[424] notion of 'judicial indications of inconsistency'. *Moonen v Film and Literature Board of Review*[425] concerned whether a book and photographs tended to exploit children and were likely to injure the public good. At first instance, the Board of Film and Literature found the material to be objectionable as exploitative and injurious. The appellant appealed to the High Court on several grounds, one of which was that the Board had failed to consider his rights to freedom of thought and expression under the *NZBORA*. The High Court upheld the Board's decision and the appellant appealed to the Court of Appeal. The Court of Appeal held:

> Yet, because s 5 is subject to s 4, that breach [of *NZBORA* rights] does not invalidate the legislation. The inconsistency is recognised but the legislation stands. Section 4 says as much …
>
> …
>
> Where an unjustified and unreasonable limitation nevertheless results, because no other meaning or application is tenable, such limitation, while constituting a breach of s 5, nevertheless prevails by dint of s 4.[426]

However, the Court also observed:

> Section 5 of the New Zealand Bill of Rights Act 1990 gives the Court the power, and on occasions the duty, to indicate that although a statutory provision must be enforced, it is inconsistent with the Bill of Rights Act in

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[423] Ibid, paragraph 8.
[424] Andrew Butler, 'Judicial Indications of Inconsistency - A New Weapon in the Bill of Rights Armoury?'(2000) *New Zealand Law Review* 43; Phillip A Joseph, 'Constitutional Law' (2000) *New Zealand Law Review* 301; James Allan, 'Moonen and McSense' (2002) *New Zealand Law Review* 142; Jim Evans, 'Questioning the Dogmas of Realism' (2001) *New Zealand Law Review* 145.
[425] (2000) 2 NZLR 9.
[426] Ibid, 16.

> that it constitutes an unreasonable limitation on the relevant right in a free and democratic society. Such judicial indications will be of value to the Human Rights Committee constituted under the International Covenant of Civil and Political Rights and also to Parliament.[427]

Whether such a power exists is still not resolved:

> The question as to whether a declaration of inconsistency is an available remedy under the NZBORA is still to be resolved: see the discussion in Geiringer, "An Update on Implied Declarations of Inconsistency under the New Zealand Bill of Rights Act" (Paper presented at "Celebrating 60 years of the Universal Declaration of Human Rights", Wellington, 9 and 10 December 2008). We prefer to leave the question to be decided in a case in which the outcome depends on the answer, as this Court did in *R v Poumako* and the Supreme Court did in *Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54.[428]

Despite the status of the Act and the controversy concerning 'judicial indications of inconsistency', New Zealand case law speaks of the same indicia of independence (and impartiality) as already referred to above. Indeed, in a recent case in the High Court of New Zealand,[429] the Court referred to and adopted the discussion of the concepts of independence (and impartiality) as set out in the Canadian *Valente* decision to which reference has already been made.

Given our shared common law heritage, it is not surprising that the notion of judicial independence is expressed with consistency and harmony across relevant jurisdictions.

2. Impartiality – Australian and comparative law

In criminal trials, judges are the arbiters of law and juries are the arbiters of fact. For a trial to be fair, both sets of decision makers must make their

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[427] Ibid, 9 and 17.
[428] *Boscawen v Attorney-General* (2009) 2 NZLR 229, 241.
[429] *Wikio and Anor v Attorney General* [2008] NZHC 1104; see also, *Muir v Commissioner of Inland Revenue and anor* [2007] NZCA 334.

respective decisions free from actual bias or the apprehension of bias. Impartiality thus concerns two kinds of bias: actual and apprehended (or sometimes referred to as 'imputed', 'apparent', 'apprehended', 'suspected', 'notional' or 'deemed'.[430]) Actual bias concerns the actual subjective motives, attitudes, predilections or purposes of the decision-maker. However, a complaint of apprehended bias requires the complainant to show that 'in all the circumstances the parties or the public *might* entertain a reasonable apprehension that [the decision-maker] *might* not bring an impartial and unprejudiced mind to the resolution of the question involved in it'.[431] Accordingly, apprehended bias is determined by reference to a standard that is more easily made out than actual bias, but apprehended bias must still be 'firmly established'.[432] It is not the safe haven of or further cause of action for a litigant disgruntled by the outcome.

Importantly, the requirement of impartiality applies not only to the judge, but to jurors as well.[433] This is not surprising in criminal matters, as the judge makes decisions as to law and the jury make decisions as to fact. *Webb v The Queen*[434] concerned the impartiality of a juror. Justice Deane (as he then was) identified four kinds of cases where a juror would be disqualified for the appearance of bias: interest; conduct; association; and extraneous information. These four categories apply with equal force to the position of the judge.

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[430] *Minister for Immigration v Jia Legeng* [2001] 205 CLR 507, 541 per Kirby J.
[431] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293-294; see also *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272, 275; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 368; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[432] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 553.
[433] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 per Gleeson CJ.
[434] (1994) 181 CLR 41, 74.

In one of the *Pinochet* cases in the United Kingdom,[435] Senator Pinochet's counsel argued that because Lord Hoffman (who had heard an earlier Pinochet case) was a Director and Chairperson of Amnesty International Charity Limited (AICL), there was a real danger[436] that Lord Hoffmann was biased in favour of the related entity, Amnesty International, which had intervened in that earlier case on which Lord Hoffman had sat. Lord Hoffman's wife also worked for Amnesty International. Alternately, it was submitted by Pinochet's counsel that such links gave rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.[437] The latter submission specifically referred to and relied upon the Australian test of impartiality set out in *Webb v The Queen*.

The House of Lords explored the maxim *nemo judex in sua causa* - a person shall not be a judge in his own cause. What is interesting in this case is that the Lords recognized that impartiality involved more than a judge having a pecuniary interest in the outcome of a matter, say, through a shareholding in a company which was a party to the suit before that shareholding judge.[438] Rather, a judge's alignment with a cause, in the sense of what could be called a philosophical or social justice interest, as opposed to a pecuniary interest in the legal proceedings, satisfied that test and was sufficient to warrant the exclusion of that judge.[439]

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[435] *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[436] *R v Gough* [1993] AC 646.
[437] Per Lord Browne-Wilkinson.
[438] *Dimes v Grand Junction Canal* (1852) 3 HLC 759, 793.
[439] Per Lord Browne-Wilkinson:

> It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or Director of a charity which is

For a considerable period of time, the test of impartiality in the United Kingdom was as set out in *R v Gough*, being whether there is a 'real danger' of bias. However, in *Porter v Magill*, [440] the Lords resolved to approve a 'modest adjustment'[441] to the 'real danger' test, by deleting reference to the concept of 'real danger' altogether and adopting the objective test which asks whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased:

> … the objective test which the Strasbourg court applies … [and] is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court.

The objective test applied by the Strasbourg Court is 'the reasonable apprehension of bias', which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified.[442] In *Hauschildt v Denmark*[443] the Court held that when considering whether there was a legitimate reason to fear that a judge lacked impartiality, the standpoint of the accused was important but not decisive: 'What is decisive is whether this fear can be held objectively justified'.

> closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

[440] [2002] 2 AC 357.
[441] Paragraph 103.
[442] *Piersack v Belgium* (1982) 5 EHRR 169, 179-180, paragraphs 30-31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, paragraph 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-403, paragraph 30.
[443] (1989) 12 EHRR 266, 279, paragraph 48.

In Canada, again in the decision of *Valente*,[444] LeDain J spoke not only of independence as referred to in the previous sub-section, but also of impartiality:

> Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' … connotes absence of bias, actual or perceived.[445]

In Canada, the test for bias pre-dates the Charter, and can be traced back to 1954,[446] although citations often refer to the specific description given by Du Grandpré J in *Commission for Justice and Liberty v The National Energy Board*[447] in 1978 being that

> [t]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons in the community in which the matter occurred, applying themselves to the question and obtaining thereon the required information.

In New Zealand, the common law[448] has followed the UK's 'real danger' test as set out in *R v Gough.* Of the differing approaches between the 'real danger' test on one hand, and a 'reasonable apprehension' on the other, Cooke J said:[449]

> If a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should countenance such refinements. In the result we accept the real danger test as satisfactory.

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[444] *Valente v The Queen* [1985] 2 SCR 673; *Mackin v New Brunswick* [2002] 1 SCR 405; *Ell v Alberta* [2003] 1 SCR 857.
[445] *Valente v The Queen* [1985] 2 SCR 673, 685.
[446] Association of Maritime Arbitrators of Canada, Quebec, *Bias,* http://www.amac.ca/Bishop.htm at 13 January 2009.
[447] [1978] 1 SCR 369; see also *Mackin v New Brunswick* [2002] 1 SCR 405; *Ell v Alberta* [2003] 1 SCR 857.
[448] *Auckland Casino Ltd. v Casino Control Authority* [1995] 1 NZLR 142.
[449] Ibid, 149.

Impartiality has also been subject to post-regime change consideration in South Africa,[450] wherein the Labour Appeal Court of South Africa has observed that:

> Although the right to a fair trial runs throughout our common law jurisprudence it found majestic form and content in section 34 of the Constitution of the Republic of South Africa, Act 108 of 1996.

Section 34 of that *Constitution* provides for the right of everyone to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. In so far as impartiality is concerned, that Court referred to and relied upon a long history of cases,[451] which provided that the applicant's for recusal had the onus of showing that they entertained an apprehension of bias on the part of the court and that apprehension was reasonable.

In a high profile case in South Africa, the 'SARFU' judgment (South African Rugby Football Union),[452] one of the parties to the dispute challenged the impartiality of certain judges of the Appeal Court, who had been members of President Nelson Mandela's political party, in circumstances where President Mandela was also a party to the dispute.

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[450] *South African Commercial Catering and Allied Workers Union and others v Irvin and Johnson Limited, Seafoods Division, Fish Processing* [1999] ZALAC 17, paragraph 24

[451] See paragraph 25.

[452] *The President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147. See also:

- Office of the President, 'Mandela: Response to Judgement in Sarfu Case', 13 August 1998, http://www.info.gov.za/speeches/1998/98814_0w6509810203.htm at 13 January 2009.
- Ministry of Sport and Recreation, 'Mandela: Sarfu Case Ruling' 17 April 1998, http://www.polity.org.za/polity/govdocs/pr/1998/pr0417a.html at 13 January 2009.
- ANC Daily Briefing, 'Sarfu Judgment Coming, Govt Told' 4 August 1998, http://70.84.171.10/~etools/newsbrief/1998/news0804 at 13 January 2009.

Further it was alleged that the President of the Court had a long and still current relationship of lawyer and client with the President's political party, and by implication, the President. The application for disqualification was refused.

The Court held:[453]

> The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to hear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of the counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience.

In some countries, such as New Zealand and previously England, the test of apprehended bias relies upon there being a 'real danger' of bias.[454] In other countries, such as Australia, the test depends upon whether a reasonable person *might* entertain a reasonable apprehension that the decision-maker *might* not bring an impartial and unprejudiced mind to the resolution of the question involved. Of course, there are subtle differences in the tests, but relevantly for these purposes, all jurisdictions fiercely protect and promote impartially as a constituent and mandatory element of a fair trial.

[453] At 177.
[454] *R v Gough* [1993] AC 646 as modified by *Pinochet* above.

E. Independence and impartiality: international human rights law

1. The ICCPR

Given the language of Article 14 and the specific reference to independent and impartial courts and tribunals (entities which the Committee has defined broadly to include any judicial bodies entrusted with a judicial task[455]) it is not surprising that the Human Rights Committee has found that the requirements of a competent, independent and impartial tribunal, as contemplated by Article 14(1), is an absolute right that is not subject to any exception.[456]

The Committee has also had opportunities to consider what constitutes a fair trial, as provided for in Article 14(3) and thus concluded the following matters as constituting violations of the relevant provisions:

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[455] *Perterer v Austria,* UN Doc CCPR/C/81/D/1015/2001 (2004)*,* paragraph 9.2 (disciplinary proceedings against a civil servant); *Everett v Spain*, UN Doc CCPR/C/81/D/961/2000(2004), paragraph 6.4 (extradition).

[456] 'The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception'. *Gonzalez del Rio v Peru,* UN Doc CCPR/C/46/D/263/1987 (1992), paragraph 5.2. That being said, the HRC's *General Comment No 32*, above n 381, elaborates:

> While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.[] Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,[] except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.[] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.

- excluding the public, the accused and his or her representatives from the hearing for reasons other than the exceptions provided in Article 14(1);[457]
- restricting an accused person's right to a lawyer of their own choice;[458]
- severely restricting or denying the accused person's right to communicate with their lawyers, particularly when held incommunicado;[459]
- threats made to the lawyers;[460]
- providing inadequate time to prepare the case;[461] or
- severely restricting or denying the accused person's right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.[462]

2. The ICCPR and independence

In its *General Comment No 32*, the Committee referred to the same kinds of indicia of independence as do the courts of common law countries when

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[457] *Becerra Barney v Colombia,* UN Doc CCPR/C/87/D/1298/2004 (2006); paragraph 7.2; *Polay Campos v Peru,* UN Doc CCPR/C/61/D/577/1994 (1997), paragraph 8.8; *Gutiérrez Vivanco v Peru,* UN Doc CCPR/C/74/D/678/1996 (2002), paragraph 7.1; *Carranza Alegre v Peru*, UN Doc CCPR/C/85/D/1126/200228 (2005), paragraph 7.5.

[458] *Gutiérrez Vivanco v Peru,* UN Doc CCPR/C/74/D/678/1996 (2002), paragraph 7.1.

[459] *Polay Campos v Peru,* UN Doc CCPR/C/61/D/577/1994 (1997), paragraph 8.8; *Carranza Alegre v Peru*, UN Doc CCPR/C/85/D/1126/200228 (2005), paragraph 7.5.

[460] *Vargas Más v Peru,* UN Doc CCPR/C/85/D/1058/2002 (2005), paragraph 6.4.

[461] *Quispe Roque v Peru,* UN Doc CCPR/C/85/D/1125/2002 (2005), paragraph 7.3.

[462] *Gutiérrez Vivanco v Peru,* UN Doc CCPR/C/74/D/678/1996 (2002), paragraph 7.1; *Carranza Alegre v Peru*, UN Doc CCPR/C/85/D/1126/200228 (2005), paragraph7.5; *Quispe Roque v Peru,* UN Doc CCPR/C/85/D/1125/2002 (2005), paragraph 7.3; *Vargas Más v Peru,* UN Doc CCPR/C/85/D/1058/2002 (2005), paragraph 6.4.

interpreting domestic, common law obligations. Thus, the Committee referred to the requirement of independence as referring to:[463]

- the procedure and qualifications for the appointment of judges;
- guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office – this is a prerequisite for an independent judiciary;[464]
- where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions; and
- the actual independence of the judiciary from political interference by the executive branch and legislature – where an Executive can control or direct the judiciary is a relationship or influence which is incompatible with the notion of an independent tribunal.[465]

With respect to political influence, the Committee in its *General Comment No 32*, and judgments/observations such as its *Concluding Observations concerning Slovakia*,[466] urged States to take specific measures to protect the judiciary from political influence and interference:

> … through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.

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[463] *General Comment No 32*, above n 381, paragraph 19. See also Nowak, above n 377, 319-320.
[464] Sarah Joseph, Jenny Schultz and Melissa Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed 2004), paragraph 14.30; United Nations Human Rights Committee, Concluding Observations on Slovakia, UN Doc CCPR/C/79/Add.79 (1997), paragraph 18; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 128 per Kirby J.
[465] *Oló Bahamonde v Equatorial Guinea,* UN Doc CCPR/C/49/D/468/1991 (1993), paragraph 9.4.
[466] Concluding Observations, Slovakia, CCPR/C/79/Add.79 (1997), paragraph 18.

Unsurprisingly, the Human Rights Committee has also found that dismissal of judges by the executive, for example, before the expiry of the term for which they have been appointed, without any specific reasons being given to them and without effective judicial protection being available to contest the dismissal, was incompatible with the independence of the judiciary.[467] The same is true, for instance, in the case of the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law to test or determine those allegations.[468]

Again, the Committee's language with respect to independence emphasises the same characteristics, features and values as was revealed above in domestic jurisdictions.

Whilst the independence of military trials is considered in detail in Part F below, Nowak notes: 'It goes without saying that the independence of the judiciary is not always assured with military courts, revolutionary tribunals and similar special courts'.[469]

3. The ICCPR and impartiality

The Committee has observed in both its *General Comment No 32*,[470] and in case law,[471] that impartiality has two aspects to it. First, the judicial officer's decision making must be free from personal bias, prejudice and misconceptions – the concept of actual bias referred to in the common law summarised above. Second, the reasonable observer watching the proceedings must also consider that the process and proceedings appear

[467] *Pastukhov v Belarus*, UN Doc CCPR/C/78/D/814/1998 (2003), paragraph 7.3.
[468] *Mundyo Busyo v Democratic Republic of Congo,* UN Doc CCPR/C/78/D/933/2000 (2003), paragraph 5.2.
[469] Nowak, above n 377, 320.
[470] Paragraph 21.
[471] *Karttunen v Finland,* UN Doc CCPR/C/46/D/387/1989 (1992), paragraph 7.2.

impartial – again, the concept of apprehended bias evident at common law, as well as reliance upon the reasonable person tests as prevails in common law countries.

4. ECHR

Like Article 14 of the *ICCPR*, Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides for procedural equality and fairness. Also like the Human Rights Committee, the European Commission and Court of Human Rights have had the opportunity to examine and explore the substance of this Article,[472] this being particularly so given Article 6 is the article most commonly invoked be applicants to the Strasbourg court.[473]

5. ECHR - Independence

As highlighted by Clare Ovey and Robin White,[474] a lack of independence can be found through the 'personality, behaviour or prior involvement of' the judge or jury, or, through matters concerning the judicial institution itself. With respect to the latter consideration, when deciding whether a court or tribunal is independent, the European Court of Human Rights considers:

- the manner of appointment of its members;
- the duration of their office;

[472] See for example, the summaries of jurisprudence in *Findlay v United Kingdom* (1997) 24 EHRR 221*; V v United Kingdom* (1999) 30 EHRR 121.
[473] Ovey and White, above n 385, 158.
[474] Ibid, 183.

- the existence of guarantees against outside pressures;[475]
- the question whether the body presents an appearance of independence; and[476]
- the independence of the judicial body and its decision makers from both the executive and the parties.[477]

As for the appointment process, the Court has found that the mere fact that judicial officers are appointed by the Executive is not, by itself, a violation of the Article.[478] Rather, to impugn an appointment process for a lack of independence, the European Court would need to be satisfied that the appointment processes or practices were unsatisfactory when considered as a whole, or, that the tribunal itself was created in such a way as to influence the outcome.[479] Further, appointments for fixed terms, as opposed to *ad hoc* terms, have been seen as guarantees of independence.

However, the length of the fixed term has been a cause of disquiet – for example, in one case, fixed six-year terms for Appeal Council members was found to provide a guarantee of independence,[480] but, in another case,[481] a three-year term was considered too short.[482]

A lack of independence has also been found in military settings, for example, where a military judge sits as a member of a state court, as occurred in Turkey for the trial of civilians for offences against national security. The Strasbourg Court found that the military judge's duty to

[475] *Salov v Ukraine* (2007) 45 EHRR 51.
[476] *Campbell and Fell v UK* (1985) 7 EHRR 165, paragraph 78.
[477] *Ringeisen v Austria* (1971) 1 EHRR 455, paragraph 95. *Sramek v Austria* (1985) 7 EHRR 351.
[478] *Campbell and Fell v UK* (1985) 7 EHRR 165, paragraph 79.
[479] *Zand v Austria* (1979) 15 EHRR 70, paragraph 77.
[480] *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1.
[481] *Campbell and Fell v UK* (1985) 7 EHRR 165, paragraph 80.
[482] But, it was acknowledged that the posts were unpaid and it was difficult to get volunteers, and it was not considered a violation of Article 6.

observe military discipline[483] lead to the consequence that the accused did not have a trial before an independent judicial entity.

As with the majority of common law precedent, the European Court imposes an objective test when considering suspicions of dependence. Thus, if a judicial officer came from and then returned to the very department upon which she or he had passed judgment, or made decisions about accused people whom he had served with or could again serve with, it would objectively appear that she or he would be loyal to colleagues and subordinate to superiors. Such an entity would therefore lack independence (and impartiality).[484]

The Court has also found the following to be violations of Article 6:

- where the same judges performed both advisory and judicial roles in the case;[485] and
- where a judge presided over a planning appeal and had also participated in the parliamentary debate on the adoption of the development scheme.[486]

6. ECHR - impartiality

The common law concepts of actual bias and apprehended bias find equivalents in European Court jurisprudence.[487] Actual bias, the Court has acknowledged, is hard to prove, with there being a presumption of

[483] *Incal v Turkey* (2000) 29 EHRR 449.
[484] *Belilos v Switzerland* [1988] EHHR 4, paragraphs 66-67.
[485] *Procola v Luxembourg* (1995) 22 EHRR 193.
[486] *McGonnell v United Kingdom* (2000) 30 EHRR 289.
[487] *Piersack v. Belgium* (1983) 5 EHRR 169, paragraph 30. *Fey v Austria* (1993) 16 EHRR 387.

personal impartiality.[488] As for apprehended bias, the European Court, like most domestic common law countries, adopts an objective test to ascertain whether the court processes appear to have lacked impartiality.[489] Both forms of partiality apply in equal force to jurors as well. Thus, when a juror in a French domestic court was overheard by a third person to say 'What's more, I'm a racist', but the domestic court declined to investigate the allegation, the European Court found a violation of Article 6.[490] The basis of the violation was that because the domestic court declined to take note of the statement, the accused was denied the opportunity to remedy the situation. Conversely, where a domestic court does properly investigate allegations of impartiality, a violation is unlikely to be found.[491]

The European Court of Human Rights has paid considerable attention to cases where the judge has performed a range of procedural roles in the course of the one proceeding. Accordingly:

- a judge cannot have been in a member of the department that investigated the initial complaint, initiated the prosecution and then hear the matter as a judicial officer; [492]
- a judge who made pre-trial detention/bail decisions and referred to a 'particularly strong suspicion' of the accused person's guilt could not then hear the substantive matter; [493]
- a judge who had heard and determined the guilt of one accused at trial, could not then sit on the appeal against conviction of a

[488] *Hauschildt v Denmark* (1990) 12 EHRR 266, paragraph 47. *Lavents v Latvia* [2002] ECHR 786.
[489] *Fey v Austria* (1993) 16 EHRR 387, paragraph 30. Sigurðsson v Iceland (2005) 40 EHRR 15.
[490] *Remli v France* (1996) 22 EHRR 25.
[491] *Gregory v United Kingdom* (1997) 25 EHRR 577; *Sander v United Kingdom* (2000) 31 EHRR 1003.
[492] *Piersack v Belgium* (1983) 5 EHRR 169.
[493] *Hauschildt v Denmark* (1990) 12 EHRR 266.

co-accused, particularly when the judge at first instance had referred to the complicity of all accused;[494]

- judges who sat on the trial at first instance, could not then sit on the appeal from that judgment; and[495]
- a judge who decided upon an objection at first instance, could not then sit on the appeal against that decision.[496]

The European Court's decisions are thus consistent with the notions of independence and impartiality at domestic common law.

F. Independence and impartiality: military trials

Before discussing challenges to the independence and impartiality of military trials in various jurisdictions, it will be useful to first explain some relevant terms which feature in the ensuing analysis.

The **Judge Advocate General** (JAG) is not a general legal adviser to the military.[497] Instead, in Australia, the JAG must be a judge of a Federal Court or a State Supreme Court. The JAG makes procedural rules for Service tribunals, provides the final legal review of proceedings within the ADF, and participates in the appointment of Judge Advocates, Defence Force Magistrates, Presidents and members of courts martial, and legal officers for various purposes.[498] In Australia, the Governor-General appoints the JAG, with that appointment being either on a full-time or part-time basis.[499] The JAG is assisted by three Deputy Judge Advocates General (DJAG), one for each Service.

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[494] *Ferrantelli and Santangelo v Italy* (1997) 23 EHRR 33.
[495] *Oberschlick (No. 1) v Austria* (1991) 19 EHRR 389.
[496] *De Haan v the Netherlands* (1997) App No. 84/1996/673/895.
[497] In Australian, the role of general legal advice falls to the Director General of The Defence Legal Service (DGTDLS).
[498] http://www.defence.gov.au/JAG/ at 11 May 2010.
[499] *DFDA* s 179.

When a court martial is convened to determine a matter, a **Judge Advocate** is appointed to the court from the panel of judge advocates; the panel of judge advocates comprises persons who have been nominated to that panel by the JAG and upon nomination, appointed to the panel by the Chief of Defence or a service chief.[500] Judge Advocates, in Australia, serve on the panel for no more than three years, but can be re-appointed to the panel for a further period or periods. Those on the panel must be legal practitioners. When appointed to sit on a specific court martial, the judge advocate gives binding advice to the court martial panel on matters of law.

A **court martial panel** is similar to a civilian jury. In Australian courts martial, matters of fact are decided by the court martial panel, as they are by the jury in Australian civilian criminal trials. However, the military court martial panel is comprised of three to five career service officers, whereas the civilian jury is usually a panel of 12. Clearly, the pool from which a court martial panel can be drawn is much smaller than civilian jury pools, and majority verdicts are allowed in military matters. (If a matter is to be heard before a Defence Force Magistrate, that legally trainer officer decides both matters of fact and matters of law.)

The **Convening Authority** has been previously discussed (see Chapter 1, Part B). As noted earlier, the Convening Authority makes a number of important decisions in the trial process including: whether there should be a trial; the nature of the tribunal and charges; who will be the trial judge and jury; who will be the prosecutors; and to confirm the outcome or otherwise impose a different determination of guilt or innocence, and sentence upon conviction.[501]

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[500] *DFDA* s 196.

[501] For confirmation of these multiple roles, see *Military Justice Report 1999*, Table 4.1, although in Australia, some of these roles have been removed from the Convening Authority.

1. Independence and impartiality: United Kingdom military trials

The multiple roles of the convening authority and their effect on the independence and impartiality of courts martial were the subject of the judgment of the European Court of Human Rights in *Findlay v United Kingdom*.[502] As the Australian courts martial and convening authority system is based on the UK system of military justice and the multiple roles traditionally held within the Australian military justice system are the same as those which were impugned in *Findlay* and later in *Grieves v United Kingdom*[503] (discussed below), this jurisprudence is of particular relevance to Australia. This is especially so given that Article 14 of the *International Covenant on Civil and Political Rights* (by which the United Kingdom is also bound) is very similar to the terms of Article 6 of the European Convention, which was the provision in issue before the European Court in *Findlay*.

The Findlay decision arose out of an incident 1990. After a night of heavy drinking, Lance-Sergeant Alexander Findlay of the Scots Guards held several members of his unit hostage with a loaded firearm, and threatened to kill some of them, then himself. He surrendered after firing two shots into a television. In November 1991, Findlay pleaded guilty to three charges of common assault (a civilian offence), two charges of conduct to the prejudice of good order and military discipline (a military offence) and two charges of threatening to kill (a civilian offence). He was tried before a court martial and sentenced to two years' imprisonment, reduction in rank and discharge from the service.

Unhappy with the sentence and lack of reasons given for it, and after exhausting the review mechanisms in the *Army Act* 1955, Mr Findlay lodged an application with the European Court of Human Rights. There,

[502] *Findlay v United Kingdom* (1997) 24 EHRR 221.
[503] *Grieves v United Kingdom* (2004) 39 EHRR 2.

he submitted that the court martial which had been convened to determine his sentence was not an independent and impartial tribunal; that it did not give him a public hearing; and, that it was not a tribunal established by law – accordingly, he submitted that his rights under Article 6 of the European Convention had been violated. With respect to independence and impartiality, the European Court found that Mr Findlay's fears about the independence of the court martial could be 'objectively justified'.[504] The European Court identified a range of flaws in the court martial that had determined Mr Findlay's guilt. First, the Court held that the convening officer played a central role in the prosecution of the case. Second, it held that all members of the court martial board (that is, the deciders of fact) were subordinate in rank to the convening officer and under his command. Third, it held that the court martial findings had no effect unless and until the finding was confirmed by the convening authority. Taken together, '[t]hese circumstances gave serious cause to doubt the independence of the tribunal from the prosecuting authority.' The European Court also expressed concern about the *ad hoc* nature of courts martial, because this suggested a lack of independence for its members.

The European Court reviewed the relevant domestic law and practice,[505] and found that independence of a tribunal was to be assessed by the 'manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.[506] With respect to impartiality, it found that the tribunal must firstly be 'subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint'. It explained the latter to mean that a tribunal must

[504] Paragraph 72.
[505] *Army Act* 1955 (UK), the *Rules of Procedure (Army)* 1972 (UK) and the *Queen's Regulations* 1975 (UK).
[506] Paragraph 73; see also *Bryan v United Kingdom* (1995) 21 EHRR 342, paragraph 37.

offer satisfactory guarantees to exclude legitimate doubt in this respect.[507] The European Court held that Mr Findlay's concerns about the independence and impartiality of the tribunal 'were objectively justified'.[508]

The *Findlay* decision caused legislative reforms to the British courts martial system. The role of convening authority was abolished, and its functions distributed between a prosecuting authority, the courts martial administration officer and a reviewing authority, all of whom are separate from one another.[509]

Dean Morris was also to be responsible for changes to the military justice system in the United Kingdom.[510] Once of the Household Cavalry Guard Regiment of the British Army, Morris complained of being bullied within his Regiment. Fearing further attack (in an earlier attack he said he had been hit on the head, causing him to fall from his horse and hit his head on the ground) he went absent without leave and was charged and convicted accordingly. Before the European Court, Morris argued that the structure of the court martial hearing his matter was such that he had been denied an independent and impartial hearing.

In 2002, the European Court dismissed most of his complaints, but found that the court martial which had been convened to hear his matter offended the Convention because a non-judicial authority automatically reviewed convictions and sentences, and could substitute its own findings of guilt or innocence, and findings as to sentence in lieu of that reached by the court martial. As a consequence, and following further review, the *Armed Forces Act* 2006 was passed. Most significantly the Act abolished the three, previously separate, service discipline Acts, unifying military

[507] Paragraph 73; see also *Pullar v United Kingdom* (1996) 22 EHRR 391, paragraph 30.
[508] Paragraphs 79, 80.
[509] Ann Lyon, 'After *Findlay*: A consideration of some aspects of the military justice system' in Fidell and Sullivan, above n 21, 221; Rubin, above n 38, 36–57.
[510] *Morris v United Kingdom* (2002) 34 EHRR 1253.

justice under the one system with tri-service application. With respect to the *Morris* outcome, the Act also abolished the Reviewing Authority's power to amend a finding or sentence, and conferred upon all convicted persons a right of appeal to the Court Martial Appeal Court.

In the subsequent decision of *Grieves v United Kingdom,*[511] the European Court of Human Rights considered an application challenging the consistency of Royal Navy court martial proceedings with the Convention. In June 1998, Mr Grieves had been convicted by naval court martial of unlawfully and maliciously wounding with intent to do grievous bodily harm contrary to the *Offences Against the Person Act* 1861 – a civilian criminal law act. He was sentenced to three years' imprisonment, had his rank reduced, was dismissed from the service and ordered to pay £700 compensation. At his court martial, the Judge Advocate (the entity required to give binding rulings on matters of law), a naval barrister, was lower in rank than the President of the court martial, which in turn raised implications for perceptions of command influence. Both the defending and prosecuting officers were junior in rank to the Judge Advocate.

Like Findlay, Grieves argued that the court martial that had tried him lacked independence and impartiality, and that he was therefore denied a fair and public hearing by an independent and impartial tribunal established by law contrary to Article 6 of the *European Convention on Human Rights*. More particularly, Grieves complained that in the Navy, unlike in the RAF and Army, the role of judge advocate was not out-sourced to civilian lawyers who did not fall within the chain of command.

The European Court found objective justification in Grieves' complaints about the judge advocate and held that the judge advocate's appointment and his or her position within the chain of command was not a strong guarantee of independence:

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[511] *Grieves v United Kingdom* (2004) 39 EHRR 2.

> The Court recalls that in order to establish whether a tribunal can be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.
>
> In this latter respect, the Court also recalls that what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. [512]

It then added:

> 89. Accordingly, the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial (army and air-force court-martial systems being the same for all relevant purposes – the *Cooper* judgment, § 107), for the absence of which the Government have offered no convincing explanation.
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> 90. Sixthly and finally, the Court considers the Briefing Notes sent to members of naval courts-martial to be substantially less detailed and significantly less clear than the CMAU (RAF) Briefing Notes examined in detail in the above-cited *Cooper* case (see paragraphs 45-62 of that judgment). The Court considers that they are consequently less effective in safeguarding the independence of the ordinary members of courts-martial from inappropriate outside influence. [513]

By contrast, in the matter of *Cooper v the United Kingdom*,[514] a judgement delivered at the same time as *Grieves*, the Court found no violation of Cooper's Article 6(1) rights. Graham Cooper was a serving member of the Royal Air Force when, in 1998, he was convicted of theft before a court martial. He was sentenced to 56 days in prison, reduced in rank and dismissed from the service. Before the Strasbourg Court, Cooper made a number of complaints, including that a service tribunal could not try civilian criminal charges; the court rejected this submission. In response to his challenge to the independence of the participants at his court martial, the Court found sufficient separation between the prosecuting, convening and adjudicating roles in the court martial process, and found sufficient

[512] Paragraph 69.
[513] Paragraph 89.
[514] *Cooper v United Kingdom* (2004) 39 EHRR 8.

independence of the decision-making bodies from chain of command, rank or other service influence. Unlike the status of the judgement advocate in *Grieves'* court martial, Cooper's judge advocate was a civilian, appointed by the Lord Chancellor (a civilian) and had been appointed to a court martial by the Judge Advocate General (also a civilian). Accordingly, the European Court found there was no ground to question the independence of the Air Force judge advocate.

However, the *Cooper* decision was not to be the end of challenges to the independence and impartiality of courts martial. Mathew Stow,[515] an Operator Mechanic in the Royal Navy at the relevant time, entered a plea of guilty to two charges of drunkenness and using insubordinate language to a superior officer. Stow was sentenced to 42 days of detention and dismissed from the service. At the start of his trial, prior to the entry of his plea of guilty, Stow applied to the Judge Advocate that the proceedings be stayed because the circumstances surrounding the Prosecuting Authority violated Article 6 of the ECHR. The judge advocate dismissed that application, and as a consequence, Stow pleaded guilty.

What differentiated this matter from the previous *Findlay* and *Morris* decisions was that those matters involved challenges to the entities which made decisions in the trial process: the courts-martial panel (that is, similar to jurors deciding matters of fact) and the judge advocate (who makes findings of law). In *Stow*, the challenge was not to these decision making entities, but to the role of the Prosecuting Authority and its lack of perceived independence.

Upon the judge advocate's dismissal of his application to stay, Stow then petitioned against his conviction to the Reviewing Authority. The Reviewing Authority also refused his petition. Undeterred, Stow then appealed to England and Wales Court of Appeal (Criminal Division), again

[515] *R v Stow* [2005] EWCA Crim 1157.

arguing that his Article 6 rights to an independent and impartial trial had been violated because the Prosecuting Authority did not enjoy sufficient independence from the chain of command. In particular, he made three complaints: (1) that at the time of his trial, the performance of the prosecuting authority was reported upon within the service, and as a consequence, it was argued that the reporting could form pressure upon the Prosecutor from his superiors; (2) the person who constituted the Prosecuting Authority in Stow's case was not in his final posting, meaning he was perceived to be susceptible to 'inducements, enticements or threats'[516] with respect to his future career; (3) Stow complained that the Prosecuting Authority was of junior rank, meaning he was less immune from pressure or influence'[517] from higher ranked officers. Stow's counsel invited the Court not to look at each complaint in isolation, but cumulatively.[518]

The Court of Appeal received into evidence one of the reports which had assessed the Prosecuting Authority's performance as a prosecutor. Relevantly, at paragraph 21 of the judgment, the Court extracted the Report (emphasis added):

> CROZIER has made a most promising start to this appointment. He was already very experienced as a naval prosecutor and quickly brought his considerable expertise to bear during a busy period for his organisation which has seen the successful resolution of some long-running and complex cases. I understand that his advocacy in court is of the highest order and he has successfully appeared in the Court of Appeal as the respondent. He leads with considerable enthusiasm, exhibiting sensitive but most effective management style that manifests itself in a team of happy, well-motivated individuals who turn in consistently good results. He is an articulate and good-humoured officer with a deep commitment to the Service that reflected in his impeccable reliability and invariably good judgment.

[516] Paragraph 14.
[517] Paragraph 15.
[518] Paragraph 16.

While the Court did not explicitly say so, the references to 'successful appearances for the respondent' and 'consistently good results', can only being references to outcomes favourable to the Navy.

The Court held that Article 6(1), and in particular, the right to an independent and impartial trial, extended to the role of the Prosecuting Authority. Further, the Court held that even though the prosecutor was bound by the civilian Code for Crown Prosecutors and Bar Code of Conduct, the process of reporting on a naval prosecutor's performance in courts martial led to the objective perception that superiors within the chain of command could bring pressure to bear on the prosecutor when fulfilling his or her prosecutorial duties. The Court was less concerned about the second and third challenges raised by Stow. At paragraph 39, the Court held (emphasis added):

> We have not found this an easy case to determine. There were undoubted safeguards in existence, as set out earlier in this judgment. Certainly the Prosecuting Authority *should* have acted independently and impartially and there is no evidence that he did not. But merely because he was under such an obligation is not enough. He has to be in such a position that an objective observer would regard him as free from potential pressure in his decision-making. Given the system of reporting on him which existed at that time within the Royal Navy, we have concluded that such an observer would not have seen him as sufficiently protected from such pressure. That then has to be combined with the other factors referred to, namely his rank and scope for further promotion within the service. When we put all those together, we are forced to conclude that the naval Prosecuting Authority at the time of this court-martial did not enjoy necessary safeguards of his independence and impartiality.

The appeal was allowed and Stow's conviction quashed.

2. Independence and impartiality: Canadian military trials

In 1987, the Supreme Court of Canada[519] confirmed that section 11 of the *Charter* applied to the proceedings of a court martial, and indeed to all persons prosecuted by the State for public offences

> involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. The section is intended to provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense.

Five years later, the Supreme Court of Canada[520] considered a matter concerning Corporal Michel Généreux, a member of the Canadian Forces, who had been charged with three counts of possession of narcotics for the purpose of trafficking and one count of desertion. He was convicted before a court martial but, on appeal, contended that the court martial was not an independent and impartial tribunal for the purposes of sections 7[521] and

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[519] *R v Wigglesworth* [1987] 2 SCR 541. Roger Wigglesworth was a Constable of the Royal Canadian Mounted Police. In August 1981, he was interviewing a person suspected of drink driving. In the course of the interview it was alleged that Wigglesworth had hit the suspect until he confessed his guilt. Wigglesworth was charged with two offences - the civilian crime of common assault, and an offence against the *Royal Canadian Mounted Police Act* (being unnecessarily violent to a prisoner). The Mounted Police charge was heard by a court martial, where a conviction was recorded. The civilian court declined to proceed with the civilian charge on the basis of *autrefois convict*. The Crown appealed that decision. The matter progressed through various levels of appellate courts, ultimately finding its way to the Supreme Court.

For Wigglesworth, the outcome of the court's decision was that despite being found guilty of a 'major service offence' under the *Royal Canadian Mounted Police Act* he could also be tried for common law assault without violating his Charter rights protecting against double jeopardy. That was so, even though both matters arose out of exactly the same single assault. The justification was the purpose of the statute – the service offence involved an internal disciplinary matter, whilst the charge of common assault involved the protection of society.

[520] *R v Généreux* [1992] 1 SCR 259.

[521] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11(d)[522] of the *Charter.* Further, he argued that the court martial had violated his rights to equality guaranteed by section 15[523] of the *Charter* by hearing the drugs charges along with the military charge of desertion.

A majority of five members of the Supreme Court of Canada[524] held that the essential conditions for independence included: security of tenure; financial security; and institutional independence. The majority held that Généreux's court martial lacked those critical features and thus did not comply with the requirements of section 11(d) of the *Charter*. First, the majority held that the Judge Advocate at the court martial did not enjoy sufficient security of tenure because the relevant Act and regulations failed to protect a Judge Advocate against discretionary or arbitrary interference by the Executive. In reaching this conclusion, the majority noted that Judge Advocates were appointed by the Judge Advocate General, who was not independent of, but was rather a part of the executive: 'The Judge Advocate General serves as the agent of the executive in supervising prosecutions'.[525] The Court was also critical of the appointment of judge advocates on a case-by-case basis because there was no objective guarantee that his or her career as military judge would not be affected by decisions tending to favour an accused rather than the prosecution.[526] The majority determined that a reasonable person might well hold an apprehension that the Judge Advocate had been selected because of past

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[522] Section 11(d) provides:

> Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

[523] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[524] Lamer CJC, Sopinka, Gonthier, Cory and Iacobucci JJ; L'Heureux-Dubé J dissenting.
[525] *R v Généreux* [1992] 1 SCR 259, paragraph 5.
[526] Ibid, paragraph 5.

performances in satisfying, or at least not disappointing Executive expectations. Security of tenure, the majority held, was required so that a military judge would both be beyond, and appear to be beyond, 'the discretionary or arbitrary interference of the executive'.[527]

The second problem identified by the majority concerned the lack of financial security for all Judge Advocates and all courts martial members.[528] Since a military legal officer's salary was determined by a performance evaluation, there was nothing to prevent an officer's performance on a court martial being evaluated for salary determinations. As a consequence, the majority held that the executive could, or it could appear that the executive could, interfere with the salaries and promotion opportunities of judge advocates and members of a court martial based upon their court martial performance.[529]

The third flaw found by the majority concerned a perceived lack of institutional independence for the court martial.[530] When the majority examined the legislation governing courts martial they found it to be unacceptable that the authority that convened the court martial – the convening authority being part of the executive - also appointed the prosecutor, as well as the members of the court martial.[531] Further, institutional independence was undermined because the Judge Advocate General, who was appointed by the Governor-General in Council, appointed the judge advocates.[532] To satisfy section 11(d), the majority held that an independent and impartial judicial officer should appoint military judges to sit as judge advocates.[533]

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[527] Ibid, paragraph 5.
[528] Ibid, paragraph 6.
[529] Ibid, paragraph 6.
[530] Ibid, paragraph 6.
[531] Ibid, paragraphs 6-7.
[532] Ibid, paragraph 6.
[533] Ibid, paragraph 7.

Karen Forster's appeal to the Supreme Court of Canada, *R v Forster,*[534] was heard at the same time as the *Généreux* matter. Forster, a commissioned officer in the Canadian Armed Forces, had been relieved of her duties in Edmonton, but then posted to Ottawa. However, when she did not report to her Ottawa posting, she was arrested by the military police and later charged with being absent without leave contrary to the Canadian *National Defence Act.* At the court martial, Forster testified that she did not attend at her new posting because she had already tendered a letter of resignation, and thus honestly believed that she had resigned from the Armed Forces. Forster was convicted and her appeal to the Court Martial Appeal Court was dismissed. Like Généreux, Forster petitioned the Supreme Court and argued that the court martial which heard her matter was not an independent and impartial tribunal for the purposes of section 11(d) of the *Canadian Charter of Rights and Freedoms*.

Forster's appeal was allowed and a new trial ordered. Eight of the Supreme Court judges[535] followed the reasons given in *Généreux*, to the effect that the structure and constitution of Forster's court martial did not meet the requirements of section 11(d) of the *Charter* and that that infringement of her Charter rights could not be justified under section 1 of the *Charter*. [536]

As a consequence of the *Généreux* and *Forster* decisions, the provisions of the *National Defence Act* and relevant regulations were amended. No longer could the performance of an officer sitting as a member of a court martial be used for pay and promotion purposes. No longer could the convening authority appoint the President and members of the court. The

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[534] [1992] 1 SCR 339.

[535] Lamer CJ and Sopinka, Gonthier, Cory and Iacobucci JJ. La Forest, McLachlin and Stevenson JJ largely agreeing with Lamer CJ; only L'Heureux-Dubé J dissented.

[536] The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

number of officers required to sit on the court was reduced from nine to five for a general court martial, and to three for Disciplinary Courts martial. The judge advocate was given greater independence to decide matters of law by removing the fetters which could be imposed upon the Judge Advocates decision making from those higher up in the chain of command.[537]

The next Canadian court decision of significance came on 24 April 2008, when the Court Martial Appeal Court of Canada handed down a far-reaching decision[538] - it struck down the provisions of the *National Defence Act* that provided for the Director of Military Prosecutions to select which type of court martial would hear proceedings for a specific case.

Like the Australian DFDA and United States Uniform Code of Military Justice, the Canadian *National Defence Act* employed a drafting technique whereby that Act included a range of specific offences and then imported the offences contained in the civilian Criminal Code of Canada. In the Canadian setting, Joseph Trépanier had been charged with a service offence under the *National Defence Act*, which was one of those offences imported from the Criminal Code; in this case, sexual assault. The offence of sexual assault under the Criminal Code was an indictable offence carrying a maximum penalty of ten years' imprisonment. However, if he was punished for a service offence by summary conviction, he was liable to a term of imprisonment not exceeding eighteen months.

The Director of Military Prosecutions decided that the matter would be heard before a Standing Court Martial, which exposed Trépanier to the 10-year maximum sentence. Trépanier appealed against the Director's ability

[537] For an overview of the Canadian reform processes, see Michel Rossignol, *National Defence Act: Reform of the Military Justice System,* Political and Social Affairs Division, Depository Services Program, Government of Canada, *22 January 1997,* http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/961-e.htm at 14 January 2009.
[538] *R* v *Trépanier* (2008) CMAC 3.

to decide the forum of his hearing, complaining that the prosecution's ability to select the forum constituted an 'unjustifiable breach of the accused's right to present a full answer and defence and to control the conduct of his defence'[539] as required by section 11(d) of the Act. All parties agreed that had Trépanier been charged under the Criminal Code, he would have had 'the right to elect and choose the court before which he would have wanted his trial to be held.'[540] At paragraph 103, the majority held:

> In our view, to give the prosecution, in the military justice system, the right to choose the trier of facts before whom the trial of a person charged with serious *Criminal Code* offences will be held, as do section 165.14 and subsection 165.19(1) of the NDA, is to deprive that person, in violation of the principles of fundamental justice, of the constitutional protection given to offenders in the criminal process to ensure the fairness of their trial.

As a result, the convening of Canadian courts martial was suspended for several months in 2008 whilst the government drafted and passed amending legislation, Bill C-60, to address the problems identified in the *Trépanier* decision.

3. Independence and impartiality: United States military trials

American military judges (like their Australian counterparts) are not guaranteed constitutional independence and impartiality as is provided for civilian judges under Article III of the *Constitution* of the United States.[541] As Lederer and Zelif point out, judicial independence and impartiality are

[539] Paragraph 5.
[540] Paragraph 28.
[541] Lederer and Zeliff in Fidell and Sullivan (eds), above n 21, 27-59; McKenzie in Fidell and Sullivan (eds), above n 21, 230-32; Note, above n 206; Harrison, above n 111, 221; Sherman in Finn (ed), above n 27, 48-50.

cornerstones of the civilian justice system, but lacking for the American military judge. [542]

In the United States, military courts are not Article III constitutional courts but are instead established pursuant to Article I, section 8 of the *Constitution* of the United States which gives Congress the power to raise and support armies, to provide and maintain a navy, and to provide for organising and disciplining them. This is a constitutional arrangement similar to that which exists for Australian courts martial and their judges.

Similar to the Australian military justice system, the US military justice system is also driven by the chain of command and command control[543] - the military judge in the United States military justice system is appointed by the JAG on an ad hoc basis, without tenure, and at the pleasure of the JAG.[544] The military judge's performance is assessed annually by more senior officers, with promotion and pay being determined by that annual assessment. [545]

Frederic Lederer and Barbara Hundlay Zeliff report that despite the supposed requirement of judicial independence, 'periodic reports' have been made with respect to senior officers seeking to influence military judges, particularly in sentencing matters: [546]

> In one extraordinary incident the secretary of the navy attempted, unsuccessfully, to have the judge advocate general of the navy fire a navy trial judge because of the judge's sentencing. At the very least, some military judges have complained of punitive reassignment or promotion denial following judicial assignments. [547]

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[542] Lederer and Zeliff in Fidell and Sullivan (eds), above n 21, 28.
[543] Ibid, 29.
[544] Ibid, 28.
[545] Ibid.
[546] Ibid.
[547] Ibid. See also *United States v Mitchell* 37 MJ 903, 913, 918; *United States v Campos*, 37 MJ 894, 896-97.

In July 1992, the American Judges Association wrote to the President of the United States raising the lack of independence and impartiality for military judges as an issue of concern:

> The perception is that without tenure, a military judge is subject to transfer from the service tribunal should he/she render unpopular evidentiary rulings, findings or sentences. There is no protection from retaliatory action by dissatisfied superiors in the chain of command.
>
> Similarly, the perception exists that judges who make rulings unpopular with [the] military hierarchy are endangering their possibilities of promotion because that same hierarchy is the system which makes selections for promotion.[548]

In *Weiss v United States*,[549] (which was heard with a second case, the matter of *Hernandez* v *United States)* the United States Supreme Court was required to address the lack of independence and impartiality in the courts martial regime. Eric Weiss, a US Marine, entered a plea of guilty before a special court martial to one count of larceny. He was sentenced to three months confinement, forfeited some pay and was discharged for bad conduct. Ernesto Hernandez, also a Marine, pleaded guilty to several serious drug trafficking charges and one count of conspiracy. He was imprisoned to 25 years' imprisonment, lost all pay, was reduced in rank and was dishonourably discharged. On review of his sentence, the convening authority reduced his jail term to 20 years.

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

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[548] Lederer and Zeliff in Fidell and Sullivan, above n 21, 28.
[549] *Weiss v United States*, 510 US 163, 180 (1994).

Both petitioners failed. Chief Justice Rehnquist delivered the opinion of the Court:[550]

> It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process." ... A necessary component of a fair trial is an impartial judge. ...Petitioners, however, do not allege that the judges in their cases were or appeared to be biased. Instead, they ask us to assume that a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality. Neither history nor current practice, however, supports such an assumption.
>
> Although a fixed term of office is a traditional component of the Anglo American civilian judicial system, it has never been a part of the military justice tradition. ...
>
> In the United States, although Congress has on numerous occasions during our history revised the procedures governing courts martial, it has never required tenured judges to preside over courts martial or to hear immediate appeals therefrom. ... Indeed, as already mentioned, Congress did not even create the position of military judge until 1968. Courts martial thus have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all.
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> … Petitioners in effect urge us to disregard this history, but we are unwilling to do so. We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today. But as Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice, it has nonetheless chosen not to give tenure to military judges. The question under the Due Process Clause is whether the existence of such tenure is such an extraordinarily weighty factor as to overcome the balance struck by Congress. And the historical fact that military judges have never had tenure is a factor that must be weighed in this calculation.
>
> ...
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> Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer. ... Rather than exacerbating the alleged problems relating to judicial independence, as petitioners suggest, we believe this structure helps protect that independence. Like all military officers, Congress made military judges accountable to a superior officer for the performance of their duties. By placing judges under the control of Judge Advocates General, who have

[550] The Syllabus identifies: In which Blackmun, Stevens, O'Connor, Kennedy, Souter, and Ginsburg JJ, joined, and in which Scalia and Thomas JJ, joined as to Parts I and II-A. Souter, J, filed a concurring opinion. Ginsburg, J, filed a concurring opinion. Scalia, J, filed an opinion concurring in part and concurring in the judgment, in which Thomas, J, joined.

> no interest in the outcome of a particular court martial, we believe Congress has achieved an acceptable balance between independence and accountability.

The difficulty with this reasoning is that it highlights the position of the military judge within the chain of command.[551] Further, it is difficult to justify a system tainted by a lack of perceived independence simply on the ground that it has always been this way. In addition, whether or not the JAG has a direct pecuniary interest[552] in a specific matter only goes to the concept of actual bias; it does not assist in dispelling concerns with apprehended bias. Or, as Judge Wiss of the Court of Military Appeals noted

> the reports of decisions of this Court for the past four decades are peppered with instances of honourable persons – line officers, lawyers, judges and even high ranking officers of the JAG Corps – who affected the trial or appeal of cases in ways whin which they undoubtedly at the time believed were permissible but which this court ultimately condemned.[553]

On reviewing the Weiss, Mitchell and other relevant decisions, Lederer and Zeliff conclude

> the sad truth is that insofar as *structural independence* is concerned, the Court's praise is too broad and dangerous. The very cases discussed above demonstrate some of the periodic problems permitted by the current statutory and regulatory structure. The praise is dangerous because it has already had its effect: too many have decided that, given the Court's language, there is no problem to be addressed by Congress. Nothing could be further from the truth. If nothing else, "*an acceptable balance between independence and accountability*" is a far cry from the "best balance". [554]

Chapter Two, Part B of this thesis introduced the concept of judicial deference to the military, whereby both Australian and United States

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[551] See the discussion of this case in Lederer and Zeliff in Fidell and Sullivan (eds), above n 21, 40-45.
[552] *United States v Mitchell*, 39 MJ 131, 141-142 (1994).
[553] Ibid, 148-49. See also the discussion of this case and others in Lederer and Zeliff in Fidell and Sullivan (eds), above n 21, 40-45.
[554] Lederer and Zeliff in Fidell and Sullivan (eds), above n 21, 51 (their emphasis).

civilian courts are most hesitant to intervene in matters which involve or rely upon the powers of the Executive and/or Congress. For US jurisprudence, this theory explains (whether rightly or not) why the judiciary appears loathe to involve itself in matters which it perceives ought properly vest with Congress' decision making powers.

In addition to the theory of judicial deference, perhaps an underlying reason why discipline continues to prevail over justice in the American military justice system can be found in the debates over the Uniform Code of Military Justice in 1948. General Dwight D Eisenhower is reported as saying that the UCMJ was 'never set up to insure justice.' Rather the military's purpose was to defend the nation and in doing so, it must 'violate the very concepts of rights and justice for which the nation stood.'[555]

What this overview does show is that the American military justice system, being a system similar to its Australian counterpart where both are driven by the command structure, suffers from the same kind of problems with respect to perceptions of independence and impartiality.

4. Independence and impartiality: New Zealand military trials

Whilst the *New Zealand Bill of Rights Act* 1990 (*NZBORA*) was enacted in 1990, it was not until 1999 that it was authoritatively determined that it applied to New Zealand's military justice system.[556] Christopher Jack was an Ordinary Marine Engineering Mechanic on board the HMNZS *Philomel*. Despite entering a plea of guilt, Jack sought to appeal his conviction against six drugs misuse charges, including procuring, smoking cannabis and possessing seeds and a pipe for smoking cannabis. He did not appeal a seventh guilty plea concerning the possession of two cans of

[555] Quoted in Roberts-Smith, above n 42, 28.
[556] *R v Jack* [1999] 3 NZLR 331.

beer in his cabin. The substance of his appeal was that the searches that led to finding the drugs in his cabin offended section 21 of the *NZBORA*, which provides a right to every person to be secure against unreasonable search and seizure. Accordingly, Jack argued at first instance before the Judge Advocate and again on appeal that if the searches contravened the *NZBORA*, then the evidence ought not be admitted. The Judge Advocate ruled the evidence to be admissible, as did the Courts Martial Appeal Court.[557] His application for leave to appeal was allowed, but the appeal dismissed.[558]

Even though the application of the *NZBORA* to the military was not argued before the court, the Court Martial Appeal Court nevertheless observed:

> Because the purpose of the NZBORA is to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights 1966, it would be virtually impossible to conclude that the Act did not apply to member of the armed forces unless such an exclusion was specified in the general provisions of the NZBORA.[559]

There is no such exclusion of the military in the general provisions.

In 2001, the New Zealand Court of Appeal heard the matter of *Drew v Attorney-General*,[560] which, like *R v Jack* above, did not directly involve the New Zealand military justice system and its consistency with the NZBORA. Instead, Drew's matter concerned whether the hearing of the discipline offences alleged to have occurred in prison attracted fair trial rights. With the emphasis on the notion of discipline offences, there were enough similarities between the findings in *Drew* and the New Zealand

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[557] Ibid, 341.
[558] The Court held that the Regulators' activities in looking through cabins were not 'searches' for which justification or warrant was required. Rather, the Court held that ordering shipmates to accompany regulators to their cabins was a normal incident of service discipline.
[559] *R v Jack* [1999] 3 NZLR 331, 339.
[560] *Drew v Attorney-General* [2002] 1 NZLR 58 (Court of Appeal).

military justice system (itself a system of discipline offences) to make the decision important and relevant for the New Zealand military.

While Drew was serving a prison sentence, he was subjected to a lawful random drug test. The test was positive for heroin, and he was accordingly charged with an offence against prison discipline.[561] As this was a discipline offence, sections 7 and 34 of the *Penal Institutions Act* 1954 provided for the Superintendent of the prison, or his/her Deputy, to hear the matter. The Deputy Superintendent who heard the matter found Drew guilty; he imposed a penalty of seven days of cell confinement, 28 days' loss of privileges and seven days' loss of remission of sentence.[562] The similarities between the prison discipline system and the military's discipline is apparent from the following description, where the word 'military' could easily be substituted for the word 'prison':

> The disciplinary offences scheme is found in ss32 to 36 of the Act. Section 32 makes certain forms of conduct (not relating to drugs or alcohol) offences against discipline. The less serious offences are listed in subs(1), which covers, for example, disobeying the lawful order of an officer, behaving in an offensive or insolent manner, or assaulting another inmate. The more serious offences are contained in subs(2); for example, mutiny, or inciting other inmates to mutiny or assaulting a prison officer or other person (not being an inmate), or escaping from an institution or from lawful custody. Subsection (3) concerns attempts to commit or being a party to an offence against discipline ...[563]
> ...
>
> The Penal Institutions Act provides for a regime of prison discipline that is separate from the criminal justice system. It reflects the particular need in the prison context to maintain order within the institutions by punishing conduct which undermines proper authority or orderly community living.
>
> At the heart of the statutory scheme for prison discipline is the policy that is shared with many countries that responsibility for dealing with misconduct by prisoners should, in general, form part of the governmental function of prison management. In this context the Act contemplates that the principal burden of disciplinary adjudication should fall on those responsible for the operation of the prison. That is achieved by providing under the Act a two tier disciplinary process. At the first level the prison disciplinary system is

[561] *Penal Institutions Act* 1954 (NZ) s 32A(1)(a).
[562] *Drew v Attorney-General* [2000] 3 NZLR 750, paragraph 6 (High Court).
[563] Paragraph 8.

> administered by the senior officers in the prison, with the aim that the great majority of incidents will be dealt with at this level in a fair, timely and effective manner consistent with the need to maintain order.[564]

Drew appealed both the conviction and sentence to a Visiting Justice – a Visiting Justice is either a Justice of the Peace or a District Court judge holding commissions to attend upon prison and conduct a range of interviews, including to hear complaints and to re-hear de novo discipline offences that had been heard by the Superintendent or Deputy Superintendent.[565] Drew again sought legal representation at this hearing, and tried to offer into evidence a conflicting toxicologist's report which he had obtained. However, because Drew did not have the means or ability to pay for the adversarial expert's presence at Court for cross-examination, the report was not admitted into evidence. In turn, Drew's efforts to cross-examine the Crown's toxicologist were called, not surprisingly, 'ineffectual'.[566] When the sentence was confirmed, Drew sought judicial review before the High Court. Drew argued that the refusals to grant his requests for legal representation at the two hearings (before the Deputy Superintendent and before the Visiting Justice) were contrary to sections 24 (right to representation) and 25 (right to, inter alia, an independent and impartial hearing) of the *NZBORA*.

In the High Court of New Zealand,[567] Hansen J held that sections 24(c) (right to representation) and 25 (right to, inter alia, an independent and impartial hearing) of the *NZBORA* did not apply to the prison's discipline offences, and even if the right to representation did apply, the denial was justified under section 5 of the Act.[568]

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[564] Paragraph 85-86.
[565] *Penal Institutions Act* 1954 (NZ) ss 10, 33.
[566] *Drew v Attorney-General* [2000] 3 NZLR 750, paragraph 21.
[567] Drew's matter was first re-considered by a Visiting Justice, where he was again denied legal representation. He then sought judicial review in the civilian High Court, then the Court of Appeal.
[568] Section 5 Justified limitations
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the Court of Appeal,[569] Drew (this time with legal representation), argued that the mode of trying discipline offences violated section 27 *NZBORA* (right to natural justice) and corresponding common law principles of natural justice. The Court of Appeal held that the rules of natural justice would have been violated if a person accused of a discipline offence was 'always' denied legal representation.[570] The Court held that the rules of natural justice applied to discipline offences,[571] and, unless legislation and subordinate legislation were clearly excluded from the operation of the Bill of Rights, provisions inconsistent with the *NZBORA* would be given a 'meaning that is consistent with the rights and freedoms contained in the Bill of Rights'.[572] Further, while *NZBORA* does not allow primary legislation to be struck down, secondary legislation may be declared *ultra vires* if the effect of *NZBORA* on enabling legislation is that there was no power to make such regulations.

Whereas the decision in *R v Jack* confirmed that the *NZBORA* applied to the military, the decision in *Drew* must have left the military with little doubt that its justice system – a system designed to maintain discipline - would be given an interpretation consistent with the *NZBORA*, and that regulations could be declared *ultra vires*. Consequently, in 2002, the Chief of Defence Force ordered the conduct of the Military Justice Review. The review team was required to develop amendments to the military justice system to ensure compliance with the *NZBORA*, but at the same time maintain the military's ability to ensure discipline.[573]

While the New Zealand military justice system has not been the subject of *direct* judicial review of its compatibility with the *NZBORA*, research

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[569] *Drew v Attorney-General* [2002] 1 NZLR 58.
[570] Paragraph 66.
[571] Paragraph 66-67.
[572] Paragraph 68.
[573] Chris Griggs, 'A New Military Justice System for New Zealand' (2006) 6 *New Zealand Armed Forces Law Review* 62, 65.

conducted by the History Department of the University of Waikato,[574] refers to the difficulties for military justice *appearing* to be impartial when the defence force itself is comprised of a small profession in which most members know, or know of, each other. As a consequence, when a court martial is constituted, it is likely that each court member will know or know of each other, the accused, other court personnel, and witnesses. This can then have implications for the appearance of bias when courts martial are conducted:

> We had situations where there's a half-colonel under examination and he's over at the mess at lunchtime having his lunch with the President of the Court, all the members plus the prosecutor plus the Judge Advocate; they're all on first-name terms and he's under cross-examination. In the real world, on civvy street, if we saw a policeman talking to a juror and that policeman wasn't even connected with the trial, that would mean an automatic re-trial. Here, the accused isn't allowed into the mess. Well...it doesn't have a strong appearance of justice, that sort of thing.[575]

In 2007-2008, the Clark Government introduced a range of amendments to the *Armed Forces Discipline Act* 1971, with the Minister of Justice citing the reasons for reform as follows:

> Attitudes and the environment have changed considerably since then [the 1971 Act]. Community expectations and the New Zealand Bill of Rights Act 1990 have highlighted and expanded rights, which need to be observed.
>
> …
>
> Acknowledging the need to respond to a changed environment, the Defence Force undertook a review between 2002 and 2006 to assess what reforms needed to be made. This review took into account New Zealand's international obligations. It also looked at the experiences of other states such as Australia, Canada and the United Kingdom, which have gone through a similar process in recent times.[576]

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[574] Cheryl Simes, 'Not Your Average Trial : The Statutory Unfairness of Courts-martial in New Zealand' (1998) 2(1) *The Electronic Journal of Military History,* History Department, University of Waikato, Hamilton, New Zealand, http://www.waikato.ac.nz/wfass/subjects/history/waimilhist/1998/wmh3.html
[575] Mike Bungay cited in Simes, ibid.
[576] Goff, above n 45.

The 2007 Act abolished the *ad hoc* court martial system and replaced it with a permanent Court Martial of New Zealand. The Judge Advocate General became the new Chief Judge of the court and was granted the same security of tenure and retirement age as a High Court judge.[577] The Act also created an independent Director of Military Prosecutions who is appointed by the Governor-General and reports to the Solicitor-General – a civilian.

In statutory measures designed to enhance impartiality, the *Armed Forces Discipline Act* (NZ) 1971, as amended by the 2007 Act**,** provides that a person with 'a personal interest in the case' may not serve on the trial.[578] 'Personal interest' is not defined in the statute. Also excluded from service at a trial is a person who investigated the charge against the accused or was the officer who made the preliminary inquiry into the case.[579] The defendant's commanding officer between the charge date and the trial also cannot be a member of the court;[580] however, a person who was the defendant's Commanding Officer prior to the charge date may serve on the court martial. That latter relationship would not be allowed in civilian trials and juries. Indeed, the Courts-Martial Appeal Court has recognized that disciplinary procedures within the military have the potential for bias.[581]

The cure for perceived or actual bias levelled against a court martial member in New Zealand is a curious one. Challenges on the basis that a proposed member 'might not act, or is not in a position to act,

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[577] *Court Martial Act* 2007 (NZ) s 19.
[578] *Armed Forces Discipline Act* 1971 (NZ) s 122(h); see also *Court Martial Act* 2007 (NZ) s 23.
[579] *Armed Forces Discipline Act* 1971 (NZ) s 122(d).
[580] Ibid, s 122(b).
[581] *Kaye v R,* CMAC 235 (1995). See discussion in Alex Conte, 'Courts-Martial and Summary Proceedings under the Armed Forces Discipline Act 1971: The Right to a Fair And Public Hearing by an Independent and Impartial Court' (1997) *Bill of Rights Bulletin* 1, 11-12.

impartially'[582] must be made *before* the intended member is sworn in, and is then decided by the other members of the court,[583] who presumably have been sworn in. If an accused only becomes aware of information which would constitute actual or apprehended bias *after* the member has been sworn in, they have no ordinary right to object unless the improper constitution of the court martial has caused a substantial miscarriage of justice.[584] The test is not that substantial miscarriage *may* occur, but that it has. The test would seem to require proof of actual bias, but not an objective demonstration of apprehended bias. This approach to impartiality thus impedes the accused person's due process/natural justice rights, as well as their right to a hearing before a court to be perceived to be independent and impartial. It is also inconsistent with international obligations.

The New Zealand military has however, identified and reformed a range of fair trial defects within its courts martial system:

> No longer does the Judge Advocate act as prosecutor as well as legal adviser. No longer may a tribunal ignore a Judge Advocate's rulings on questions of law. Naval personnel now have the right to bring evidence and be heard. The presiding officer may no longer see the summary of prosecution evidence before the trial. The tribunal members may no longer hear the 'trials within trials' that decide whether disputed evidence is admissible. Summary proceedings … may now be reviewed.[585]

[582] *Armed Forces Discipline Act* 1971 (NZ) s 129(1)(b).
[583] For problems in the US equivalent, see Schlueter, above n 144, 21.
[584] *Armed Forces Discipline Act* (NZ) 1971 s 129.
[585] Simes, above n 574.

5. Independence and impartiality: Australian military trials

(i) Do the requirements of independence and impartiality apply to Australian courts martial?

It is beyond doubt that in Australia, where a court or tribunal is 'capable of exercising the judicial power of the Commonwealth [it must] be and appear to be an independent and impartial tribunal'.[586] As a statement of principle and law, it would be difficult to cavil with this.

However, this statement, with its emphasis on the exercise of *judicial* power, raises an important point for courts martial and trials that had been heard before the Australian Military Court. In a trilogy of judgments, the High Court has held,[587] albeit without a binding *ratio decidendi,*[588] that courts martial are not Chapter III Constitutional courts, and that the adjudication and decision-making undertaken by such entities finds its power not in Chapter III of the *Constitution*, but is conferred pursuant to the defence power contained in section 51(vi) of the *Constitution*.[589] Thus, in *Tracey*, Brennan and Toohey JJ held:

> … the imposition of punishments by service authorities as for the commission of criminal offences in order to maintain or enforce service discipline has never been regarded as an exercise of the judicial power of the Commonwealth.[590]

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[586] *North Australian Legal Aid v Bradley* (2004) 218 CLR 146, 163 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.
[587] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.
[588] *Re Colonel Aird* (2004) 220 CLR 308, 321 per McHugh J.
[589] Section 51 provides:

> The Commonwealth Parliament is empowered to make laws with respect to:
> …
> (vi) 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.

[590] (1989) 166 CLR 518, 572.

If courts martial (and the Australian Military Court when it existed) do *not* exercise judicial power of the Commonwealth and are not Chapter III courts, then it needs to be established whether there is any requirement that those proceedings be independent and impartial. It *could* be said that support for the proposition that military trials do not need to exhibit independence and impartiality (or indeed other indicia of a fair trial) is found in the Human Rights Committee's *General Comment No 32* where it defines courts and tribunal to include 'judicial bodies with a judicial task'.[591] Such a definition would, *prima facie*, exclude the Australian military justice system service tribunals as they are not created as judicial bodies exercising judicial power pursuant to Chapter III of the Constitution, but service tribunals created under the defence power. However, in making this *prima facie* observation with respect to *General Comment* No 32, it is acknowledged that HRC Comments are neither binding on the Commonwealth nor are they followed or adopted by the Commonwealth with any regularity. The point here, however, is to determine whether there is *any* justification or support for the proposition that military trials are exempt from the fair trial requirements of independence and impartiality.

If such propositions are correct, both the Australian Military Court and courts martial *could* be thought to escape the requirement that their processes be fair, independent and impartial because they are not judicial entities within the meaning of Chapter III. The principles of natural justice would still apply however as such principles do not depend upon Chapter III of the Constitution.[592]

However, the Human Rights Committee has observed[593] that the concept of a 'court' and a 'tribunal' includes bodies, however so named, that are

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[591] *General Comment No 32*, above n 381, paragraph 7. See also *Perterer v Austria,* UN Doc CCPR/C/81/D/1015/2001 (2004), paragraph 9.2 (disciplinary proceedings against a civil servant); *Everett v Spain*, UN Doc CCPR/C/81/D/961/2000(2004), paragraph 6.4 (extradition).
[592] See for example, *Kioa v West* (1985) 159 CLR 550.
[593] *General Comment No 32*, above n 381, paragraph 18.

established by law, are independent of the executive and legislature and conduct judicial tasks.

Certainly, the AMC and courts martial were established by law (the DFDA) and conduct judicial-type tasks (if not via judicial power), but they are not independent of the Executive – indeed, they are part of it. However:

> This right [to a hearing by an independent and impartial court or tribunal] cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision.[594]

For Australian military courts, it is clear that even though these 'courts' are part of the executive, and despite their exercise of defence power (not judicial power) the right to a fair trial still applies. In *Cox,*[595] and *Bevan*[596] and *Tracey*,[597] the various Justices all agreed that courts martial were not Chapter III judicial bodies. However, despite this status, they were still required to act judicially. In *Cox*, Dixon J cited *Bevan*, saying:

> In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional. ... To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land. [598]

In the more recent case of *White v Director of Military Prosecutions*,[599] the High Court reviewed that trilogy of authorities (*Cox,*[600] and *Bevan*[601] and *Tracey*[602]), with then Gleeson CJ observing:

> 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

[594] Ibid.
[595] (1945) 71 CLR 1, 23.
[596] (1942) 66 CLR 452.
[597] (1989) 166 CLR 518, 573-574.
[598] (1945) 71 CLR 1, 23 (emphasis added).
[599] *White v Director Military Prosecutions* (2007) 231 CLR 570.
[600] (1945) 71 CLR 1, 23.
[601] (1942) 66 CLR 452.
[602] (1989) 166 CLR 518, 573-574.

> the Constitution, that the defence power authorises Parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth; it is a power sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline. [603]

Callinan J observed:

> … command and that which goes with it, namely discipline and sanctions of a special kind, for the reasons that I earlier gave, are matters of executive power, albeit that the power should still be exercised, so far as is reasonably possible, in a proper and judicial way, adapted as necessary to the special circumstances of military service, as I take the second defendant to accept. The presence of s 68 in the Constitution alone provides an answer to the plaintiff's submission that by necessary implication military judicial power may only be exercised by a Ch III court.[604]

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

It would appear that Article 14 of the ICCPR has been invoked only once in aid of an appeal to the Defence Force Discipline Appeal Tribunal. In *Stuart v Chief of Army*[605] the Appellant argued that the military justice system, as constituted by the *Defence Force Discipline Act*, Regulations and associated subordinate legislation, was 'inherently flawed in that it fails to accord procedural fairness to accused persons because of "inherent systemic bias and command influence" '.[606]

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[603] Paragraph 14 (emphasis added).
[604] Paragraph 240 (emphasis added).
[605] [2003] ADFDAT 3 (21 August 2003).
[606] Paragraph 33.

Ms Diana Stuart had been charged with 7 counts relating to non-compliance with various orders and insubordination. The trial before a DFM resulted in convictions on counts six and seven only; one count was withdrawn and Ms Stuart was found not guilty on the balance. Very minor penalties were imposed in relation to the two counts upon which there were findings of guilt. One of the counts (count 6) upon which she was convicted was that of insubordinate conduct contrary to section 26(1) of the Act, in that she swore at her superior officer.[607] The other count upon which she was convicted (count 7) was that she failed to comply with a general order, contrary to section 29 of the Act, 'by failing to have her uniform correctly pressed and free of stains contrary to Army Standing Orders for Dress, Volume 1, Chapter Two paragraph 2.3 and Chapter 3 paragraph 3.48 dated 2 August 2000'. [608]

Upon appeal to the Tribunal, Stuart's counsel argued that the multiple roles of the convening authority meant the hearing was tainted by the appearance of a lack of independence and impartiality. The Tribunal did not accept this submission and adopted the language of the High Court in *Tyler* finding that the Act established 'a system of independence commensurate with a service tribunal established for the purpose of the discipline of the Defence Force'.[609]

Ms Stuart's counsel also argued that the hearing had violated her Article 14 ICCPR rights. However, the Tribunal held: [610]

> 37. … The International Covenant on Civil and Political Rights is not part of Australian domestic law and, therefore, has only a limited role to play in this

[607] At the Macrossan Training Centre on 31 May 2002, Stuart replied to her superior officer, by stating "There's two fucking ends to the fucking rope, why did he have to fucking start at my end." When cross-examined (extracted in Appeal paragraph 25), the superior officer gave evidence that he wasn't troubled by the swearing; it was that she screamed at him "in my face".
[608] Paragraph 2.
[609] Paragraph 35.
[610] Paragraph 37.

> country: see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 286 ff. …
>
> 38 Counsel for the appellant pointed out that the Covenant has been incorporated into a schedule contained in the Human Rights and Equal Opportunities Commission Act. However, as he also acknowledged, the Full Court of the Federal Court has ruled that this does not mean that the Covenant has been incorporated into domestic legislation in such a manner as to give rise to enforceable rights: *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129 at paras [35] to [36].

Ms Stuart also argued that section 61 of the Constitution gave rise to an implied right to natural justice and referred to the *Findlay* decision of the European Court of Human Rights in support. The Tribunal rejected that submission:

> 39 … Those conclusions [in Findlay] in relation to the legislation, then existing in the United Kingdom, are not open in respect of the Defence Force Discipline Act because of the reasoning of the High Court in *Re Tyler*; Ex parte Foley, supra. …

While service tribunals (and the former AMC) are not Chapter III Constitutional Courts, there can be no doubt that they must exercise power in a proper and judicial manner. If we return to the wide ambit given by *General Comment No 32* to 'court' and 'tribunal', then at international law, it simply must be that a person brought before a court martial has a right to an independent and impartial hearing.

(ii) Independence and impartiality - Australian military trials

In order to determine whether a tribunal satisfies the international standards of independence and impartiality, the following features collated from the previous examination of what constitutes an independent and impartial trial need to be scrutinised:

- the manner of the appointment of its members, including the procedures and qualification for appointment;
- members' terms of office, including security of tenure and security of pay;
- where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions;
- the existence of effective guarantees against outside pressure;
- the actual independence of the decisions makers from political interference by the executive branch and legislature; and
- whether the body presents an appearance of independence and impartiality.

Impartiality needs to be understood as having two essential features:

- First, freedom from actual bias; and
- Second, freedom from apprehended bias as measured by the reasonable observer.

The next section takes the above criteria concerning both independence and impartiality and measures them against the courts martial system that existed up to 2007, the AMC system which operated between 2007 and 2009, and then the courts martial system that was re-introduced in October 2009 after the High Court held the AMC structure to be constitutionally invalid.

Appointments, tenure promotion and pay: courts martial to 2007

Prior to the commencement of the Australian Military Court in October 2007, courts martial were convened on an *ad hoc* basis, with their members being nominated for duty by the Convening Authority as one-off

appointments.[611] Further, the Convening Authority was only able to appoint members who had been nominated by the Judge Advocate General.[612] The problem with this appointment process was that having been appointed by Governor-General-in-Council, the Judge Advocate General's links to the Executive were strong, and thus the Judge Advocate General's authority to appoint the panel of members (or jury pool) gave rise to the perception of executive influence. It is precisely this kind of perception of a lack of institutional independence that the Canadian Supreme Court held to be flawed in the *Généreux* and *Forster* decisions of 1992 and the European Court at Strasbourg in the suite of cases referred to in Part F above (*Findlay, Grieves,* and *Morris*).

The only eligibility requirement for membership of a court martial was that the person had been an officer for at least three years. To be the President of a General Court Martial, the person also needed to hold a rank of at least the naval rank of captain or the rank of colonel or group captain. To be President of a Restricted Court Martial, the person was to hold a rank no lower than the rank of commander, lieutenant colonel or wing commander.[613]

Upon the Convening Authority nominating the court members, the accused was able to object to an appointment on the basis that the member or judge advocate was (a) ineligible, (b) was or was likely to be

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[611] *DFDA* 1982 s 119, compilation prepared 14 January 2004, Incorporating Amendments to Act No. 135 of 2003.

> Convening order
> (1) A convening authority shall, in an order convening a court martial:
> (a) appoint:
> (i) the President and the other members;
> (ii) an adequate number of reserve members; and
> (iii) the judge advocate; and
> (b) fix, or provide for the fixing of, the time and place for the assembling of the court martial.

[612] *DFDA* 1982 s 129B, compilation prepared 14 January 2004, Incorporating Amendments to Act No. 135 of 2003.
[613] Ibid, s 116.

biased, or (c) would be thought on reasonable grounds to be biased.[614] However, this cure for bias suffers the same problem as that mentioned with respect to New Zealand military courts: the challenge on the basis of bias was required to be made before the members were sworn in. In civilian courts, the challenge can be made at any time during the trial.

The Judge Advocate General and any Deputy Judge Advocates General were to be appointed by the Governor-General on a full-time or part-time basis.[615] The Judge Advocate General was also required to be, or have been, a justice of a state or federal court. Defence members could be appointed as Deputy Judge Advocates General,[616] meaning they were still subject to defence discipline and the chain of command.

Under the court martial system up to 2007, the terms of appointment for the Judge Advocate General and Deputy Judge Advocate Generals were of concern:

> **183 Terms and conditions of appointment etc**.[617]
> (1) The Judge Advocate General or a Deputy Judge Advocate General holds office for such period, not exceeding 7 years, as is specified in the instrument of the Judge Advocate General's appointment.
> …
> (3) The Judge Advocate General or a Deputy Judge Advocate General holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined by the Governor-General.

The international jurisprudence already examined indicates that a fixed term, and one of some length, is a greater guarantee of independence than terms that are short or not fixed. It would be difficult to take issue with the 7-year term. However, sub-section (3) is of concern as the Judge Advocate General and Deputy Judge Advocate Generals would appear indebted to the Governor-General (as advised by her Executive) for the

[614] Ibid, s 121.
[615] Ibid, s 179.
[616] Ibid, s 180.
[617] Ibid, s 183.

terms and conditions of office. Further, section 183(3) did not require the terms and conditions be fixed in the instrument of appointment.

The court martial system to 2007 was silent on promotion, but pay was to be determined by the Remuneration Tribunal. The latter feature of determining pay by a separate body is certainly a feature promoting the appearance of independence but the lack of certainty about promotion did not enhance the independent status of a court martial member.

Appointments, tenure, promotion and pay: the AMC system

The *Defence Legislation Amendment Act* 2006 created an Australian Military Court, the position of Chief Military Judge (in place of the former Chief Judge Advocate) and several full time and part time Military Judges (in place of the former Judge Advocates). The Act also specified the appointment process, tenure, pay and promotion prospects for the Chief Military Judge and Military Judges. The Explanatory Memorandum asserted that these measures were to enhance the independence and the appearance of independence of the court and its office holders – yet, the 2006 Act explicitly provided that the AMC was not a Chapter III court:

> **114 Creation of the Australian Military Court**
> (1) A court, to be known as the Australian Military Court, is created by this Act.
>
> Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.
> Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of *service tribunal* in subsection 3(1).[618]

However, whether an independent selection process was to be used when looking to appoint the Chief or ordinary Military Judges was a matter entirely within the discretion of the Minister of Defence who 'may' require the Chief of the Defence Force to establish an independent selection

[618] *Defence Legislation Amendment Act* 2006 (No. 159, 2006), s 114.

committee to give to the Minister a recommendation for appointment.[619] This meant the selection process could have been tainted, or appeared to be tainted, with arbitrariness and a lack of transparency. Further, contrary to the principles of independence from the Executive and other influences, both the Chief Military Judge and the Military Judges were required to be members of the Permanent Navy, the Regular Army or the Permanent Air Force, or a Reservist who was rendering continuous full-time service. The appointees were also required to meet their individual service deployment requirements, with failure to do so constituting a ground to terminate their tenure on the court.

The judges' subordination to the command structure and military discipline was made clear by virtue of these requirements, and in light of these arrangements, it could not be said that the fair trial requirement of an independent court was satisfied. Indeed, the European Court has held that a military judge's position within the chain of command and consequent requirement to observe orders[620] rendered the court in violation of the right of the accused to a trial before an independent judicial entity.

As for qualifications, all judges were required to be lawyers. The Chief Military Judge was to be of a rank no lower than the naval rank of commodore or the rank of brigadier or air commodore[621] and Military Judges were to be of a rank no lower than the naval rank of commander or the rank of lieutenant colonel or wing commander.

However, once selected, both the Chief Military Judge (formerly JAG) and Military Judges were appointed by the Governor in Council and for a period of 10 years.[622] In earlier draft legislation, the government had

[619] Ibid, s 188AE and s 188AS.
[620] *Incal v Turkey* (2000) 29 EHRR 449.
[621] *Defence Legislation Amendment Act* 2006 (No. 159, 2006), s 188AD.
[622] Ibid, s 188AC and s 188AP respectively.

proposed a five-year term for judges, but increased the length of appointment after receiving submissions that five years was 'inconsistent with principles of judicial independence.'[623] Fixing the term was in marked contrast to the arbitrary nature of the earlier court martial process. It also seemed that once the judge served the 10-year term, they were not to be appointed again. This is an important safeguard for institutional independence and the appearance of impartiality, as it cannot be said that the judge is indebted to the Executive for a further term.

The remuneration of the Chief and ordinary Judges continued to be determined by the Remuneration Tribunal, or failing that, as prescribed.[624] However, the *DFDA* did not contain a section like section 72 of the *Constitution* to the effect that the judge's pay could not be lowered during the person's term of office.

Sections 188AJ and 188AX of the AMC regime created automatic promotions for the military judges elevating them to the next rank at the five-year mark of service. Otherwise, and consistent with the principles of independence, there were to be no promotions and therefore no prospects, or perception, that the right outcome would have been rewarded.

Appointments, tenure, promotion and pay: the 2009 system

The provisions enacted in October 2009 largely mirrored the arrangements that existed for courts martial prior to the introduction of the AMC. Courts martial returned to being convened on an *ad hoc* basis, and the eligibility for membership required the person to be an officer of not

[623] For example, see Roberts-Smith, above n 42, 25.
[624] *Defence Legislation Amendment Act* 2006 (No. 159, 2006), s 188AG.

less than three years tenure.[625] The term of office returned to seven years,[626] and, the former bias provisions were revived.[627]

However, whereas the Convening Authority had been responsible for convening courts martial and appointing its members,[628] under the 2009 regime, it became the responsibility of the Registrar of Military Justice[629] to convene each court martial and appoint the President and judge advocate.[630] Yet, consistent with the courts martial system up to 2007, the only people that could be appointed as Judge Advocates were officers nominated by the Judge Advocate Generals.[631] The links to the Executive were thus restored.

The qualifications of and appointment process for the Judge Advocate General and any Deputy Judge Advocate Generals returned to the 2007 courts martial system.[632] Defence members were eligible for appointment as the JAG or Deputy JAG,[633] meaning they were still subject to defence discipline and the chain of command.

The Act resumed its silence on the conferring of promotion, but pay was to be determined by the Remuneration Tribunal.

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[625] *DFDA* s 116 compilation prepared 24 September 2009.
[626] Ibid, s 183.
[627] Ibid, ss 121, 122.
[628] *DFDA* s 119 compilation prepared 14 January 2004.
[629] Section 188FA provides that the Registrar is to assist the Judge Advocate General and the Chief Judge Advocate by providing administrative and management services in connection with charges and trials under the Act.
[630] *DFDA* s 119 compilation prepared 24 September 2009.
[631] Ibid.
[632] *DFDA* ss 179, 180 compilation prepared 24 September 2009.
[633] Ibid, s 180.

Part time and acting appointments: all systems

Each of the three systems allowed for acting appointments.[634] A reasonable observer may understandably conclude that an Acting Judge Advocate General may wish to be considered for the permanent position. Justice Ronald Sackville of the Federal Court of Australia and Chair of the Judicial Conference of Australia has made these observations with respect to acting appointments and the appearance of independence:

> In an age when judicial decisions can be the subject of intense public controversy, particularly where sentencing of criminal offenders is concerned, how is the appearance of independence to be maintained when an acting Judge makes difficult and potentially controversial decisions towards the end of his or her term?
> …
> What if an acting Judge is hearing a case in which the government is a party when a permanent vacancy in the Court is about to be filled? If the government wins and the acting Judge is later appointed as a permanent Judge, will the losing party accept that the two events were unrelated?[635]

The idea of acting judges is one that has been the subject of concerns in international human rights law and controversy at home.[636] In the context

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[634] *DFDA* s 188 compilation prepared 14 January 2004. Sections 188AN, 188AP and 188BB of the 2006 Act; section 188 of the compilation prepared 24 September 2009.

[635] Judicial Conference of Australia 'Acting Judges and Judicial independence' *The Age*, 28 February 2005.

[636] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45. In a separate case, the Victorian Bar refused to attend the welcoming ceremony of Magistrate who had been appointed an acting judge of the County Court. The Bar Council of Victoria stated:

> The appointment of an acting judge to the County Court threatens the independence of the judiciary in the State of Victoria. …
>
> How can a member of the public be confident that his or her case against the Government or one of its instrumentalities, such as Workcover or TAC, will be decided without fear or favour by a judge who is dependent on the goodwill of the Government for his or her continued employment.

Victorian Bar, Press Release, 16 May 2008, http://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles%2FVictorian+Bar+Media+Release+MAGISTRATE+COTTERELL+SHOULD+BE+JUDGE+NOT+ACTING+JUDGE+16+May+08.pdf, at 24 January 2009. See also, Steve Butcher, 'Part-time judge not so welcome', *The Age* (Melbourne) 16 May 2008.

of a proposed amendment to the *Constitution Act* 1975 (Vic) that would provide for Acting Judges, Justice Ronald Sackville, as Chair of the Conference, spoke of acting judges as

> a genuine threat to judicial independence. I do not mean this in some theoretical or abstract sense. The proposed legislation, if passed, constitutes a practical threat to the integrity of the judicial system in Victoria.[637]

The usual reason for appointing acting judges is to assist with a backlog, but in circumstances where a full time permanent appointment cannot be justified. However, the acting judge provisions of the AMC system allowed for the appointment of an acting judge to deal with a specific matter; in other words a one-off appointment where the acting appointee could be matched to a specific case. The section provided (emphasis added):

> **Sect 188BB Acting Military Judges**
> Recommendation to appoint an acting Military Judge
> (1) If , after receiving advice from the Chief Military Judge, the Minister considers that a charge that has been, or will be, referred to the Australian Military Court requires the experience or expertise of a person who:
> (a) has been a Chief Military Judge or Military Judge; or
> (b) is, or has been, a justice, judge or magistrate of a federal court, or of a State or Territory court;
> the Minister may make a recommendation to the Governor-General that the person be appointed to act as a Military Judge to try the charge and, in the case of a conviction, take action under Part IV.

The Act was, and remains, silent as to what constitutes expertise or experience. While the person appointed in the acting capacity was required to be an enrolled legal practitioner for at least 5 years, the appointee was also required to be a defence member and meet 'person's individual service deployment requirements'.[638] The appointee's place in the chain of command remained.

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[637] *The Age* (Melbourne) 28 February 2005. As at September 2010, there has not been a challenge to s80D of the *Constitution Act* 1975 (Vict.).
[638] Section 188BB(3).

The *ad hoc* nature of the appointment is made clear by sub-section (4) which mandated that the acting Military Judge held office until the trial ended (for example, the entering of a *nolle prosequi*) or the day upon which the accused person is acquitted or sentenced upon conviction. Section 188BB(4) provided:

> **Term of appointment**
> (4) An acting Military Judge holds office for the period specified in the instrument of appointment. The instrument must provide that the period ends on:
> (a) if the proceedings for the charge are terminated without the accused person being acquitted or convicted--the day of the termination; or
> (b) if the accused person is acquitted--the day of the acquittal; or
> (c) if the accused person is convicted--the day that action is taken under Part IV.

This is not the kind of tenure envisaged by the Human Rights Committee, European Court or the Bar Council in this country.[639] It would be open for a reasonable observer to conclude that a trial lacked, or was perceived to lack, independence and impartiality if the acting judge was specifically selected and appointed by the Minister to hear a specific matter. It may also appear to the reasonable observer that the acting judge was obliged to the Executive for that specific appointment and beholden to the Minister with respect to the prospects of any future appointments.

A pragmatic reason can be seen as to why governments would look to appoint acting judges to reduce a backlog while avoiding long-term salary and pension commitments. However, the DFDA's AMC provision seemed to be aimed at a purpose other than enhancing access to justice without delay; the provisions seemed to be aimed at the apparent matching of a specific judge with a specific case. As such, the acting appointments in the *DFDA's* AMC system were anathema to the appearance of independence and impartiality.

[639] See above n 636, 633.

Termination of Chief JAG and JAGs: courts martial to 2007 and resumed in 2009

The provisions for termination of appointments under the courts martial systems up to 2007 and as resumed in 2009 were curious; only a justice of a state or federal court could be the Chief Judge Advocate General, but the Governor-General could not terminate the person's appointment as the Chief or Deputy Judge Advocate General. It is therefore hard to see how or when the Governor-General would be required to consider the termination of a Chief Judge Advocate General by reason of the misbehaviour or physical or mental incapacity, given those holding civilian, superior judicial office were exempt.[640]

Termination of Military Judges: AMC system

The military judge's subordination to military discipline was highlighted by the grounds upon which a military judge's tenure could have been terminated. Sections 188AL and 188AZ provided that a judge's position could have been terminated for (a) misbehaviour, (b) physical or mental incapacity, or (c) if they no longer meet their individual service deployment requirements. Failure to be a member of the force or reserves was also a ground for termination of office.

The effect of these provisions highlighted that a military judge was first and foremost a defence force member and thus subject to military discipline and the chain of command. It is difficult to see how these judges could have been perceived to be independent when their position depended upon them being a member of the forces, part of the executive, obliged to the chain of command and required to meet their individual service requirements.

[640] *DFDA* s 186(1) compilation prepared 14 January 2004 and compilation of 2009.

Further, removal from office by the Governor-General amounted to removal by the executive. Civilian judges, as discussed above, can only be removed from office when brought before the Bar of Parliament.

Independence of staff assisting the court: all systems

Recalling the Canadian decision of *Valente*[641] (referred to by Gleeson CJ in *Fingleton*[642]), not only must the judicial officers be independent, but so too must their administrative and support staff. However, section 188GQ of the Act up to 2007 and as restored in October 2009[643] provided that the Department's Secretary and service chiefs may make staff 'available' to the DMP, but is then silent on the status or independence of those support staff.

Similarly, section 121 of the 2006 Act which created the AMC contained this provision:

> **121 Staff of the Australian Military Court**
> The staff necessary to assist the Australian Military Court are to be the following:
> (a) defence members made available for the purpose by the appropriate service chief;
> (b) persons engaged under the *Public Service Act 1999* and made available for the purpose by the Secretary of the Department

The better reading of both provisions, taken as a whole with the Act, is that personnel provided to the Director of Military Prosecutions and to the court remain within the command structure and subject to military discipline and

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[641] *Valente v The Queen* [1985] 2 SCR 673.
[642] *Fingleton v R* (2005) 227 CLR 166, 191 per Gleeson CJ.
[643] Section 188GQ provides:

> **Staff**
> The staff necessary to assist the Director of Military Prosecutions are to be the following:
> (a) defence members made available for the purpose by the appropriate service chief;
> (b) persons engaged under the *Public Service Act 1999* and made available for the purpose by the Secretary of the Department

control. The European Court of Human Rights has found such an arrangement to be incompatible with Article 6.[644]

The multiple sins of the multiple roles of the convening authority

A recurrent criticism of military justice systems has been the perceived lack of independent and impartial adjudication as evidenced by the traditional, multiple roles of the convening authority.

The 'convening authority' has been 'a cornerstone of the Australian military justice system. … This is an officer appointed by the Chief of the Defence Force or a Service Chief'.[645] The Convening Authority's jurisdiction is enlivened once a matter is referred to it, in a procedure analogous to the civilian police referring matters to the civilian Director of Public Prosecutions (DPP). However, unlike a civilian DPP, the Convening Authority in Australia has traditionally had the sole discretion for each of the following steps along the trial process:

- Whether there should be a trial;
- Whether the charges referred from the accused person's commanding officer were adequate;
- If not, drafting and presenting new charges;
- What kind of tribunal would be convened;
- Who would be the prosecutor and defending officer;
- Who would be the Defence Force Magistrate or Judge Advocate;
- Securing attendance of the prosecution and defence witnesses;
- Appointing members of the court martial panel; and

[644] *Incal v Turkey* (2000) 29 EHRR 449.
[645] The Hon. Justice P Heerey (President, ADFDAT), 'The role of the Commander in Military Criminal Procedure' (Speech delivered to the *6th Budapest International Military Law Conference*, 14-17 June 2003).
http://www.defenceappeals.gov.au/papersheerey.html at 14 January 2009

- at the end of the process, to review the outcome of the proceedings, with the ability to replace the determination of guilt or innocence, and sentence.[646]

The decisions of the European Court of Human Rights and the Canadian Supreme Court in *Findlay v United Kingdom, Grieves v United Kingdom Morris v United Kingdom, R v Généreux, R v Forster* and *R v Trépanier* (refer Part F above), indicate that from a human rights perspective, these Australian arrangements, including the central role of the convening authority in the prosecution, the confirmation/substitution of sentences by the convening authority and the ad hoc nature of the judge advocate's appointment to a court martial (and DFM in the Australian context), violated the accused person's right to an independent and impartial hearing. In addition to the problems of the multiple roles of the convening authority, international jurisprudence is also to the effect that because the convening authority called prosecution *and* defence witnesses that too would have constituted a violation of the accused person's right to summons witnesses.[647] Similarly, with respect to the last of these actions (reviewing the outcome of proceedings), the European Court has held that in order to comply with Article 6, a tribunal must have the power to give a binding decision which cannot be altered by a non-judicial authority.[648]

Similarly, the Court Martial Appeal Court of Canada had found that giving the DMP power to determine the nature of the tribunal (as the convening authority did in Australia)– as opposed to the forum of trial be upon the accused person's election – was unconstitutional and contrary to Article 11 of the *Canadian Charter of Rights and Freedoms*. [649]

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[646] See for example, confirmation of these multiple roles in *Military Justice Report 1999,* Table 4.1. See also Roberts-Smith, above n 42, 7.
[647] Refer Part F above.
[648] *Van de Hurk v Netherlands* (1994) 18 EHRR 481, and *Findlay v United Kingdom* (1997) 24 EHRR 221*,* paragraph 77.
[649] *R v Trépanier* (2008) CMAC 3.

These multiple roles have exposed the military justice system to attack because they offend the principle of independent and impartial adjudication of the criminal charges: 'He or she can decide that a charge be laid and that it be heard by a DFM [Defence Force Magistrate] or court martial and then select the DFM or the members of the court martial'.[650] Thus, having initiated the prosecution, the Convening Authority could be seen to have an interest in the outcome of the case to justify the initial decision to prosecute. [651] Further, 'where the officer prosecuting the trial is under the command of the Convening Authority, allegations may be levelled regarding the undue influence of the Convening Authority, to the possible detriment of the accused individual':[652]

> [I]t has been thought that the present powers of the convening authority involve a perceived conflict of interest. He or she can decide that a charge be laid and that it be heard by a DFM or court martial and then select the DFM or the members of the court martial.[653]

Chapter Five details the process of law reform to the multiple roles of the convening authority in the Australian military justice system. In short however, it took almost a decade from the first recommendations made by Justice Abadee in 1997 for the multiple roles of the convening authority to be effectively abolished. It was not until the middle of 2006 – and after the scathing 2005 Senate Report, the sixth in a suite of inquiries – that a Director of Military Prosecutions and Registrar of Military Justice and a Director of Defence Counsel Services were all established. However, services tribunals still remained dependent upon the defence power, and thus the executive, for their operations.

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[650] Heerey, above n 645.
[651] *Abadee Report*, 152, cited in *Military Justice Report 1999*, 4.17.
[652] *Military Justice Report 1999*, 4.17.
[653] Heerey, above n 645.

(iii) Other fair trial flaws - Australian military trials

As is clear from the overview of fair trial rights at the start of this Chapter, there is more to a fair trial than the independence and impartiality of the relevant participants. This final section highlights, albeit in a summary way, that the Australian military justice system offends against several of the other standards of a fair trial already identified.

Equality before the law is a principle found in common law, the *ICCPR* and the *Universal Declaration of Human Rights*.[654] It requires that each individual within a court's jurisdiction is subject to the same laws, and that no individual or group has special legal privileges. Further, equality before the law requires that the law be applied to each person in the same way. It is a principle designed to ensure that those with power (be that political status or financial power for example) are treated in the same way as those who are disenfranchised or indigent.

The Australian military justice system, as expressed in the *DFDA*, codifies different sentences for different ranks. This is hardly a measure of equality. Certainly, rank may be relevant as a factor in aggravation or mitigation of sentence, but the actual sentencing options in the *DFDA* do not commence on an equal footing. Thus, a member of the forces who is not an officer may be sentenced to detention for a period not exceeding two years, but an officer cannot be detained at all. This evokes thoughts of the class system to which Goffman referred in his theory of total institutions. When the Hon James Burchett QC conducted a review of the *DFDA* in 2001, he found two further areas of inequality in the armed forces: (1) the perception of leniency for more senior ranks, aircrew, critical trades categories and Reserves;[655] and (2) differing sentences across the services, for example, sailors face longer maximum sentences than their

[654] Art. 14(1) *ICCPR*; Art. 7 *UDHR*; and for the common law, see *Baume v Commonwealth* (1906) 4 CLR 97.
[655] Burchett Report, paragraphs 171 and 176.

air force and army counterparts who are convicted of the same offences.[656] Burchett recommended that sentencing tariffs, 'the going rates', especially for summary offences, be published as a way of promoting consistency but without fettering the sentencing discretion.[657]

Different laws have also been applied by the different services, including for example, the elements of the offence of assault have differed between the navy and the army.[658]

Equality of arms is another aspect of fair trial, whereby each party has a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage with respect to his or her opponent.[659] In a recent Victorian civilian case, Justice Bell held that equality of arms requires that both parties 'be treated in a manner

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[656] Burchett Report, paragraph 147:

> It may be time to remove such an obvious inequality, which may not be thought compatible with modern notions of fairness as between members of the respective Services, especially where there is no material difference between the normal daily working conditions of the three Services, as, for example, in Canberra.

[657] Burchett Report, paragraph 172.

[658] In *R v Reynhoudt* (1962) 107 CLR 381 it was held by a majority of the High Court (Taylor, Menzies and Owen JJ, Dixon CJ and Kitto J dissenting) that on a charge of assaulting a police officer in the execution of his duty contrary to section 40 of the *Crimes Act* 1958 (Vic) it was sufficient to prove intent in relation to the assault only; it was not necessary to show intent in relation to the other elements of the offence, namely that the person assaulted was a policeman and that he was acting in the execution of his duty. Thereafter, the Director of Army Legal Services sought an opinion from the JAG of the Army about amending the relevant part of the *Manual of Military Law*. The JAG's ruling, which bound the Army was to the effect that no amendment to the Manual was necessary and that the decision in *R v Reynhoudt* should not be applied to offences of striking a superior officer and similar charges.

However, the Royal Australian Navy took a different view. In an advice dated 26 July 1978 the JAG of the RAN advised the Chief of Naval Staff that the accused person's state of knowledge did not have to be proved by the prosecution as one of the ingredients of the offence. The JAG of the Navy referred to *R v Reynhoudt*, and, unable to distinguish that decision, advised that it was not necessary for the prosecution to prove knowledge on the part of the accused that the person assaulted was a superior officer.

[659] *Niderost-Huber v Switzerland* (1997) 25 EHRR 709, paragraph 23.

ensuring that they have a procedurally equal position to make their case during the whole course of the trial'.[660] Yet, in the *Military Justice Report 1999*, the Joint Standing Committee expressed its concerns about inequality in this regard:

> There seems to be no limit placed on the financial and human resources used by the ADF in prosecuting potential offences, yet there are strict limits on the level to which the ADF will fund the legal representation of accused ADF members.[661]

Apart from the principle of equality of arms, actual access to legal representation has also challenged the Australian military justice system. Access to legal representation is another aspect of a fair trial at common law, and in ECHR and ICCPR jurisprudence. In his 2001 report concerning the Australian military justice system, Burchett recommended that the ADF review the number and location of legal officers, because of the considerable evidence that persons in need could not access legal advice because either: (a) a lawyer was not available; or (b) the sole lawyer on base had already advised the Commanding Officer with respect to the relevant matter and was thus conflicted out of advising the accused individual.[662]

Burchett also considered whether or how the presumption of innocence was applied in Australian military trials, the presumption being a further basic right in civilian trial proceedings (see for example, *ICCPR* Article 14(2) and the 'golden thread' of innocence from *Woolmington.*[663]) He found that even though the ADF now repudiates an attitude embodied in the expression 'March the guilty bastard in',[664] the presumption of guilt still existed. He found this to be so based upon interviews, submissions and focus groups, which led him to conclude that there was a practice and

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[660] *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1.
[661] *Military Justice Report 1999*, 149.
[662] *Burchett Report*, 107.
[663] *Woolmington v DPP* [1935] AC 462, 481.
[664] Paragraph 48.

perception that charges were not brought unless it was quite definite that the person charged would be found guilty. Burchett found that the implications were several: the accused was deprived of a genuine examination of the case against him/her; the accused was effectively required to prove his/her innocence; the accused was pressured to plead guilty; and, there was a loss of face for the preferrer of charges if the accused was acquitted. Burchett expressed the concern that only charging those pre-determined to be guilty 'is bad for discipline, both in itself and because it may introduce a temptation to distort the evidence in order to ensure a conviction'.[665]

G. Summary

It is both fair and appropriate to apply common law and human rights fair trial principles to courts martial. Hide as it may wish behind the defence power of the Constitution, it is abundantly clear that where a person may be imprisoned, and when the *DFDA* refers to guilt, offences, conviction and punishment, the accused has a right to a fair trial.

The *2005 Senate Report* cited with approval the following evidence it had received:

> To allow a person's liberty to be taken away from them without procedural fairness and due process is a fundamental breach of the rights of an accused in the Australian system of criminal justice.[666]

Although a case concerning customs prosecutions, the sentiment expressed by Kirby J in *Labrador Liquor* is apposite:

> In our form of society, loss of liberty as a punishment, in particular, is ordinarily one of the hallmarks reserved to criminal proceedings conducted

[665] *Burchett Report*, paragraph 204.
[666] *2005 Senate Report*, 82.

> in the courts, with the protections and assurances that criminal proceedings provide.[667]

Judged by its ability to deliver an independent and impartial trial, the military justice system fails when measured by our own common law standards for civilian trials, comparative common law and international jurisprudence.

As has already been discussed in Chapter Two, and as will be seen in the following chapter (Chapter Five), the ADF has long argued that the primary purpose of the military justice system is to address efficiency, discipline and morale of the military. If that is so, the fair trial flaws identified above fall away as casualties in the pursuit of this principal goal of ensuring discipline. But dispensing justice and ensuring discipline are different commodities. International law and common law requires that a justice system is to be, amongst other features, fair, perceived to be fair and deliver punishment proportional to the offence. A discipline system such as exists in the military, operates swiftly, economically and 'if sufficiently severe sanctions are imposed for rule violations, the basic survival instinct will normally impel compliance'.[668]

The review of the literature in Chapter Two revealed that those favouring the separate system placed primacy on the pursuit of discipline; those arguing against the discipline system placed emphasis on the pursuit of justice. For the Australian military justice system, the delivery of justice comes second to the pursuit of discipline.

The fair trial flaws identified above ought not be trivialised or subordinated to a singular pursuit of regulating the efficiency, discipline and morale of the military. Without doubt, efficiency, discipline and morale of the military

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[667] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 179.

[668] Lederer and Zeliff, above n 30, 37; see also Schlueter, above n 144, 5 for further on the discipline-justice debate.

are important – but so too are the rights, guarantees and obligations that constitute a fair trial as recognised at common law, comparative common law and in international jurisprudence. Indeed, from a practical level, one would have thought that justice delivered fairly would be more likely to promote military efficiency, discipline and morale, than justice denied a fair application. Burchett found this to be so and it is plain common sense that

> A truism in the area of judicial work is perhaps apposite: the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.[669]

However, as demonstrated in Chapter Two, those aligned to or within the military argue for the primacy of the pursuit of efficiency, discipline and morale and as a corollary, in favour of the exceptional status of military justice. These are themes which will be further illustrated in the following Chapter, which examines the military's response to the decade of rolling inquiries into the Australian military justice system held between 1995 and 2005.

Yet, the review of the common law, comparative common law and international human rights jurisprudence shows that a trial conducted by an independent and impartial court or tribunal established by law imports public interests far broader than the pursuit of just a military goal - a public interest that a fair trial is a human right, and that human rights matter.[670]

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[669] *Burchett Report*, paragraph 191.

[670] Sir Ronald Wilson AC KBE CMG QC, 'Why Human Rights Matter for Everyone', (1996) 3(3) *Murdoch University Electronic Journal of Law,* http://www.murdoch.edu.au/elaw/issues/v3n3/wilson.html at 30 January 2009.; Khan, Irene, 'Why Human Rights Matter', podcast on 1 February 2007 at http://www.nottingham.ac.uk/podcasts/details/07_02_irene_khan.php at 30 January 2009. Mary Robinson, UN High Commissioner for Human Rights 1997–2000, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal.*

CHAPTER FIVE

AUSTRALIAN MILITARY JUSTICE: RESISTANCE AND CIVILIANISATION

The previous Chapter highlighted not only the components of a fair trial at common law and international jurisprudence, but also the failings of the military justice system when assessed by those principles. This Chapter moves to identify the civilianising recommendations made by the various inquiries, as well as the military's response to them. In analysing the military's response, the two theories of total institutions and isomorphism are employed to assist in understanding the military's resistance to reform, and the civilianisation that has occurred notwithstanding that opposition.

A. The 'decade of rolling inquiries'[671]

The Australian military justice system was the subject of six separate, external inquiries between 1997 and 2005, all of which have made recommendations of a civilianising nature, and in particular the adoption of fair trial standards of independent and impartial adjudication.

That 'decade of rolling inquiries' is constituted as follows:

- *"The Abadee Report"*
  Brigadier Hon A.R. Abadee, *A Study into the Judicial System under the Defence Force Discipline Act* (11 August 1997).

[671] *2005 Senate Report*, at xxi.

- *"Ombudsman Report"*
  Commonwealth Ombudsman*, The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976* (January 1998).

- *"Military Justice Report 1999"*
  Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice in the Australian Defence Force* (21 June 1999).

- "*Rough Justice Report"*
  Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Rough Justice? An investigation into Allegations of Brutality in the Army's Parachute Battalion* (11 April 2001).

- "*Burchett Report*"
  The Hon. JCS Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force* (July 2001).

- "*2005 Senate Report*"
  Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, *The effectiveness of Australia's military justice system* (June 2005).

By any standard, this is a significant number of inquiries in a short time span. In the most recent Report of 2005, the Senate Committee observed:

> Despite several attempts to reform the military justice system, Australian Defence Force personnel will continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.
>
> A decade of rolling inquiries has not met with the broad-based change required to protect the rights of service personnel. The committee considers that a major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.[672]

[672] *2005 Senate Report*, at Preface xxi.

B. The Abadee Report 1997

1. Background

In November 1995, the Chief of Defence Force commissioned Brigadier the Hon. Justice Alan Abadee RFD QC (a Deputy JAG and Justice of the Supreme Court of New South Wales) to review the conduct of military trials and to determine whether they satisfied the tests of judicial independence and impartiality. The study was prompted by the previously discussed judicial decisions[673] in the United Kingdom and Canada which had held that those countries' military justice systems failed to meet the standard of judicial independence and impartiality required respectively by the ECHR and Canadian Charter. The judge's report, *A Study into Judicial Systems under the Defence Force Discipline Act* was completed in August 1997. While it has not been publicly released,[674] subsequent inquiries refer to and quote from it. The report made a total of 48 recommendations, with considerable attention focused on reducing the multiple roles of Convening Authorities. Of the 48 recommendations, 39 were agreed to by the Chief of Defence Force.[675] The recommendations of the Abadee Report, and the ADF's response, are at Appendix 6.

Based upon what has been quoted in subsequent reports, it seems that the Judge conducted a detailed examination of the perceived lack of

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[673] Including, in Canada: *R v Généreux* [1992] 1 SCR 259; *R v Forster* [1992] 1 SCR 339. In the United Kingdom: *Findlay v United Kingdom* (1997) 24 EHRR 221.

[674] After exhaustive but unsuccessful attempts by me to locate it, the Queensland Supreme Court library was commissioned to secure a copy. On Monday 13 August 2007 at 4:58 PM, the Library advised by email:

> With regards to the first item [the Abadee report], unfortunately we have been unable to source it through any libraries in Australia, including Parliamentary, Court and Defence libraries. I have found a reference to it in a piece of NSW legislation from 2003 that says the report was never made public. You can find a summary of Abadee's findings however in an Appendix to the report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*.

[675] See Appendix 6.

independence and impartiality of courts martial, and in particular, how those perceptions were fuelled by the multiple roles of the convening authority and the perception that the convening authority could exert command influence over the trial process. The extracts quoted in subsequent reports such as the *Military Justice Report 1999* and the *Burchett Report* indicate that Abadee examined the decision of the European Court of Human Rights in *Findlay v United Kingdom,*[676] where the Court held that Sergeant Findlay had not received a fair hearing by an independent and impartial tribunal.[677] As noted by Justice Abadee, the *Findlay* decision highlighted that the *method* by which a court martial was constituted, and the pivotal role of the convening authority gave rise to the perception of a lack of impartiality and independence irrespective of how the trial itself was actually conducted. As such, Justice Abadee seems to have accepted that the method of convening a court martial and the multiple roles of the convening authority did not guarantee a fair trial.

Justice Abadee also accepted that while the *European Convention* did not apply to Australia, there was a close similarity between Article 6(1) of the *European Convention* and Article 14(1) of the *ICCPR*. Yet, as a matter of law, Justice Abadee apparently concluded that while Australia had ratified the ICCPR and was, in fact, a party to the First Optional Protocol to the ICCPR

> as a general proposition under the common law, entry by the Executive into a treaty is insufficient, without legislation to implement it, to modify the domestic or municipal law, by creating or changing public rights and legal obligations. If the Executive wishes to translate international agreements into domestic law it must procure the passage of legislation to implement those agreements. [678]

[676] *Findlay v United Kingdom* (1997) 24 EHRR 221.
[677] The decision in *Findlay* is discussed in Chapter 4 F above.
[678] *Abadee Report,* 45, cited in *Military Justice Report 1999*, paragraph 4.12.

Therefore 'an explicit municipal law- which is inconsistent with international law will override the latter'.[679] Justice Abadee apparently concluded that 'rights under the ICCPR cannot be directly enforced in Australia'[680] and that 'as the law now stands in Australia, the military justice system is not required to be consistent with Article 14 of the ICCPR'.[681]

While the every specific language reported to have been used by His Honour is correct, that is not to say that an Australian cannot institute proceedings asserting a violation of their Covenant rights. For example, in 26 December 1991, the day after the First Optional Protocol took effect in Australia, 28-year-old Tasmanian lawyer, Nicholas Toonen submitted his claim to the United Nations Human Rights Committee.[682] Toonen was gay. His challenge was to the Tasmanian *Criminal Code* sections 122 (a) (c) and 123, which effectively made homosexual conduct between

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[679] *Abadee Report*, 45, cited in the *Military Justice Report 1999*, paragraph 4.12.
[680] *Abadee Report*, 46, cited in the *Military Justice Report 1999*, paragraph 4.13.
[681] *Abadee Report*, 47, cited in the *Military Justice Report 1999*, paragraph 4.13.
[682] In *Toonen v Australia,* UN Doc CCPR/C/50/ D/488/1992 (1994), Mr Toonen was required to show how the law had affected him as an individual. Hence, Mr Toonen cited numerous ways in which his life had been affected by the domestic law, including: being under the constant threat of having his privacy invaded by police investigating his sexual activity; being threatened with arrest by the Tasmania police in 1988 when the Hobart City Council banned the Tasmanian Gay and Lesbian Rights Group stall from Salamanca Market and directed the police to arrest all gay activists in the Market; being vilified by public figures in Tasmania with statements such as 'Representatives of the gay community are no better than Saddam Hussein and the convicted murderer Dr Rory Jack Thompson' (Ulverstone Councillor Jack Breheny Feb 1991); and having no choice but to knowingly break those conditions of his lease which prohibit the use of his flat 'for illegal purposes'.

Mr Toonen submitted that the relevant Criminal Code provisions and their practical consequences violated three *ICCPR* articles; Article 2 (no discrimination on the basis of sex or other status), Article 17 (a right to privacy), and Article 26 (equality before the law irrespective of sex or other status). This was the first complaint where the Human Rights Committee was required to consider whether the right to privacy applied to sexual conduct. As noted by the Hon Elizabeth Evatt, AC, the Australian member of the Committee, the *Toonen* case revealed a violation of the Convention 'which may not have been obvious at time of ratification', in Australian Senate, Legislative and Constitutional Reform Committee, *Report: Commonwealth Power to Make and Implement Treaties*, Chapter 14, referring to Submission Number 110, Volume 7, 1408-1409 (1996).

consenting males not only unlawful, but also criminal conduct.[683] On 31 March 1994, the Committee unanimously held that the Tasmanian Criminal Code provisions violated the right to privacy contained in Article 17 of the ICCPR.[684]

Accordingly, international obligations are still binding on signatory countries, even if not directly enforceable under domestic law. Further, with respect to justiciable human rights, Australians can take complaints to the Human Rights Committee and other international bodies, on certain conditions, asserting a violation of their human rights.

Returning to Abadee's conclusion that 'rights under the ICCPR cannot be directly enforced in Australia',[685] the position of international law norms and rights in Australian domestic courts is perhaps best put by Mason CJ and McHugh J in *R v Dietrich:*

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions. This position is not altered by Australia's accession to the First Optional Protocol to the *ICCPR*, effective as of 25 December 1991, by which Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the

[683] *Tasmanian Criminal Code Act 1924*, ss 122, 123.
[684] In coming to this conclusion, the Committee made it clear that the Covenant had been breached not only by the possibility of arrest under the challenged laws, but also by the discrimination, harassment and stigma created by the laws. Further, the Committee dismissed the argument that the law was justified in terms of public health or morality. Given these findings the majority of the Committee considered it unnecessary to consider whether there had been a violation of the right to equality before the law on the basis of sexual orientation (Article 26). However, in an individual opinion, Mr Bertil Wennergren found Tasmania was in violation of Article 26 as well.
[685] *Abadee Report*, 46, cited in the *Military Justice Report 1999*, paragraph 4.13.

> ICCPR are incorporated into domestic law, but such an approach is clearly permissible. [686]

Nonetheless, Abadee urged that the 'requirement that the trial of a person should be fair and impartial is deeply rooted in the Australian system of law'.[687] It should not be taken that Justice Abadee was dismissive of the importance of international norms and the Optional Protocol when assessing their importance to and impact upon domestic legislation. Extracts of the report that are available, indicate an approach consistent with the language employed by Brennan J of the High Court in *Mabo*:

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights []. See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol.2, p 23 brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[688]

2. Evaluating the response to Abadee - Eliminating the multiple roles of the Convening Authority

Notwithstanding Abadee's view that the rights created by the ICCPR did not give rise to a cause of action in domestic Australian law, Abadee observed:

> There is a particular view, indeed almost a consensus view, that provisions of the DFDA in allocating multiple roles to the CA [Convening Authority], including the initiation of prosecution, and review of CM [Courts Martial] (and DFM) proceedings, do raise legitimate concerns as to the appearance

[686] *Dietrich v R* (1992) 177 CLR 292, 305 per Mason CJ and McHugh J (footnotes omitted).
[687] *Abadee Report*, 37, cited in the *Military Justice Report 1999*, paragraph 4.13.
[688] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 per Brennan J (emphasis added).

> of fairness and impartiality of such trials, despite the specific precautions to protect against the improper or unlawful use of command influence and the wide range of procedural rights to guard against command influence. ...There is an acceptance that the system may be perceived to place the CA ... in the position of determining whether there be a trial, the nature of the tribunal and charges, and selecting the trial judge, 'jury' and prosecutor, as well as reviewing the proceedings.[689]

Justice Abadee concluded:

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

The military responded:

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

The problem with this response was three-fold: first, the JAG was an appointee of the Executive and thus his ability to select the court martial panel and DFM could not be viewed as independent of the Executive. Second, the JAG's power to appoint was not unfettered, as the JAG was required to consult others within the chain of command. Third, the ADF response only focused on one aspect of the multiple roles problem by transferring to the JAG the power to nominate who would decide matters of fact (the court martial members or DFM) - but a JAG that had to consult others within the chain of command. What is not said in the response is that numerous of the other roles of the convening authority were to remain with that single entity.[690]

For the military, the convening authority has been described as a 'cornerstone'[691] of the military justice. Perhaps more fundamentally though, the convening authority is the means by which the commander

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[689] *Abadee Report,* 151–2 cited in *2005 Senate Report*, paragraph 4.12 (emphasis added).
[690] See confirmation of the post-Abadee multiple roles in the *Military Justice Report 1999*, Table 4.1.
[691] Heerey, above n 645.

can control, threaten and punish his or her troops. If regard is had to the theory of total institutions, the convening authority and its central role in the chain of command *and* trial process embody the first and third feature of this theory: the first being the idea of the same single authority controlling all aspects of the subordinates' lives, the third being an imposition of explicit rulings being imposed from above.[692] Understood this way, it was little wonder that the military accepted only minor change to the means by which it could control its members from within the chain of command.

Similarly, the military's argument for the retention of the convening authority and the importance of a commander's ability to maintain discipline through the ability to control a prosecution and trial is really an argument on the military's behalf about pursuing its official aim – harnessing a disciplined force to fight and win wars. The pursuit of the 'official aim of the institution' is also a feature of the theory of total institutions, and as such, it is no surprise that maintaining the multiple roles of the convening authority trumped Abadee's recommendations of a civilianising, fair trial nature. Such an outcome is consistent with the research conducted by Lynne Zucker, Ronald Jepperson, Neil Fligstein and Walter Powell[693] who all separately concluded that the more controlled the institution, the greater the resistance to change. Thus, we see the military resisting the over-arching reform recommended by Justice Abadee with respect to the multiple roles of the convening authority, and instead opting for a piece-meal, minimalist approach.

That minimalist approach is itself also consistent with the theory of institutional isomorphism. These recommendations of Justice Abadee effectively questioned the institutional legitimacy of the military justice

[692] Goffman, *Asylums*, above n 231, 5-6 (emphasis added). See also: Conti and Nolan, above n 244; Becker, above n 244; Davies, above n 244; Perry, above n 230.
[693] Refer Chapter 3 Part D, resistance to change theories.

system because the recommendations raised the prospect that the system offended notions of a fair trial. Yet, rather than embrace the recommendations as a whole, the military's response was to react as minimally as possible. Such an approach evokes the institutional isomorphic theories of Rosabeth Kanter, as well as Meyer and Rowan[694] who argued that organisations construct stories or myths about their functioning as a means of creating public legitimacy for their actions, irrespective of what the organisation actually did and how it achieved those goals. In slightly modifying the multiple roles of the Convening Authority, the military was able to say it had 'done something' and thereby seek to appease its critics and answer public/societal expectation that it was an entity worthy of support.

3. Evaluating the response to Abadee - Establishing a DMP

In recommending the abolition of the multiple roles of the convening authority, Justice Abadee promoted the idea of creating, in its place, an independent office of the Director of Military Prosecutions on a tri-service basis. He considered such an office would be

> important to ensure a high degree of manifest independence in the vital task of making decisions to prosecute and in the exercise of prosecution discretions. The decision to prosecute should be made on entirely neutral grounds to avoid the suspicion that it might otherwise be biased.[695]

Accordingly, he recommended that:

> 4 Careful consideration should be given to examining the question of the appointment of an 'independent' Director of Military Prosecutions upon a tri-service basis.

This is a recommendation aimed at achieving institutional independence, particularly with respect to the prosecuting role and prosecutorial decision

[694] Refer Chapter 3 Part D.
[695] *Abadee Report*, 160 cited in the *Military Justice Report 1999*, paragraph 4.50.

making. However, this recommendation was flatly rejected; the ADF responded (ADF emphasis) that:

> **A DMP will not be established**. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.[696]

Justice Abadee's recommendations that depended upon an appointment of a DMP were similarly rejected:

> 5 The matter of any such appointment, if at all, whether it should be tri-service, the role and duties of any Director and the matter of the responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.
>
> ADF Response - THIS RECOMMENDATION HAS NOT BEEN AGREED. A DMP will not be established (See Recommendation 4).

Justice Abadee was not the first person to urge the creation of a DMP for the Australian military justice system. Justice Burchett, in his 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* identified the matter as having first being raised in 1995:

> As a discrete issue, the idea of a DMP appears to be relatively recent. So far as I am aware, it was first specifically raised, in an Australian Defence Force context, in 1994 by the then Judge Advocate General, Rear Admiral Rowlands, in a paper entitled The Civilian Influence on Military Legal Structures. The following year, in his annual report for 1995, he stated:
>
> > 'I believe there would be an advantage in establishing a legal officer at the Colonel (or equivalent) level as a Director of Military Prosecutions. The office would encourage consistency in approach and more professional supervision of the prosecution process before Defence Force Magistrates and Courts Martial (and, perhaps, more serious charges at the summary level).'[697]

[696] Response cited in the *Military Justice Report 1999*, Appendix E.
[697] Burchett Report, paragraph 207.

Thus, the institution and its official aim prevailed, a response again consistent with the theory of total institutions and its emphasis on the pursuit of the institutional goal. Perhaps the key to understanding this response from an isomorphic standpoint is to return to the judge's actual recommendation. Unlike other recommendations, for example number nine which spoke in directive, proscribed language ('There should be no reporting ...'), the language of Recommendation 4 was different (emphasis added): 'Careful consideration should be given ...'.

All the military was required to do was carefully consider the matter. That is not the language of coerced change. Yet, given the military's response to various of Abadee's recommendations concerning the multiple roles of the Convening Authority and DMP, it is unlikely the recommendation would have been accepted even if written in dispositive, mandatory language. Protective of its status as a total institution and protective of the control of military members that comes with that status, mere words of recommendation would not constitute sufficient coercion to a resistant military.

4. Evaluating the response to Abadee - Performance for Pay and Promotion

The Report recommended there be a prohibition against considering 'an Officer's performance as a member of a court martial being used determine qualifications for promotion or rate of pay or appointment'.[698] The extracts of Abadee's Report that have been reproduced in subsequent reports do not identify what 'performance' specifically relates to – it could be the rate of convictions secured, or the simple act of being a member. There is some suggestion from the following extract, that

[698] *Abadee Report*, Recommendation 19, extracted at *Military Justice Report 1999*, Appendix E.

performance relates to matters of efficiency, but efficiency in what is left unsaid:

> Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members of any court martial. Section 193 protects such a member during performance of his/her duties as a member. There is a case for implementing the spirit of such a section generally.[699]

What this does reveal is that those who have been selected by the convening authority to decide matters of fact, have the efficiency of that decision making reported upon and taken into account for performance and pay purposes. By contrast, jury deliberations in civilian, criminal trials are required to be secret and it is a contempt of court to communicate with a juror without the leave of the court.[700] It is also the case that in civilian trials, the fair trial aspects of independence and impartiality applies to jurors (refer Chapter 4 D(2)). What can be gleaned from Abadee's Report runs anathema to the idea of independence and impartiality.

The reporting extended beyond a review of the efficiency of court martial panel members, but included reporting on the Judge Advocates (meant to give supposedly binding legal advice), DFMs (deciders of fact and law) and the entity that reported on the court martial/DFM proceedings to the convening authority. This must be so because another of Abadee's recommendations was framed in this way:

> 9 There should be no reporting on JAs, DFMs and s.154(1)(a) reporting officers in respect of their judicial duties.

Consistent with the independence and impartiality which ought apply to a jury, there can be no doubt that these principles apply in equal force to these judicial officers. Yet to review a judicial officer's performance in that role of judicial officer is in violation of the principles of independence and impartiality.

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[699] Ibid.
[700] For example, *Jury Act* 1995 (Qld) s 54.

The theory of total institutions describes a closed social world wherein all aspects of inmates' lives are regulated by a higher authority within that institution. Thus, reporting on the performance of courts martial members is consistent with the single authority regulating its members. As the theory of total institutions also provides, such regulation is part of the 'single rational plan purportedly designed to fulfil the official aim of the institution.'[701] The official aim of the Australian Defence Force is provided for in the *Defence Act* 1903, being 'to provide for the Naval and Military Defence and Protection of the Commonwealth and of the several States.'[702] Details of how this is to be achieved are found in the arguments of those who favour the exceptional status of the military justice system (refer Chapter 2) who clearly articulate that the ability to enforce command discipline must remain within the military[703] and that '[m]ilitary justice provides a stimulus to cultivate such habits [instantaneous obedience to another person's decisions] by posing the threat that disobedience of commands will be penalized.' [704]

When challenged by Abadee about these unquestionably dubious practices, the ADF accepted the recommendations. It would have been untenable for the military to try and justify or reject such an untenable position.

[701] Goffman, *Asylums*, above n 231, 5-6 (emphasis added). See also: Conti and Nolan, above n 244, 166-186; Becker, above n 244, 4; Davies, above n 244, 77-95; Perry, above n 230, 345-355.
[702] Long Title of the Act.
[703] See for example: Mitchell and Voon, above n 106.
[704] Everett, above n 66.

C. The Ombudsman's 1998 Report

On 14 July 1995 the Chief of Defence Force invited the Commonwealth Ombudsman, Ms Philippa Smith, to conduct an investigation into matters surrounding an allegation of sexual assault on a Defence base. The report was finalised in January 1998, with the Ombudsman identifying a range of systemic flaws and shortcomings in both the administrative and disciplinary investigation processes with respect to allegations of sexual assault.[705] While the Ombudsman did not consider the trial process for sexual assault offences, she highlighted that the importance of a thorough, rigorous, balanced and properly documented investigation process cannot be over-emphasised, because the outcome of the investigative process will have a direct bearing on whether a prosecution will be brought and if so, whether the evidence will withstand testing at trial: if an investigation is tainted or flawed, so too will any trial that rests upon the evidence so gathered.

The Ombudsman summarised her findings with respect to disciplinary investigations as follows:

> 5.54. I consider that there is evidence of a range of problems experienced in the conduct of investigations in cases examined by my office. These have included:
> - inadequate planning of investigations
> - failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed
> - pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response
> - failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses

[705] For example, Ms Smith found at paragraph 4.25 of the *Ombudsman Report*: 'In the past there have been accusations of bias in some investigations, and there has been one case where a Commanding Officer investigated a complaint against himself.'

- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and
- inadequate record keeping.

The Ombudsman noted that as a result of her recommendations, the ADF would 'form a working party to develop an ADF-wide training strategy and guidance on DIR [*Defence Inquiry Regulations* 1985] investigations'.[706]

The recommendations of the Ombudsman's Report and the military's responses thereto are at Appendix 7. The emphasis of this report was on the investigation process and is thus outside of the scope of this thesis other than to note that flawed investigations result in evidence going before a court martial, DFM or summary authority which lacks probative value. Whether this lack of probity is actually or effectively examined at trial would depend on the experience and skills of the relevant participants in the hearing process, most of whom at the summary authority level would lack the forensic experience of considering legal training.

D. Military Justice Report 1999

1. Background

This Joint Standing Committee Inquiry arose as a consequence of the 'considerable public interest and media comment'[707] concerning the circumstances surrounding the deaths of service personnel, as well as the treatment of some members of the ADF who considered they had been treated unfairly by the military justice system. The Committee observed that public debate had raised the apprehension and concern that the principles of natural justice had not been applied to this latter class of ADF members and that they had not been treated with appropriate respect for

[706] Ibid, 5.57.
[707] *Military Justice Report 1999*, paragraph 1.7.

their human rights. As a corollary, media and public attention raised the issue as to whether the current military justice system was appropriate, just and fair.

Upon these concerns being raised in Parliament, the Senate resolved to establish an inquiry to 'examine the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and ADF disciplinary processes.'[708] Unlike the Abadee Inquiry or the Ombudsman's Own Motion study, this inquiry invited submissions and comment from people who considered themselves (or their next of kin in the case of deceased ADF members) victims of the military justice system. Its Terms of Reference required the Committee to examine

> the avenues for investigative and punitive action within the ADF to determine if extant procedures are unfair, inappropriate or open to misuse. The Committee restricted its investigations to the legislative framework and procedures for military inquiries and disciplinary processes and did not attempt to re-hear specific cases.[709]

A considerable part of the report focused upon the administrative inquiry processes, such as Boards of Inquiry and Redress of Grievance procedures, being the second part of the military justice system described in Table 2. As also noted in the introduction to this thesis, those administrative procedures are beyond the parameters of this thesis.

In the 42 pages that constitute the Report's chapter concerning the justice system,[710] the Committee provided a summary of the issues that had already been canvassed by Abadee, including for example, the content of Australia's obligations under the ICCPR. However, this part of the report is more in the style of a summary of previous arguments presented in the earlier Abadee report, as opposed to a critical analysis of the ADF submissions previously made to Abadee and to this Committee. For

[708] Ibid, paragraph 1.8.
[709] Ibid, paragraph 1.14.
[710] Being Chapter 4.

example, the Committee accepted,[711] with little rigorous analysis, the submissions made by the Department in a *private* briefing that 'without such a [separate] system of military discipline it [the military] cannot effectively perform its role: to fight and win wars.'[712] This kind of rhetoric is reminiscent of the language employed in the theory of total institutions which refers to the official aim of the institution. In accepting the position in-house justice is a prerequisite to fighting and winning wars, the Committee also accepted Defence submissions that a by-product of the pursuit of discipline was that soldiers do not enjoy the same rights as the citizens they must protect.[713]

However, this conclusion that soldiers do not enjoy the same rights as non-military citizens was at odds with the Committee's view on the status of the ICCPR within Australian municipal law. First, the Committee rightly identified the importance of the decision in *Findlay* due to the similarity between Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms and Article 14 of the *ICCPR*.[714] The Committee was also aware that the UN Human Rights Committee had held in its *General Comment No. 13* that Article 14 of the *ICCPR* was to apply to military courts as well as civilian courts.[715] The Committee also observed

> with regard to the first protocol, there is an obligation within public international law which is placed upon Australia to comply as an original signatory to the covenant. … Although the ICCPR is not legally binding on its signatories, the Australian government is clearly of the opinion that existing laws provide for all the rights that are provided for in the ICCPR. In essence, Australia has complied with the ICCPR and it is now part of Australian law. Justice Abadee agrees, suggesting that the 'requirement that the trial of a person should be fair and impartial is deeply rooted in the Australian system of law'.[716]

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[711] *Military Justice Report 1999,* paragraphs 4.1-4.4 culminating in its finding at paragraph 4.5.
[712] Department of Defence, Private Briefing, cited in the *Military Justice Report 1999*, paragraphs 4.2 and 4.3, and footnote 3.
[713] *Military Justice Report 1999,* paragraphs 4.3-4.5.
[714] Ibid, paragraph 4.10.
[715] Ibid, paragraph 4.10.
[716] Ibid, paragraph 4.13.

Despite the requirement of a fair trial being 'deeply rooted' in our system of justice, and despite submissions urging the DFDA be amended to reflect this right,[717] the Committee accepted Defence submissions that the 'remote theoretical possibility'[718] of an international tribunal adjudicating on the independence and impartiality of Australian courts martial did not warrant overturning the system and its status quo. This is an approach analogous to a naughty child in a playground persisting with poor behaviour because he or she has not been caught. To be fair, though, the military did not perceive its system even warranted criticism, self-servingly describing it as 'practical, efficient and effective.'[719]

The Committee also considered whether the responsibility for military trials ought be transferred to a judicial entity separate from the ADF,[720] but ultimately did not make any recommendations for or against the creation of a military judiciary separate from the ADF. The Committee did, however, join with and accept the Ombudsman's earlier findings of January 1998, with respect to flawed investigations, secret investigations denying natural justice, and inadequate training in the operation of the *DFDA*.[721]

The recommendations pertaining to the military justice system (as opposed to boards of inquiry and investigations) are set out at Appendix 8. The recommendations required very little of the military, and deferred a review of post-Abadee institutional independence for another day.[722]

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[717] See for example, Professor Barker who submitted to the Committee that the findings of *Findlay v. United Kingdom* are relevant to Australia, and that the *DFDA* should be amended to ensure that an accused person before a court martial is guaranteed a fair trial by an independent tribunal in accordance with Article 14 (1) *ICCPR*, cited in the *Military Justice Report 1999*, paragraph 4.11 and fn 21.
[718] Department of Defence, Submission, 1043, cited in the *Military Justice Report 1999*, paragraph 4.14.
[719] *Military Justice Report 1999*, paragraph 4.14.
[720] Ibid, paragraphs 4.23-4.32.
[721] Ibid, paragraphs 3.122-3.134, 4.100-4.104.
[722] Ibid, Recommendation 46.

Nevertheless, two years later, when the Joint Standing Committee investigated the 3RAR allegations, dissenting members noted:

> 7.7 The committee's earlier Report 'Military Justice Procedures in the Australian Defence Force' was tabled in June 1999, nearly 2 years ago.
>
> 7.8 It is extremely disappointing that the government has yet to formally respond. Nor has it provided any explanation for such a delay.

As matters later emerged, the Committee which drew up the *Military Justice Report 1999* was not made aware of the allegations of brutality within the 3rd Battalion, Royal Australian Regiment (3RAR) or the ADF investigations into those allegations which were underway at the time of its review. The subsequent *Rough Justice Report 2001* by the Joint Standing Committee on Foreign Affairs, Defence and Trade expressed concern that the allegations and investigation may have been withheld from the 1999 Committee, adding that the 3RAR evidence 'could have materially affected the recommendations made in the 1999 report'.[723] This is an important consideration, as the Joint Committee of 1999 effectively took the military's word that all was going well. Thus the Report recommended:

> **Recommendation 46**
> The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

2. Evaluating the response to the *Military Justice Report 1999*

Given this Inquiry was set up to look at allegations of 'punitive action in the ADF' and to consider whether current procedures were open to misuse, and despite the ADF providing the Committee with a private briefing, it seems disingenuous on the part of the ADF to have failed to alert or

[723] *Rough Justice Report*, paragraph 1.4.

otherwise advise the Joint Committee of the 3RAR investigations being conducted by the ADF.[724]

Eventually, serious allegations of brutality, extra-judicial procedures and illegal punishments were made public.[725] However, the failure to disclose this important body of evidence to the Joint Committee can be understood (although not accepted as appropriate) by reflecting on the military as a total institution protective of its closed status and separate existence. Certainly, it can be understood that no organisation likes embarrassing material in the public domain, but in this instance, the ADF did more than just fail to mention something of importance and direct relevance to this Senate Inquiry – to the contrary, it positively presented a case that all was going well.[726]

Saying that all was fine, and the system was 'practical, efficient and effective' (despite the reality) speaks of the kind of myth making identified by John Meyer and Brian Rowan in their examination of institutional isomorphism (see Chapter 3, Part D). In their *Institutionalized Organizations*,[727] Meyer and Rowan argued that organisations create stories or myths about their functioning as a means of creating public legitimacy for their actions, irrespective of what was *actually* happening

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[724] The majority in the 2001 report found the failure to advise the 1999 Committee 'disappointing' but added at paragraph 6.19: 'While the existence of the 3RAR issue may have materially affected the committee report, there is no evidence to show that there was any intent to mislead the committee.'

[725] See for example:

- Michael Ware, 'Behind Closed Doors: Australia's Army covers up brutality in an elite unit – and undermines the military justice system' *Time*, 21 August 2000, 52-54;
- Lincoln Wright 'I was told to bash others: ex-Army private', *Canberra Times*, 26 November 2000, 3;
- 'Cosgrove defends slow-paced army justice', *Townsville Bulletin,* 29 August 2000, 9.

[726] For example, Department of Defence, Submission, 1043, cited in the *Military Justice Report 1999*, paragraph 4.14.

[727] John Meyer and Brian Rowan, 'Institutionalized organizations: Formal structures as myth and ceremony' (1977) 83, *American Journal of Sociology*, 340-363.

within the organisation. Meyer and Rowan also argued that not only did organisations spread myths to enhance their appearance of legitimacy, but myth making also had the effect of insulating the organisation from public scrutiny which might otherwise occur if the myth of legitimacy was not created and spread. Not only did myth making serve as an attempt to insulate the entity from scrutiny, but it was also a means of convincing the public that it was an entity worthy of support. Commonsense indicates that had the ADF advised this Joint Committee of the 3RAR investigations, the Committee's inquiries would have been broader and the Committee less likely to accept the military's assurances that all was well – patently, it was not. Indeed, in the subsequent *Rough Justice Report 2001*, members indicated that the knowledge of these allegations and investigations could have significantly affected the outcomes of this 1999 report.[728]

3. Evaluating the response to the Military Justice Report, 1999- international obligations

As already noted, the Committee formed the view - incorrectly as a matter of international law - that the ICCPR was not 'legally binding on its signatories'.[729] The Committee then added that because Australian domestic law had complied with the rights and obligations provided in the instrument, the 'ICCPR is now a part of Australian law'.[730] But, the military's submission with respect to our international obligations and the rights created by the ICCPR, was dismissive of these rights and the international bodies that adjudicated upon them:

> [T]he remote theoretical possibility of an international tribunal finding that the present, tested, legislative arrangements may be in breach of our treaty

[728] *Rough Justice Report*, paragraph 1.4.
[729] Paragraph 4.13.
[730] Paragraph 4.13.

> commitments is not sufficient to overturn a system which is practical, efficient and effective.[731]

Given the 3RAR allegations were in fact being investigated at this time and given that the subsequent 2001 3RAR Committee found that there was a system of extra-judicial punishment taking place at 3RAR between 1996 and 1998,[732] it is not the case that the military justice system was operating efficiently and effectively at this time – at least if the measure of efficiency and effectiveness is whether fair trial rights as articulated in Article 14 ICCPR and their common law equivalents were concerned.

If we accept the military as a total institution, then its resistance to the possibility of review by an international human rights body can be understood. In particular, the first feature of a total institution is that all aspects of life are conducted under the control of a single authority. The possibility of external review by a body charged with promoting and protecting human rights as a priority (as opposed to fighting and wining wars), is counterintuitive to an entity that maintains that 'an effective military discipline system must be implemented and managed from within the organisation itself'.[733]

4. Evaluating the response to the Military Justice Report, 1999 – post Abadee implementation

One of the Joint Committee's terms of reference was to review the implementation of the recommendations made in the earlier Abadee Report. In that regard, the ADF submitted to this Joint Committee that

[731] Department of Defence, Submission, 1043, cited in the *Military Justice Report 1999*, paragraph 4.14.
[732] *Rough Justice Report*, paragraph 6.5.
[733] Department of Defence, Private Briefing, cited in the *Military Justice Report 1999*, paragraph 4.23.

> the creation of a separate military judiciary would be both impractical and unnecessary. Unnecessary in that the existing system, enhanced by the acceptance of most of the Abadee recommendations, will provide an 'independent and impartial disciplinary system, consistent with the needs of the ADF and the interests of justice'. Impractical in terms of the 'command structure and operational requirements of the ADF'.[734]

The military's remark about accepting *"most"* of the Abadee recommendations must be a reference to quantity not quality; that is, whilst the military did accept a significant number of recommendations, the significant reforms pertaining to establishing a Director of Military Prosecutions and eliminating *all* of the multiple roles of the Convening Authority (not just selecting the decider of fact) were not. Even the Committee was not convinced that the changes proposed by the ADF would address the perception that trials were not independent and impartial;[735] yet the ADF maintained the myth that 'all was well'. This is in accord with the institutional isomorphic idea of myth making with respect to the organisation's legitimacy, irrespective of reality. It is correct that the military did, in a numerical sense, accept most of Justice Abadee's recommendations, but just not the ones of civilianizing, fair trial significance. However, mythologizing that it accepted *most* recommendations has two effects: first, it is a means by which the organization could try to insulate itself from further inquiry; and, second, as a means of convincing the inquirers and the wider public that it is a fair and just entity, responsive to change, and entitled to support. Similarly, in telling the inquiry all was well and not advising it of the 3RAR allegations, the ADF managed to avoid scrutiny of its post-Abadee implementation of reforms to the military justice system.

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[734] Department of Defence, Submission, 1041 and 1045 cited in the *Military Justice Report 1999*, paragraph 4.25 (emphasis added).
[735] Foreword to *Military Justice Report 1999.*

5. Evaluating the response to the Military Justice Report, 1999 - establishing a DMP

The Committee noted that the changes to the multiple roles of the convening authority proposed by the ADF did not address the problem that the power to prosecute remained within the chain of command and that that power was exercised without the need for binding legal advice.[736] Accordingly, it found that the creation of a DMP would remove courts martial and DFM proceedings from the chain of command, and as such, would 'facilitate an independent and impartial trial.'[737] The Committee considered a range of options which it tabularised as follows:

[736] Ibid, paragraph 4.38.
[737] Ibid, paragraph 4.39.

Military Justice Report's Table 4.2: Alternate Models

Function	Current System	Model One	Model Two	ADF System Post Abadee Reforms	Australian Criminal System
Determine whether there should be a trial	Convening Authority	DMP	Convening Authority	Convening Authority	DPP
Determine the nature of the tribunal and the charges	Convening Authority	DMP	Convening Authority	Convening Authority	DPP
Select the trial judge and jury	Convening Authority	JAA (JAG's office)	JAA (JAG's office)	JAA (JAG's office)	Administrative function of the Court and legislation
Select the prosecutor	Convening Authority	DMP	DMP	Convening Authority	DPP
Automatic review of proceedings	Convening Authority	Authority other than the Convening Authority	Authority other than the Convening Authority	Authority other than the Convening Authority	None
Review on Petition	Reviewing Authority[84] Service Chief	Reviewing Authority Service Chief	Reviewing Authority Service Chief	Reviewing Authority Service Chief	None
Appeal	DFD Appeals Tribunal[85] Federal Court	DFD Appeals Tribunal Federal Court	DFD Appeals Tribunal Federal Court	DFD Appeals Tribunal Federal Court	Higher court within the Australian judicial system

Report's footnotes:

[84] A member convicted of a service offence has access to two levels of review on petition. In the first instance there is access to a reviewing authority appointed by the Service Chief and then there may be a further review by the Service Chief (See Department of Defence, Submission, p. 563). When conducting a review by petition, a reviewing officer is required to obtain a legal report which is binding on them on questions of law.

[85] A person convicted by a court martial or by a DFM may be able to pursue an appeal against the conviction, but not the punishment, to the Defence Force Discipline Appeals Tribunal convened under the *Defence Force Discipline Appeals Act 1955*. Appeals are heard by a tribunal comprising,

> usually, of not less than three judges (Justice or Judge of a federal court or of the Supreme Court of a State or Territory) who are appointed by the Governor General (*Defence Force Discipline Appeals Act, 1955*, Section 7).

The Committee further noted that a DMP would offer three main advantages or benefits: first, prosecutorial decision would be made independent of the chain of command; second, consistency across the three services would be promoted; and, third, it would provide for trials that were impartial.

The ADF once again did not support the creation of this independent prosecutorial office, and instead: pointed to the need for the commander to make these decisions; stated that there was 'no Australian legal imperative requiring such an appointment'; and, argued that it intended to reform the convening authority structure as a consequence of the Abadee report.[738] Yet, the reforms to the Convening Authority which the ADF proposed did not have the effect of quarantining the decision to prosecute from the command.

Further, it is unclear why, if the ADF had embraced Abadee's recommendations as they said, the proposed changes to the multiple roles of the convening authority were still only proposals. It was also disingenuous to present the appearance of embracing Abadee's recommendations, when the judge found a 'substantial case for establishing a DMP to enhance impartiality and independence', a recommendation which the ADF would not countenance.

The military again argued that the commander must retain the power to decide whether a prosecution would occur, and that 'is a paramount tenet of military discipline'.[739] The military also expressed concern that a DMP

[738] Ibid, paragraphs 4.12-4.20, 4.62.
[739] Department of Defence, Submission, 1042, cited in the *Military Justice Report 1999,* paragraph 4.57.

would create delays, whereas a commander could apply justice swiftly.[740] Ironically, delay became an issue canvassed in two subsequent reports, the *Rough Justice Report* and *Burchett Report*, both of 2001. Those two Report were critical of how long it took the military's own justice system to bring an accused person to trial. Even the Full Court of the Federal Court, in *Hoffman v Chief of Army*,[741] made adverse comments about delay in military proceedings under the court martial system, which the military called 'swift'.[742] In the *Hoffman* matter, Michael Hoffman, a Major in the Australian army, had been charged with common assault some seven years after the alleged incident occurred. The charges were preferred simply to avoid the statute of limitation expiring. At first instance, the trial DFM observed:

> I will not attach blame to the delay which has occurred, but it is my very strong view that the delay is inexcusable. That any person, pardon me, be they Major, a Private, or General, could have an investigation hanging over their heads since, at the very earliest 1999 through today, brings no credit to the Defence Force.
>
> Had this man been properly dealt with and properly punished in 1996, or seven, or indeed in 1998, or nine, then the effects of any punishment which may have been awarded would have been today effectively overcome. Even if dealt with in 1999, then the accused would currently still have at least three or four clear reporting periods at that time and would be now in a position where he would be eligible for consideration for promotion. All of his reporting periods since this offence have been clear. All of them have been, as I have mentioned before, of the very highest standing.[743]

The Full Court found that the decision to prosecute should not have been made and the Defence Force Magistrate at first instance should have considered delay as a form of abuse of process.[744]

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[740] Vice Admiral Don Chalmers, Transcript, 45, cited in the *Military Justice Report 1999,* paragraph 4.59.
[741] *Hoffman v Chief of Army* [2004] FCAFC 148.
[742] Ibid, paragraph 165, for the criticism. See Department of Defence, *Submission*, 1043, cited in the *Military Justice Report 1999*, paragraph 4.14 for the military referring to its justice as efficient.
[743] *Hoffman v Chief of Army* [2004] FCAFC 148, paragraph 90.
[744] Paragraph 175.

Returning to the ADF's attitude to the establishment of a DMP, it made submissions to this 1999 inquiry that

> the marginal advantage to be gained from the enhanced perception of independence and impartiality of an independent DMP, would not compensate for the disadvantage that would result from commanders losing the prerogative to decide whether to prosecute.[745]

The theme underlying the ADF's response is one focused on ensuring a commander can discipline and therefore coerce compliance with his or her orders. But the military justice system is much wider than providing a commander with punitive means to compel obedience to orders. If a defence member is charged with, for example, rape or theft, it is harder to justify why the (usually) non-legally trained commander must decide whether to have his/her subordinate charged, as opposed to that decision being made by a legally qualified and experienced DPP equivalent.

It is also difficult to see how a non-legally trained commander could be expected to form an educated view on the matters which ADF prosecutions policy requires the commander consider when deciding whether to prosecute:

- whether the admissible evidence available is capable of establishing the offence;
- whether there is a reasonable prospect of achieving a conviction; and
- other discretionary factors, such as consistency and fairness, operational requirements, deterrence, seriousness of the offence, interests of the victim, nature of the offender, prior conduct, degree of culpability, effect upon morale and delay in dealing with matters.[746]

These considerations are particularly important given that this report and the two preceding reports found significant flaws in investigation processes and evidence gathering procedures.

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[745] Department of Defence, Submission, 1042, cited in the *Military Justice Report 1999,* paragraph 4.62.
[746] Defence Instructions (General) Personnel 45-4.

The decision to prosecute or not is perhaps the single most important decision in the prosecution process. This is a concept recognized by the *Australian Defence Force Prosecution Policy:*

> The initial decision whether or not to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, and conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system.[747]

Instead of placing this important decision with a legally trained person independent of the chain of command, the ADF submitted that the decision to prosecute or not, must remain with the commander.

With assurances from the military that all was well, and with the promise that it intended to make some of the Abadee reforms to the convening authority, the Military Justice Report 1999 ultimately declined to formally recommend the creation of a DMP. Instead, it deferred further consideration of the independence and impartiality of courts martial and Defence Force Magistrates until the proposed post-Abadee arrangements had been in operation for three years.[748] Nonetheless, the Committee clearly indicated its view to the military and the path it would likely travel in the future:

> Independence and impartiality in the military justice system was a strong theme throughout the conduct of the inquiry. In cases involving the death of an ADF member, the Committee was aware of a strong feeling, particularly from family members of the deceased, that the military justice system lacks independence. While the Committee received no evidence to support an allegation of a lack of independence in the military justice system there is no question that this perception exists in some quarters.
>
> However the Committee was of the view that ADF initiated changes to the military justice system [post Abadee] will not fully address both the perceived and actual independence and impartiality of the system.[749]

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[747] Defence Instructions (General) Personnel 45-4, paragraph 2; see also ADF, *Discipline Law Manual*, Vol 1, paragraph 4.2.
[748] Paragraph 4.66.
[749] Foreword to *Military Justice Report 1999* (emphasis added).

The year after this report was released, the then Judge Advocate-General of the ADF, Major General Duggan, summarised the arguments for and against the creation of a DMP in his JAG *Annual Report*, 2000.[750] Major General the Hon Justice Kevin Duggan, in addition to holding the officer of JAG between 1996 and 2001, was a Justice of the Supreme Court of South Australia.

The JAG found[751] a number of advantages favouring the creation of a DMP, including that the decision to prosecute would be exercised by a legally trained officer of appropriate rank and there would be uniformity in the exercise of the prosecutorial discretion. He also considered it appropriate that the decision be removed from a commander, because it could be suggested, at times, that there was a conflict of interest in a commander deciding whether to prosecute in circumstances where that may suggest his subordinates are lacking in discipline. He also thought it far preferable that the decision to prosecute be made by a person with no connection to the alleged offender, as a consequence, removing the commander from the difficult position of deciding whether to charge a fellow officer.

The then JAG also acknowledged that a DMP would 'be following the civilian trend of appointing a Director of Public Prosecutions' that had occurred in the United Kingdom and Canadian militaries. The JAG also expressed a concern that leaving the decision to prosecute with the Commanding Officer could have the consequence of a Commanding Officer deciding to deal with the matter personally, to avoid a prosecution drawing attention to problems within his command. In assessing the benefits of establishing a DMP, the JAG had regard to a Canadian study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, which reached the following conclusion:

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[750] *JAG Annual Report* (2000).
[751] Ibid, paragraph 46.

> In terms of the characteristics of the offices of those executing the prosecution authority in the military, it is clear that the commanding officer is in no position to exercise independence of judgment in the exercise of the discretion whether to proceed on particular charges. This conclusion is inescapable when one considers the variety of roles the commanding officer must discharge in the events leading up to a trial within the military justice system. Again, given that the overriding consideration in the process is the good order and discipline of the military, the commanding officer is responsible to his or her superiors in relation to that consideration and, as such, subject to "command influence" in relation to how disciplinary matters are handled within his or her sphere of responsibility.
>
> If the sole function of the military justice system were to address matters relating to the efficiency, discipline and morale of the military, then this state of affairs would be uncontroversial. The commanding officer is obviously in a position to judge what effect certain forms of misconduct are likely to have on the smooth functioning and operational readiness of military units. Insofar as the military justice system addresses these concerns, the existing system is reasonably fit for its purpose. However, the fact that there are public interests far broader than this gives rise to a concern about the manner in which prosecutorial authority is exercised within the military.[752]

The JAG then reviewed the arguments against the creation of a DMP; he found two. First, that discipline and command issues are best addressed by the commander, and second, that the office of DMP could cause delays in the prosecution process. After considering the arguments, he concluded in favour of a DMP; 'I have reached the conclusion that it would be in the interests of the ADF to establish an office of an independent DMP to assume control over courts martial and DFM cases'.[753]

Thus, by 2000, the military ought to have been in no doubt as to the direction of the tide of opinion with respect to the establishment of an independent office of Director of Military Prosecutions. Yet, the military resisted the creation of the office, which is again not surprising when the military is understood as a total institution and protective of its separate status.

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[752] James W O'Reilly and Patrick Healy, 'Independence in the Prosecution of Offences in the Canadian Forces - Military Policing and Prosecutorial Discretion' (emphasis added) cited in the *JAG Annual Report 2000*, above n 750.

[753] *JAG Annual Report* (2000), above n 746; see also *Military Justice Report 1999*, paragraph 44.

E. Rough Justice Report 2001

1. Background

In 2000, the media exposed allegations of brutality and extra-judicial 'justice' in the 3rd Battalion, Royal Australian Regiment (3RAR).[754] The media coverage included allegations that extra-judicial procedures and illegal punishments were being applied within the Army's parachute battalion and that the investigative and discipline proceedings were inordinately delayed and lacked transparency and independence.[755] These were the allegations that the military had been investigating but which they did not advise the Committee which produced the 1999 Report.

As a result of the media coverage, two investigations began. First, Mr James Burchett QC, was appointed to investigate the wider systemic concerns with the military justice system arising out of the 3RAR matter. The Burchett Report is considered in the next section of this Chapter. Second, the Joint Standing Committee on Foreign Affairs, Defence and Trade examined the specific allegations of brutality within 3RAR. For this inquiry, the Joint Committee did not have Terms of Reference in the traditional sense, but investigated the following 13 specific allegations:[756]

> **3RAR**
> 1 Soldiers would be assumed to be guilty of a crime or misdemeanour, based on accusations
> 2 Illegal punishments were devised to 'correct' the behaviour of offenders
> 3 Some punishments were administered as bashings
> 4 Other punishments involved putting 'offenders' through activities which, by their nature, were designed to punish
> 5 Key appointments condoned the activity
> 6 The system was widely employed
> 7 There was a system of intimidation within the battalion which prevented soldiers speaking out

[754] See for example news reports above n 725.
[755] *Rough Justice Report*, paragraph 1.3.
[756] Ibid, Table 1.1.

The ADF Inquiry process
8 Obfuscation by the Department of Defence, including the misleading of a committee
9 The army had kept its knowledge of these incidents confidential for almost two years
10 The ADF failed to act when first made aware of the alleged behaviour.

The ADF Justice System
11 The system had arisen because of frustration with the bureaucracy within the existing discipline system
12 Senior officers interfered in the military discipline process.
13 There are excessive delays in the military justice system.

These were serious allegations, which, if true, made a mockery of the ADF's earlier submissions before the 1999 Committee that its justice system was efficient, fair and effective.[757]

For each of the 13 matters, the Committee approached the allegations by adopting a three-part framework: first, it asked what evidence existed to support or refute the allegations; second, it asked whether the evidence identified weaknesses within the ADF justice and inquiry system; and, third, it asked what conclusions and recommendations could be made about the ADF discipline and inquiry system.

With respect to the allegations under the heading '3RAR' above, this 2001 Joint Standing Committee concluded that it was in 'no doubt':

> 6.5 … that there was a system of extra judicial punishment taking place at 3RAR over the period of 1996–1998. The punishment was perpetrated on private soldiers who were presumed guilty of offences, most notably theft and involvement with drugs, without a hearing, or who were considered not to be performing to an adequate standard. Individuals who were loud, brash or over confident were more likely to be targeted in this way.

As for the allegations concerning illegal punishments, the Committee found 'strong evidence' that fellow privates or junior NCO's perpetrated

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

'illegal bashings' on victims: 'In most cases the victim required medical attention after the attack. These bashings were criminal acts'.[758]

With respect to the wider military justice system, the Committee also concluded:

> 6.28 We believe the entire legal process surrounding the incidents at 3RAR took far too long. Much of the blame lies with the defence legal system, which needs some reform.

The establishment of a Director of Military Prosecutions was the subject of discussion before the Committee, but the Joint Committee's members who comprised the majority ultimately found as follows:

> 6.31 The committee feels that Defence has gone a significant way to addressing the issues raised by the events at 3RAR. There was considerable discussion in the committee regarding a Director of Military Prosecutions, but the committee felt that Defence needed to be given sufficient time for the results of their actions to be assessed before discussing the possible establishment of such a position.

This outcome was notwithstanding evidence before the Joint Committee of two clear instances of command interference in the prosecutorial process. In one instance, General Cosgrove sought to remove charges to a higher authority; the outcome of this intervention was two aborted trials before a Defence Force Magistrate. While the Committee noted '[c]learly this was done with the very best of intentions interference is interference, irrespective of the *mala fides* or *bona fides* of those interfering. The second example was only alluded to as it was 'the subject of charges and presumably court martial'.[759]

[758] *Rough Justice Report*, paragraph 6.6.
[759] Ibid, paragraph 7.18.

Many of the recommendations in the *Rough Justice Report*[760] concerned the investigation processes of the military justice system, with this Committee raising the same kinds of concerns identified by the Ombudsman three years earlier. As already noted, flawed investigations have implications with respect to the probative value of the evidence upon which the convening authority (and summary authorities too) acted.

In a dissenting report,[761] 13 members (of a total of 32) took the opportunity to again agitate for the introduction of an independent Director of Military Prosecutions. The dissenters expressed the view that if the Joint Standing Committee of 1999 had been appraised of the information about 3RAR, then it would have likely recommended the establishment of a Director of Military Prosecutions.[762] The dissenters observed:

> 7.15 The general public is very comfortable with the independent operation of a Director of Public Prosecutions. The case for a Director of Military Prosecutions rests not only with the need to create the perception of independence, but the reality of actual independence.

The 13 dissenters recommended that:

> 7.23 In light of the recurrence of issues relating to brutality and military justice, and noting the recommendations of the committee's previous report into military justice procedures in the ADF, those dissenting members now strongly recommend that the ADF establish a statutory office of the Director of Military Prosecutions, for Defence Force Magistrate trials and Courts-Martial (for criminal and quasi criminal matters).

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[760] The recommendations of the *Rough Justice Report* and *Government Response* are set out in Appendix 9.

[761] The dissenting chapter begins with the following important contextual observation:

> 7.1 It is unusual for either of the major parties to dissent from a report of the Defence Sub Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The sub committee has had a significant history of bipartisanship. To provide such a report is not done lightly. The dissent is limited to the areas of a Director of Military Prosecutions and the lack of Ministerial accountability.

[762] *Rough Justice Report*, paragraph 7.14.

2. Evaluating the response to the *Rough Justice Report 2001* - creating a DMP

The Committee was advised that the ADF had established a 'prosecution team' as a means of enhancing competencies[763] and presumably greater transparency in the trial process. However, the Committee also heard evidence that:

> 7.17 As Commodore Smith said in evidence, "they (the team) are directed towards building competence and they still do not take away from the convening authority, the key decision to refer matters". So command or the convening authority still determines whether or not charges will be laid.

Whilst the creation of a prosecution team would bring benefits, even if only in improving competencies, the decision to prosecute was still not free from actual or perceived command influence.

With respect to the establishment of a DMP, the majority members recommended the ADF have more time before considering the matter, whereas the 13 dissenters called for its immediate implementation. The military, through its Department, responded on 22 March 2002, taking advantage of the lack of unity in the Committee:

> **Director of Military Prosecutions**
> The Government notes that the Committee was substantially divided on the matter of the appointment of a Director of Military Prosecutions (DMP), with a dissenting report appended to the main report recommending the establishment of a statutory office of the DMP. In announcing publicly the outcome of the Burchett Audit of Military Justice, on 16 August 2001 the Chief of Defence Force indicated that a DMP would be appointed. Legislation to amend the Defence Force Discipline Act will be proposed once the Chiefs of Staff Committee has considered how the DMP is to be appointed and function.[764]

Despite this response of March 2002, General Cosgrove advised the 2005 Senate Committee Inquiry that the establishment of a statutory DMP was

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[763] Ibid, paragraph 7.16.
[764] See Appendix 9, *Government Response to the Report on Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion by The Joint Standing Committee on Foreign Affairs, Defence and Trade,* March 2002, 4

'in limbo'.[765] Noting the position with respect to the DMP in 2005, the otherwise apparently reforming statement of intention in 2002 finds an understanding in the institutional isomorphic theory that an entity will spread a myth of legitimacy about itself, irrespective of what it is actually doing. Thus, we see the military not only saying all is well with its system, but that it was proposing an agenda of purported reform consistent with recommendations. However, those words and sentiments sat at odds with what was actually happening: in short, nothing. Institutional isomorphism describes this process of myth making as a means of presenting as a legitimate organisation to its external scrutineers, while effectively doing nothing in reality.

The military was also able to find protection from otherwise coercive isomorphic pressure due to the divided nature of the Committee's recommendations concerning a DMP. With the majority not making recommendations to create a statutory DMP, and only the minority expressly recommending one, the military could, and did, capitalise on this divide to its advantage, as encapsulated in the extract from the Government Response above. In other words, it found a convenient, safe haven in the majority's silence empowering the military to actually do nothing.

[765] *2005 Senate Report*, Executive Summary, paragraph 5, xxvi. See also Cosgrove, Submission 16, paragraph 2.83.

F. The Burchett Report 2001

1. Background

The Burchett review ran in parallel with the 3RAR Rough Justice review conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade, as set out above. Whereas that Joint Committee's 3RAR Rough Justice report examined the specific allegations of brutality and extra-judicial 'justice' in 3RAR, the Burchett report was to constitute a 'high level audit team to determine whether or not there exists within the ADF a culture of systematic avoidance of due disciplinary process.'[766] Burchett, who had retired from the Federal Court in October 2000, acknowledged that the motivation for his and the Joint Standing Committee's review was the expression of public disquiet after allegations of had been made public that members of the 3RAR had been mistreated, including assault, as a means of punishment.[767]

The Burchett review examined a broad range of topics, including: the lack of training in the use of the DFDA; unequal punishments depending on rank and service; equity and diversity issues; inconsistency of sentences; a lack of transparency; a lack of access to legal advice; delayed prosecutions; an underlying presumption of guilt; procedural unfairness; and, the need for a Director of Military Prosecutions.

In the course of his investigations, Burchett identified the same kinds of problems as had been identified in previous inquiries: flawed investigations; delayed investigations; unreasonable exertion of command influence during investigative processes; a lack of procedural fairness to

[766] See for example, Department of Defence media release, 'Army's Plan for a Fair Go', 6 October 2000.
[767] *Burchett Report*, see for example, paragraph 73.

victims and defendants; and, competence issues in the conduct of investigations.[768]

In addition to his examination of the independence and impartially of the military justice system, Burchett also considered other elements of a fair trial, including equality before the law, the presumption of innocence, and access to representation. Equal treatment before the law is a basic civil right: see for example, *ICCPR* Article 14(1). However, Burchett identified two areas of inequality in the armed forces: (1) the perception of leniency for more senior ranks, aircrew, critical trades' categories and Reserves;[769] and (2) differing sentences across the services, for example, sailors facing longer maximum sentences than their air force and army counterparts convicted of the same offences.[770] He recommended that sentencing tariffs (that is, 'the going sentencing ranges'), especially for summary offences, be published as a way of promoting consistency but without fettering the sentencing discretion.[771]

Burchett also recommended that the ADF review the number and location of legal officers after hearing considerable evidence that persons in need could not access legal advice. Information from the judge's focus groups and interviews revealed that either: (a) a lawyer was simply not available; or, (b) the sole lawyer on base had already advised the Commanding Officer on the relevant matter and was thus conflicted out of advising the individual accused person. For example, Darwin and Townsville have the greatest number of ADF personnel in Australia, but Townsville had not had

[768] Ibid, paragraphs 39-44.
[769] Ibid, paragraphs 171, 176.
[770] Ibid, paragraph 147:

> It may be time to remove such an obvious inequality, which may not be thought compatible with modern notions of fairness as between members of the respective Services, especially where there is no material difference between the normal daily working conditions of the three Services, as, for example, in Canberra.

[771] Ibid, paragraph 172.

a Judge Advocate or Defence Force Magistrate for many years and there was only one reserve Judge Advocate located in Darwin.[772]

Burchett considered the presumption of innocence, a further basic right in civilian trial proceedings (see for example, ICCPR Article 14(2)), and found that even thought the ADF now renounced the attitude embodied in the expression '*March the guilty bastard in'*,[773] the presumption of guilt still existed. He found this to be so based upon interviews, submissions and focus groups, which led him to conclude that the presumption of guilt now has a more subtle presentation, in that there was a practice and perception that charges were not brought unless it was quite definite that the person charged had committed the offence. Burchett found that the implications were several: the accused was deprived of a genuine examination of the case against him/her because of a pervading belief in the accused person's guilt; the accused effectively suffered from a reversal of the onus which should be on the prosecution to rebut the presumption of innocence and prove guilt by being required to prove his/her innocence; the accused was pressured to plead guilty; and, that the preferrer of charges was perceived to suffer a 'loss of face' if the accused was acquitted. Burchett expressed the concern that only charging those pre-determined to be guilty 'is bad for discipline, both in itself and because it may introduce a temptation to distort the evidence in order to ensure a conviction'.[774]

In turning his attention to the fair trial requirement that proceedings be open, His Honour recommended to the military that they adopt the US practice of publicising disciplinary outcomes. He was of the view that this would assist in making the system transparent and promote consistency.

[772] 2005 Senate Report, xxxiii, paragraph 37.
[773] *Burchett Report*, paragraph 48.
[774] Ibid, paragraph 204.

The Report contained a raft of recommendations, including a recommendation to establish a statutory office of the Director of Military Prosecutions.[775]

With respect to the creation of a DMP, Burchett asked whether the decision to prosecute should continue to be a responsibility of Convening Authorities or be transferred to a DMP. For Burchett, two subsidiary questions arose from this: first, whether the DMP would be granted the discretion to prosecute or not; and second, whether the DMP would act merely in an advisory role or actually conduct the prosecution.[776] In civilian courts, the equivalent office of the Director of Public Prosecutions is an independent office created by Statute and has the unfettered discretion to decide whether to prosecute an accused or not.

Like earlier Reports, when evaluating the arguments for and against the creation of a tri-service office of a DMP, separate from existing Convening Authorities to deal with the prosecution of members facing trial by Court Martial or Defence Force Magistrate, Burchett examined international law. In particular, he looked to the European Court's decision in *Findlay v United Kingdom* and the Canadian decision of *R v Généreux,*[777] where both entities had found that the multiple roles of the Convening Authority were unfair, and lacked the appearance of impartiality and independence. Burchett noted that the Convening Authorities impugned by the European Court and Canadian Supreme Court were 'substantially similar to arrangements presently in use in the Australian Defence Force'.[778] His Honour also noted that while Australia did not have the same constitutional and convention obligations as Canada and the UK, 'the

[775] The recommendations of the Burchett Report are at Appendix 10.
[776] *Burchett Report*, paragraph 206.
[777] See Chapter 4.
[778] *Burchett Report*, paragraph 208.

essential principles are no less important in Australia than they are overseas'.[779]

Burchett traced the recommendations made by the earlier *Abadee Report 1997* and the *Military Justice Report 1999* and observed the military's reluctance to accept recommendations for a DMP. He summarised that opposition to a DMP as follows:

> From the material available to me it is clear that, at the time, Australian Defence Force reluctance to agree to the DMP concept was not based only on doctrinal views of the commander's prerogative to decide whether to prosecute as a paramount tenet of military discipline, but also upon concerns about the practicality of the proposal, particularly in situations of conflict.[780]

Having considered the arguments, submissions and evidence for and against the appointment of a DMP, Burchett concluded that there was more to be gained from the early introduction of an independent DMP than from 'postponing the decision any further':[781]

> I believe the following conclusions can be drawn:
>
> - a principal tenet of Australia's military justice system is an entitlement to an independent and impartial trial;
> - there is no legal imperative (in the sense the legislation is threatened with a High Court ruling of invalidity of the kind that was encountered in UK and Canada) for the establishment of an independent DMP;
> - although there is little by way of hard evidence to support a contention that the Court Martial or Defence Force Magistrate trial process suffers from a lack of independence or impartiality in practice, the present system, post Abadee, still encourages a perception that command influence in the prosecution process is a real possibility, and involves some risk of that possibility materialising;
> - the role of the Convening Authority in the prosecution process as presently followed in Australia is substantially similar to that which was found to lack independence and impartiality by an international tribunal;
> - the establishment of an independent DMP with the discretion to prosecute is likely to reduce significantly perceptions that the

[779] Ibid, paragraph 209.
[780] Ibid, paragraph 219.
[781] Ibid, paragraph 225.

prosecution process (in its present form) lacks independence and impartiality;

- there is a strong conviction that the traditional linkage between command and discipline must be reflected in the prosecution process for Courts Martial and Defence Force Magistrate trials;
- the concept of an independent DMP appears to be more acceptable within the Australian Defence Force now than it was previously, provided a practicable model can be devised.[782]

2. Evaluating the response to the *Burchett Report 2001* - creating a DMP

Burchett's summary at paragraph 219 extracted above gives his explanation as to why the DMP - a civilianising reform - had not been implemented. When Burchett observed, 'there is no legal imperative' for the establishment of an independent DMP', what he highlights is that unlike the Canadian or British military, our military had not been coerced to change by court decision.

However, even though there was no legal imperative to force or coerce the implementation of a DMP, it was apparent that by the time of the Burchett Report, a groundswell of voices was exerting public pressure on the military to reform its system of justice. In 1994 and again in 1995, the then Judge Advocate General, Rear Admiral Rowlands had published recommendations that a DMP be created, first in a paper and then in his Annual Report. In 1997, Abadee joined with that voice. In 1999, the voices became a chorus with the Joint Standing Committee, leaving the ADF in no doubt about its views that a DMP was desirable. A year after that, in 2000, the JAG Major General Duggan reported on the advantages of a DMP in his 2000 JAG Annual Report. The Joint Standing Committee in 2001 again made its preference for a DMP clear, with the 13 dissenting members indicating that had the committee been apprised of the 3RAR allegations back in 1999, the creation of a DMP would also have certainly been recommended. So, even though a court case had not forced

[782] Ibid, paragraph 224.

change, the voices were swelling and pressure mounting. But that was not enough to cause the military to establish an independent DMP – four years later, the ADF advised the 2005 Senate Committee that the matter was 'in limbo'.[783]

It is also of some note to look at the status of people who were proposing a DMP. Rear Admiral Rowlands, the JAG, was a judge of the Family Court of Australia. Major General Duggan, a subsequent JAG, as a judge of the Supreme Court of South Australia. Justice Abadee QC was a judge of the NSW Supreme Court between 1990-2000, admitted to the NSW Bar in 1964 and appointed a Queen's Counsel in 1984. He also held the position of Brigadier and Deputy Judge Advocate-General of the Australian Defence Force from 1996-2000. Justice Burchett QC was elevated to the Federal Court on 3 June 1985 and retired on 10 October 2000. Accordingly, each man who recommended there be a DMP had long and distinguished careers in the civilian legal system, where the requirement of a fair trial was 'deeply rooted'.[784]

What is seen here are elements of *normative* isomorphism whereby these civilian judicial officers – officers themselves with constitutionally-guaranteed independence through tenure, appointment and remuneration - brought with them, when reviewing the exceptional military justice system, the norms of a civilian fair trial. Not only did they bring these values with them, but they made recommendations for organisational change.

By the time of the 2001 Burchett Report, the submissions made by career, full-time military members to the various inquiries were that the system was working well. However, two JAGs (Duggan and Rowlands), who straddled both the civilian and military legal systems, and two superior

[783] Cosgrove, above n 765, paragraph 2.83.
[784] *Abadee Report*, 7, cited in *Military Justice Report 1999*, paragraph 4.13.

court judges (Abadee and Burchett) were recommending or agitating for the creation of a DMP – a civilianising reform. Yet normative isomorphism was insufficient to cause change within the military.

G. 2005 Senate Report

1. Background

This inquiry arose from the publicity surrounding the death or treatment of individual members of the force - the death of Private Jeremy Williams; the fatal fire on the HMAS *Westralia*; the suspension of Cadet Sergeant Eleanore Tibble; allegations of misconduct by members of the Special Air Service in East Timor; and the disappearance at sea of Acting Leading Seaman Gurr in 2002.[785] As a consequence, in October 2003, the Senate asked the Senate Foreign Affairs, Defence and Trade Committee to inquire into the effectiveness of Australia's military justice system.

The Senate Committee noted that the military justice system had been the subject of various inquires, all of which had identified failings and flaws with the system. However, 'despite assurances from the ADF that measures have been taken to correct these failings, reports have continued to surface suggesting that problems persist'.[786] Accordingly, the Senate resolved to require the Committee to inquire into

> a. the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and
> b. the handling by the Australian Defence Force (ADF) of:
> i. [specific allegations of mistreatment, flawed investigations, drug abuse]

[785] *2005 Senate Report*, xxv, paragraph 4.
[786] Ibid, paragraph 1.4.

2. Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:
   a. [specific allegations concerning specific events and/or personnel][787]
3. The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions.

The Report makes it abundantly clear[788] that after almost a decade of promises the ADF had simply not made the changes envisaged by the various, previous inquiries; the language of the report has been described as 'harsh'.[789] Instead, the military had engaged in a 'reform process' which had not significantly altered the organisation's structures and the pivotal role of the commander and chain of command.

Evidently, this Committee had had enough of the ADF's promises and statements of intent (the myth making) and as a consequence made sweeping recommendations that proposed, amongst other things:

- the creation of a Chapter III Constitutional military court, 'to ensure its independence and impartiality';
- that the Australian Federal Police (not the military) investigate all criminal activity said to have been committed overseas;
- that civilian prosecuting authorities, not military ones, would decide whether to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences;
- that a DMP be created but with limited jurisdiction to initiate prosecutions where there is no equivalent or relevant offence in

[787] The death of Private Jeremy Williams; the reasons for the fatal fire on the HMAS Westralia; the suspension of Cadet Sergeant Eleanore Tibble; allegations of misconduct by members of the Special Air Service in East Timor; and the disappearance at sea of Acting Leading Seaman Gurr in 2002.
[788] The Committee's numerous recommendations and the Government Response are contained in Appendix 11.
[789] Roberts-Smith, above n 42.

> the civilian criminal law. However, given the comparisons between DFDA offences and civilian equivalent offences at Tables 4 and 5 of Chapter 2 and Appendix 6, few charges would have remained within the jurisdiction of the DMP.

The recommendations would have seen almost all aspects of the military justice systems transferred to civilian authorities, and the commander's central, pivotal and 'non-negotiable'[790] role (as described by the ADF) as initiator of prosecutions and convenor of hearing cease to exist.

The idea of a permanent Chapter III Constitution military court was not a new idea, having been first raised in the *Military Justice Report 1999*. However, the 2005 Committee gave the matter more serious consideration, taking evidence and submissions, 'regarding both the structure of Service tribunals and their operation. Both factors were identified as impeding the capacity of the disciplinary system to deliver impartial, rigorous and fair outcomes'.[791]

Unlike the ADF which had referred to international jurisprudence as a 'remote technicality',[792] this Committee placed great emphasis on the experiences in comparable jurisdictions.[793] In doing so, the Committee noted the

> growing international trend towards appointing tenured independent military judicial officials and creating standing military courts allows those Service personnel access to independent and impartial tribunals, and should not go unnoticed in Australia.[794]

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[790] *2005 Senate Report*, 23.
[791] Ibid, paragraph 5.3.
[792] Department of Defence, Submission, 1043, cited in the *Military Justice Report 1999*, paragraph 4.14.
[793] *2005 Senate Report*, paragraph 5.70.
[794] Ibid, paragraph 5.70.

The Committee observed further:

> 5.79 It is becoming increasingly apparent that Australia's disciplinary system is not striking the right balance between the requirements of a functional Defence Force and the rights of Service personnel, to the detriment of both. Twenty years since the introduction of the DFDA, the time has come to address seriously the overall viability of the system. Australian judicial decisions and the evidence before this committee suggest the discipline system is becoming unworkable and potentially open to challenge on constitutional grounds. Overseas jurisprudence and developments suggest that alternative approaches may be more effective.
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> …
>
> 5.81 Based on the evidence to this inquiry, leaving the disciplinary structures within the military justice system unchanged is clearly not viable. The status quo leaves too many members of the ADF exposed to harm. Overseas jurisdictions have increasingly moved towards structures that impart greater independence and impartiality.

The Committee noted the trend in comparable jurisdictions whereby reform only seemed to eventuate in a reactive way after successful court challenge. The Committee urged the government to be preemptive in its approach to military justice law reform:

> 5.86 The Government should not wait for disciplinary tribunals to come under constitutional challenge before acting to address the weaknesses inherent within the current system. Rather, it should adopt a proactive stance and protect Service personnel now. Nor should the Government adopt 'constitutionality' as its minimum standard. The goal should not be to establish a system that will merely gain the approval of the High Court. The goal should be to structure a tribunal system that can protect the rights of Service personnel to the fullest extent possible, whilst simultaneously accommodating the functional requirements of the ADF.

The Committee therefore recommended that the *ad hoc* courts martial and the trial by Defence Force Magistrate be abolished. In its place, it recommended the creation of a Permanent Military Court, possibly as a division of the Federal Magistrates Court.[795] This would have seen an end to the exceptional, separate status of the military justice system and seen military trials occurring within the civilian justice system. The Committee

[795] Ibid, paragraph 5.93.

also recommended that the military court be created as a Chapter III Constitutional court.

The Committee cited many benefits of such an approach,[796] including, but not limited to, conferring on service personnel the same fair trial rights as enjoyed by ordinary citizens who found themselves before civilian courts. In turn, the Committee noted that Australia would then clearly comply with its obligations under Article 14(1) of the ICCPR and our system of trying service personnel would be consistent with world's best practice.

The Committee also highlighted that the appointment of judges by the Governor-General in Council (as opposed to the convening authority or JAG) and by conferring upon those judges tenure until retirement age would remove the perceptions of a lack of independence that the Committee accepted as existing within the military justice system. Further, the Committee recommended that a condition for appointment of judicial officers would be extensive experience within the civilian justice system as well as military experience. This, said the Committee, would enable the judicial officers to appreciate the institutional context within which military discipline applies, but in a manner completely independent of the ADF.

The Committee anticipated that its recommendations would have a range of advantages, including the development of a body of precedent, which would then allow for consistent decision-making, and, the considerable costs and inconveniences associated with the *ad hoc* convening of service tribunals would be removed.

Like earlier reports, this Committee was not only critical of the failure to implement a statutory DMP, but was also critical of other fair trial flaws. In that regard, the Committee expressed its concern and frustration that the recurrent problems had not been addressed.

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[796] Ibid, paragraph 5.93.

The Committee found that despite this review being the sixth in eight years, there still existed 'an inherent conflict of duties through CDF's control over the appointment of convening authorities, who in turn control the forum and rules of a trial' and the 'CDF's role in appointing judge advocates, court martial presidents and members, and DFMs'.[797]

Flawed investigations: the committee referred to investigations 'plagued' by delay and inexperience. Indeed, members felt sufficiently strongly about this matter that they recommended thus:

> 3.118 The continual failure of the ADF to rectify recurrent problems leads the committee to the conclusion that the investigative function should be removed from the defence forces altogether and referred to the civilian experts.

Flawed decisions to prosecute: The committee formed the view that the prosecutorial decision-making processes were 'highly problematic'. In particular, it received and accepted evidence that decisions to prosecute were made, at times, on unsworn, untested, unreliable, non-corroborating inculpatory 'evidence', compiled long after the event, from witnesses that would not and could not testify at the trial. This was coupled with a concomitant failure to consider, or properly consider, exculpatory evidence when deciding to prosecute.[798]

The Committee also observed that decisions to prosecute did not always comply with the ADF's prosecution policy,[799] and moreover, when it became apparent that a prosecution could not succeed, 'the policy was again contravened by its continuation, regardless of the high likelihood of failure'.[800] In reaching this view about failings in prosecution policy, the Committee was able to rely upon not only the submissions before it, but also the Hoffman decision of the Full Court of the Federal Court

[797] Ibid, paragraph 5.19.
[798] Ibid, paragraphs Preface xxviii, 3.25, 3.40, 4.6.
[799] Ibid, paragraph 4.7.
[800] Ibid, paragraph 4.7.

decision[801] in which the Court had found that the decision to initiate a prosecution against Mr Michael Hoffman, a Major in the Australian Army, was flawed. That was the matter, discussed previously (Part 2(c)), where charges had been laid seven years after the alleged incident, simply to avoid the time limitations imposed under the DFDA.[802]

Insufficient access to legal advice: The lack of access to legal representation/advice was a matter first raised by Mr Burchett in his July 2001 Report, yet, it was a matter that once again came to the attention of the 2005 Senate Committee. Access to legal *assistance* is a right found not only in Article 14(3)(d) the *ICCPR*, but also finds a domestic resonance, at least for indictable offences, through the High Court's decision in *Dietrich v R*.[803]

The 2005 Senate Inquiry referred to the practical problems in securing legal assistance, often caused by there being only one lawyer on base, but who had already provided advice to the Convening Authority and was thus conflicted out of assisting the accused. Unlike the Burchett Report, this Committee did not focus its attention on the availability of legal assistance (as had been the issue before Burchett), but upon the quality of the legal assistance. In particular, the Committee heard and accepted concerns from witnesses that the military's Permanent Legal Officers did not have to hold practising certificates and therefore were not beholden to the ethical obligations required of civilian practitioners. The implication of this was that these Permanent Legal Officers did not have the sufficient degree of perceived or real impartiality and independence, in that they could be ordered, as military personnel to do or not do something, which would otherwise be precluded by the code of conduct of their relevant professional body.

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[801] Ibid, paragraph 4.8.
[802] Ibid, paragraph 4.8.
[803] *Dietrich v R* (1992) 177 CLR 292.

In reaching this conclusion, the Committee had the benefit of considering the decisions of the Supreme Court of the Australian Capital Territory in the various *Vance v Chief of Air Force* cases.[804] Russell Vance and the Department of Defence were involved in a suite of cases, described at one time as an 'outbreak of interlocutory skirmishing in what appears to have become a war of attrition between the plaintiff and the defendants'.[805]

Vance had been the subject of a board of inquiry, appointed in 1995, which culminated in the termination of his employment – not once, but twice, and, at each time, the termination of his employment was revoked.[806] Vance alleged that his termination on purported medical grounds was but a facade for the ADF's desire to 'get rid of him'.[807]

Relevantly, Justice Crispin held that Defence Legal Officers did not have independence, or appear to have independence, from the chain of command: at paragraphs 57 and 58 His Honour held 'they are clearly employed within an authoritarian structure in which obedience may be enforced by penal sanctions. … the degree of independence they may exercise will generally be limited to that permitted by senior officers entitled to command.'

His Honour added:

> 60. In fact, it seems clear that a DLO could be ordered to act in a manner that would be quite contrary to prevailing standards of professional ethics. ... However, the scope of the orders that members of the ADF may be compelled to obey by relevant provisions of the Discipline Act is not constrained by any provision protecting an overriding entitlement for DLOs

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[804] *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 78; *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 85; *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2007] ACTSC 80.
[805] *Vance v Air Marshall McCormack in his capacity as Chief of Air Force and Anor* [2007] ACTSC 80.
[806] *Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor* [2004] ACTSC 78, paragraphs 4 and 5.
[807] Ibid, paragraph 6.

to act in accordance with accepted professional standards. ... The provisions of a Commonwealth statute requiring obedience would plainly prevail over rules promulgated by professional associations.

61. Fourth, many DLOs would be under the command of superior officers who were not legally qualified and could not be expected to have a full appreciation of the ethical and professional standards which practising lawyers are expected to maintain or of the need for their subordinates to maintain their own independent judgment. Traditions of loyalty as well as obedience suggest a culture in which advice and decisions should be guided by the principle that the interests of the Commonwealth should prevail. Whilst practising lawyers also recognise a duty to give priority to the interests of their clients, the duty is subject to well understood limitations based upon overriding duties to the court and the need to comply with relevant rules of ethics and practice.

…

68. One such incident relied upon by Mr Purnell [counsel for Vance] occurred during the proceedings of the Board of Inquiry into the plaintiff's conduct when the President simply ordered that the DLO assigned to be the plaintiff's counsel 'hand over all files, all papers and all documentation in relation to . . . all advice that he may have given to SQNLDR [Squadron Leader] Vance'. He also ordered the DLO to hand over his computer and all floppy discs. These orders clearly required the DLO to violate his client's privilege without even consulting him about the matter. It should be noted that the President was not called to give evidence and I did not have the benefit of any explanation from him, but at face value his conduct in making these orders appears to have been quite improper.

69. The DLO representing the plaintiff complied without protest. ... at face value his failure to oppose such a grave infringement of his client's legal rights was also improper. … I accept that he was bound by the orders he was given but he could have at least objected and explained the need to respect the plaintiff's privilege, albeit to a superior officer who should already have known better.

…

71. Regrettably, there was also evidence that DLOs assigned to represent service members charged with criminal or disciplinary offences sometimes seemed unable to understand the need to act independently on their behalf. During the course of her evidence in May 1998, Ms Kelly explained that:

> Often I would find myself advising the defending officer, who would be a flight lieutenant; I would advise the prosecuting officer and I would advise the CO. Basically, they would all walk out of there and they would be pretty happy because the defending officer probably got what he thought he was going to get, but whether that is really independence of the judiciary is another thing.

The Committee agreed with these observations.[808] In particular, it expressed concern that unlike civilian lawyers, military legal officers were not required to hold practicing certificates, and as a consequence were not required to participate in continuing professional education and not required to be members of a state's bar or solicitor's associations. The Committee noted that these military legal officers were not required to uphold and conform to codes of ethical and professional conduct.

The Committee recommended[809] that Permanent Legal Officers be required to hold current practicing certificates, and that the ADF establish a Director of Defence Counsel Services.

Despite the positioning by the military that all was well, the 2005 report was variously called 'scathing' and 'damning' of the military justice system,[810] with post-release media from Committee members on both sides of politics of the following tenor: [811]

> SENATOR DAVID JOHNSTON, LIBERALS: I can say that Government members of the committee were disturbed and upset.
>
> SENATOR CHRIS EVANS, LABOR: Well, I've described it as shambolic and dysfunctional. That's been our experience.
>
> SENATOR CHRIS EVANS, LABOR: We are saying incremental reform won't fix it and leaving it to the defence chiefs to fiddle around the edges won't fix the lack of justice in the ADF.

The report was then handed to the government for its response, after taking the advice of its chief military advisors. The circuitous nature of the response process was quaintly put by a senior army intelligence analyst:

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[808] *2005 Senate Report*, paragraph 4.65.
[809] Ibid, paragraph 4.75.
[810] See for example:
- 'Military justice reforms 'window dressing'', *The Age*, 6 October 2005;
- 'Minister defends military justice system against civilian incursion', *Sydney Morning Herald*, 20 June 2005;
- Tracy Bowden, 'Military justice system changes recommended' *7.30 Report*, Australian Broadcasting Corporation, 16 June 2005.

[811] Bowden, ibid.

> LT COL. LANCE COLLINS: The senators handed down a report which was damning of the military investigative and justice process. The weakness in the system now is that the report is referred to the same minister and the same department that were the cause of the problem for them to implement. It's the old problem about Dracula being in charge of the blood bank.[812]

Ultimately, the military and the government agreed to 30 of the 40 Senate Committee recommendations in whole, in part or in principle.[813] But, while the quantity is high, those recommendations not agreed to were those that would have been truly civilianising in reform. For example, the Committee recommended that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts (Recommendation 1) and that the investigation of all suspected criminal activity committed *outside* Australia be conducted by the Australian Federal Police (Recommendation 2). Consistent with those two Recommendations, the Committee also recommended that Service police should only investigate a suspected offence in the first instance where there was no equivalent offence in the civilian criminal law (Recommendation 3).

None of these three Recommendations were agreed to; investigations and prosecutions would remain in-house. Such an outcome is consistent with the first feature of total institutions, because referral to outside authorities would mean that all aspects of life in the military were no longer conducted under the same single authority. It would also imperil the idea of the military as a separate community.

The Committee also recommended (Recommendation 7), that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities. This was not agreed to, nor was the recommendation (Recommendation

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[812] 'Burnt by the Sun', *Australian Story* 25 July 2005, http://www.abc.net au/austory/content/2005/s1422640.htm at 14 January 2010.
[813] See Appendix 11.

8) that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there was no equivalent or relevant offence in the civilian criminal law. Flowing on from that Recommendation, the Committee recommended, but the military disagreed, that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities declined to do so, but then only where proceedings under the DFDA could be reasonably regarded as substantially serving the purpose of maintaining or enforcing Service discipline (Recommendation 9).

The Committee also recommended that a permanent military court be created, and, created as a Chapter III Constitutional Court, thereby ensuring independence and impartiality (recommendations 18 and 19). While the military agreed to the creation of a permanent military court, it declined to establish it as a Chapter III Court, instead relying upon the defence power of the Constitution.

This was to have dire consequences for the military, the AMC and the 171 people convicted by the AMC before it was declared to be invalid.

2. Evaluating the response to the *2005 Senate Report* - the military justice system is fine

In its submissions, both oral and written, the military again submitted that all was well with its military justice system. General Cosgrove, the then CDF, made an 'Opening Statement to the Senate Inquiry into the Military Justice System' on 1 March 2004. In it, the General stressed that an in-house justice system was an imperative for the smooth operation of military matters.

In language reminiscent of that presented by the proponents of the separate military justice system set out in Chapter 2, General Cosgrove

developed the theme that in-house justice is imperative for discipline. For example:

> An enduring and essential feature of any effective armed force is the need for discipline. Establishing and maintaining a high standard of discipline in both peace and war is applicable to all members of the ADF. It is vital if we are to win when the Government calls upon us to fight. So, within the disciplined environment essential for the effective conduct of operations, the Military Justice System complements the system of command. This is an important difference between the military and civilian justice systems. [814]

> … The more we shift the responsibility for military justice away from the chain of command, the more we risk undermining both systems. That said, I am especially supportive of the establishment of the Offices of the Inspector-General of the ADF and the Director of Military Prosecutions, both of which I have established in my tenure.[815]

With respect to military justice overall, the General spoke of a system that was 'by and large open, fair and effective'[816] and one that by and large provided 'impartial, rigorous and fair outcomes'.[817] The General even went so far as to note that 'none of the five inquiries conducted since 1998 has concluded that the Military Justice System or aspects of it are broken'.[818] That assertion is surprising given the content and findings of earlier reports which were critical of the military justice system.

On reviewing the evidence and previous reports, the Committee could not agree with the Chief of the Defence Force that 'the military justice system is sound'.[819] To the contrary, the Committee formed the view that:

> In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment. It received a significant volume of submissions describing a litany of systemic flaws in both law and policy and believes that the shortcomings in the current system are placing the

[814] Commonwealth of Australia, *Official Committee Hansard*, Senate, Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, 'Effectiveness of Australia's military justice system', 1 March 2004, Canberra, 4.
[815] Ibid, 7.
[816] Ibid, 3.
[817] Ibid, 11.
[818] Ibid, 12.
[819] Ibid, 13; see *2005 Senate Report,* xxvi paragraph 7, with contrary views expressed by the Committee, paragraph 8.

> servicemen and women of Australia at a great disadvantage. They deserve a system that is fairer, with rules and protections that are consistently applied. The committee has recommended a series of reforms that would constitute a major overhaul of the military justice system in Australia.
> 14. ... it is apparent to the committee that in the military justice system there is at least some degree of substance in the submissions the committee has received which suggests the system is not operating properly and justly. This perception in itself is an indictment on any justice system. Modern legal systems are underpinned by the maxim that justice must not only be done but be seen to be done. Assessed against this principle, in too many instances current ADF rules and practice founder.[820]

The ADF's myths – in the institutional isomorphic sense - were not accepted this time.

3. Evaluating the response to the *2005 Senate Report* - comparisons are unhelpful

The General acknowledged that even though the civilian and military justice systems might be thought to be sufficiently similar to warrant comparison, he urged against that occurring, stating that such a comparison was 'perhaps even unhelpful'.[821]

The idea that comparisons with the civilian system are 'unhelpful' is language that finds a foundation in the theory of total institutions - no doubt unwittingly from the ADF's point of view. According to Goffman,[822] the first feature of a total institution is that all aspects of life are conducted at the same place and under the same single authority; external influences are to be avoided. Clearly, if the military justice system was to be removed from the military, discipline would no longer be conducted at the same place as the location of employment and no longer meted out by the single authority of the ADF. Such an approach would run contrary to the

[820] The recommendations arising from the Inquiry and, the then government's response to the *2005 Senate Report* are at Appendix 11 (emhasis added).
[821] *Official Committee Hansard*, above n 814, 4.
[822] Goffman (Asylums), above n 231, 5-6. See also, Conti and Nolan, above n 244, 166- 186; Becker, above n 244, 4; Davies, above n 244, 77-95; Perry, above n 230, 345-355.

military's position that in-house justice was imperative to the maintenance of discipline. One of the problems with this position is that none of the literature[823] favouring the separate military justice system could demonstrate the in-house justice and discipline nexus by reference to empirical data. Similarly, in none of the inquiries was the military able to offer such research to justify the claim to exceptionalism based upon the discipline and in-house justice nexus. To the contrary, literature critical of the separate military justice system had demonstrated that discipline was not adversely affected in those countries where the separate military justice systems had been either abolished, or contained to operation only in times of war.[824]

The military's resistance to civilianisation is also explained by Coser's variation of Goffman's theory. Coser[825] spoke of a 'greedy institution' and identified the need to 'attempt to reduce the claims of competing roles and status positions on those they wish to encompass within their boundaries'.[826] Thus comparisons to the civilian system were called 'unhelpful' because the civilian justice system threatened the role and status of the exceptional military justice system.

4. Evaluating the response to the *2005 Senate Report* - not a Chapter III Constitutional Court

Recommendation 18 of the 2005 Report was that the *DFDA* be amended to create a permanent military court capable of trying offences under the *DFDA* that were otherwise being head before courts martial or by Defence Force Magistrates; that recommendation was agreed.[827] However,

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[823] See arguments for and against the separate system in Chapter 2.
[824] See Chapter 2.
[825] See Chapter 3.
[826] Coser, above n 246, 4.
[827] Australia, Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade References Committee,* '*Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 4 ('the Government Response').

recommendation 19 was that the permanent military court be created as a court pursuant to Chapter III of the *Commonwealth Constitution* and its enshrined protections guaranteeing independence and impartiality. The Committee specifically referred to this as means of ensuring 'independence and impartiality'[828] and to that end, further recommended that the Judges be appointed by the Governor-General in Council and that they have tenure until retirement age. Thus tenure of the judges would reflect the conditions of appointment and tenure for civilian, federal judges. Recommendation 20 was that the Judges appointed to the permanent military court be required to have a minimum of five years' recent experience in civilian courts at the time of appointment.

The Committee's recommendations 19 and 20 were not agreed to;[829] the Court would be permanent, but not constituted pursuant to Chapter III and with no minimum civilian experience requirement.

In 2006, a Bill was introduced to give effect to the Government Response.[830] Both the Government's Response[831] and the *Explanatory Memorandum* for the *Defence Legislation Amendment Bill* 2006 (Cth)[832] made plain that the AMC was intended to satisfy the principles of impartiality and judicial independence, and independence from the chain of command. The government added:

> Current advice is that there are significant policy and legal issues raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.[833]

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[828] *2005 Senate Report*, xxi.
[829] *Government Response*, above n 827,14-15.
[830] *Defence Legislation Amendment Bill* 2006 (Cth).
[831] *Government Response*, above n 827, 2.
[832] Commonwealth of Australia, House of Representatives, *Defence Legislation Amendment Bill 2006*, Explanatory Memorandum, 'Outline'.
[833] *Government Response*, above n 827, 15 (emphasis added).

This is an important position to keep in mind, because as events unfolded, the High Court was ultimately asked to determine the constitutional validity of the Australian Military Court.

The Response to the recommendations concerning Chapter III of the Constitution asserted that military courts did not apply ordinary criminal 'jurisdiction', and this was so because the object of a military court was to maintain military discipline – in other words, from a human rights perspective, fair trial rights were secondary to the pursuit of discipline. In the language of the pro-exceptionalist arguments set out in Chapter 2, the Response then continued that military courts must be exceptional because 'It is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial.'[834]

As previously noted, that line of logic would have only doctors able to determine medical negligence claims in civil courts, and only engineers able to decide construction matters. Such 'logic' does a great disservice to the broad and varied range of subject matters which judges in civil courts must hear and determine every day.

The Response continued with the exceptionalist argument that a 'court' system internal to the military was required because such a 'court' would be deployable: 'it must be deployable and have credibility with, and acceptance of, the Defence Force'.[835]

This raises two issues: deployability and credibility/acceptance. The need for deployability, the first of these criteria, is at odds with actual practice, with only six hearings (all DFM hearings) being held outside Australian between 2000 and mid-2010. It is also the case that in a more modern

[834] Ibid, paragraph 5.95.
[835] Ibid, paragraph 5.95.

age where evidence can be given by video-link, it is difficult to justify the rejection of the Chapter III guarantees because of geography.

As for the second criterion of acceptance and credibility, the obvious question is acceptance by whom – the inmates (as called in the theory of total institutions) or those who control the institution and have at their disposal their own justice system to ensure compliance. It ought also be recalled that several of these inquiries (*Rough Justice*; *Burchett*; and, this *2005 Senate Report*) had their genesis in the disquiet expressed by personnel (or their families) who had negative experiences with the military justice system. This would suggest a lack of credibility and acceptance at least by those subjected to it. Burchett found that a justice system perceived to be unfair was unlikely to be accepted.[836] So too did the JAG in 2007, Major General Roberts Smith, observe that service personnel would have faith in the integrity of the justice system if it was perceived to be impartial and fair.[837] In 2009, when amendments to defence legislation were being debated, the now Member for Cowan, Mr Simpkins, himself a former Army Officer for 15 years, expressed it thus:

> I believe that for matters such as assaults that were 'dealt with' internally, justice could not have been either served or seen to be served. When we look back on that period in the early 1990s, it is not surprising that those sorts of arrangements created an environment where justice failed the soldiers.
>
> Justice, of course, is important for morale. Within months of graduating from RMC Duntroon, I saw a commissioned officer assault a steward in the officers' mess. I gave evidence at a commanding officer's hearing that I had seen the common assault take place. Yes, the officer was found guilty of a basic common assault but with no punishment and no conviction recorded. This is not the way to strengthen morale, when commissioned officers are not subject to the same standards and sanctions as apply to the enlisted personnel.[838]

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[836] *Burchett Report*, paragraph 191.
[837] Roberts-Smith, above n 42, 15.
[838] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 September 2009, 64 (Simpkins).

The argument that in-house justice is required for deployability and acceptance/credibility are not arguments which are made out in practice.

Despite the Senate's recommendations concerning the creation of a Chapter III court, the 2006 Bill provided for a continuation of exceptionalism:

> The AMC is not an exercise of the ordinary criminal jurisdiction. More is required than the ability to understand specialist evidence at a trial. A knowledge and background into the military environment and culture is required
>
> The AMC is a 'service tribunal' under the DFDA and therefore is part of the military justice system, the object of which is to maintain military discipline within the ADF.[839]

Consistent with the military's minimalist response to the Abadee civilianising recommendations concerning the multiple roles of the Convening Authority and DMP and to subsequent reviews concerning the same topics, the response to the recommendations in the 2005 Report concerning a permanent Chapter III court fell far short of that which had been proposed, tending instead to be the minimum reform. Amongst the responses was the decision not to create a permanent Chapter III military court.

The decision *not* to introduce a permanent, Chapter III military court, contrary to the recommendations, was also not well received publically.[840] More recently, Senator David Johnston, former Justice Minister in the Howard Government, and member of the 2005 Senate Inquiry, said this of the ADF when asked why compensation had still not been paid to the families of four young soldiers who suicided (the circumstances of their deaths and others were considered in Chapter 6 of the Senate Report):

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[839] *Defence Legislation Amendment Bill 2006, Explanatory Memorandum*, paragraph 4.

[840] See:

- 'Military justice reforms 'window dressing'', *The Age*, 6 October 2005.
- 'Minister defends military justice system against civilian incursion', *Sydney Morning Herald,* 20 June 2005.

> When it comes to rules of engagement, when it comes to the Rome treaty of the international criminal code, when it comes to UN resolutions, our legal representatives in the ADF are in fact the world's best, may I say.
>
> But when it comes to one on one, straight out good old justice inside the ADF, they're probably the worst. [841]

In 2006, the Senate Standing Committee on Foreign Affairs, Defence and Trade had the opportunity to review the government's response and draft legislation. The report[842] of the 2006 Senate Committee was tabled in October 2006 and in it, the Committee formed the view that the proposed AMC would *not* achieve the level of independence and impartiality needed to ensure a fair and effective military justice system and was a response that settled for the bare minimum of reform.[843] The Committee identified numerous concerns – 28 in total – with the Bill that created the AMC. Those concerns included, but were not limited to the fact that the court proposed by the draft legislation sought to create a judicial-type independent and impartial court, but without actually being a Chapter III Constitutional Court; it foresaw the prospects of a successful challenge to the validity of the proposed court in the High Court. The repugnancy of the proposed AMC was further highlighted in the High Court of Australia, when Justice Kirby took the unusual step of commenting upon the draft legislation and 'this so-called military court' during the hearing of a separate matter.[844] Notwithstanding the clear warnings, the military persisted.

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[841] Mark Bannerman, 'Army failed suicidal soldiers', *7.30 Report*, Australian Broadcasting Corporation, 28 May 2008.
[842] Commonwealth of Australia, Senate, Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006 ('the 2006 Senate Committee Report').
[843] Ibid, paragraphs 1.26 and 1.27.
[844] In 2007, the High Court heard the matter of *White v Director of Military Prosecutions* [2007] HCATrans 26, where Kirby J provided observations which made it clear that he thought little of the Bill that had been drafted and the idea of the AMC contained within. His Honour said:

> So we are calling them in the future non-courts courts and non-magistrates magistrates.

The 2005 Senate Recommendations, the 2006 Senate Committee's criticism, media condemnation, public statements and observations of a single High Court judge were not sufficient to force the military's hand to implement civilianising reform to the service tribunal system. The refusal to submit to this form of civilianisation is understood by reference to both theories of total institutions and isomorphism. The former explains why the military declined to outsource what it perceived to be is means of controlling its inmates. The latter explains that neither normative nor mimetic isomorphism were sufficient to cause change.

However, for the military, the decision to create a permanent military court, but not a Chapter III Court, was to be fatally flawed.

Section 114 of the 2006 Act that created the AMC provided:

> **114 Creation of the Australian Military Court**
>
> (1) A court, to be known as the Australian Military Court, is created by this Act.
>
> Note 1: The Australian Military Court is not a court for the purposes of Chapter III of the Constitution.
> Note 2: The Australian Military Court is a service tribunal for the purposes of this Act: see the definition of service tribunal in subsection 3(1).
>
> (1A) The Australian Military Court is a court of record. [this sub-section was inserted in 2008]
> (2) The Australian Military Court consists of:
> (a) the Chief Military Judge; and
> (b) such other Military Judges as from time to time hold office in accordance with this Act.

I have to tell you that I have not seen the military court – so-called military court before today - but having seen it I do not think it is a matter of prejudice, I think it is a matter of warning, a warning of where we are going outside the independent courts.

this so-called military court

You remove the person from the front or from the military establishment and you deal with them as a citizen.

The unfortunate practice of 'teabagging'[845] was to bring the AMC undone.

In August 2005, the accused, former Navy sailor Brian George Lane, was alleged to have indecently assaulted a superior officer. Mr Lane denied this happened but was discharged from the service in November 2007. He was charged with the offence in August 2007, but when the matter first came to the Australian Military Court in March 2008, Mr Lane objected to the Australian Military Court's jurisdiction. Lane thus applied to the High Court of Australia seeking an order prohibiting the hearing of the charges and a declaration that the provisions of the legislation which created the Australian Military Court were invalid. The seven judges of the High Court agreed. French CJ and Gummow J held:

> There was an attempt by the Parliament to borrow for the AMC the reputation of the judicial branch of government for impartiality and non-partisanship, upon which its legitimacy has been said, in this Court, ultimately to depend,[846] and to thereby apply 'the neutral colours of judicial action'[847] to the work of the AMC.
> ...
> In Australia, the 2006 Act established the AMC outside the previous command structure and evinced a legislative design to meet the concerns which had underpinned the decision in Findlay. But in doing so, the Parliament exceeded the exercise of power conferred by s 51(vi).[848]

Hayne, Heydon, Crennan, Kiefel and Bell JJ held:

> 65. ... The determinative issue in this matter is whether the DFDA provides for the AMC, a court not created in accordance with Ch III of the Constitution, to exercise the judicial power of the Commonwealth.
> **...**
> 113.For the AMC to make a binding and authoritative determination of such issues pursuant to the DFDA is to exercise the judicial power of the Commonwealth. There is no dispute that the AMC is not constituted in accordance with Ch III.

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[845] Mr Lane, the accused, was alleged to have been photographed placing his genitals on an army sergeant's forehead - a practice called 'teabagging' - while the sergeant was asleep.
[846] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9, 21-22.
[847] *Mistretta v United States,* 488 US 361, 407 (1989).
[848] *Lane v Morrison* [2009] HCA 29, 4-5.

> 114... And what the AMC is to do is to exercise the judicial power of the Commonwealth otherwise than in accordance with Ch III. The AMC cannot validly exercise the judicial power of the Commonwealth.
>
> 115... the provisions creating the AMC are invalid not just because the AMC is created a court of record, but because it is established to make binding and authoritative decisions of guilt or innocence independently from the chain of command of the defence forces. It is to exercise the judicial power of the Commonwealth. None of the provisions of Div 3 of Pt VII of the DFDA can be severed or read down in a way that would give the provisions valid operation. The whole of Div 3 of Pt VII should be declared to be invalid.

Upon the decision being handed down, the Labor Government announced it would return to the old courts martial system whilst taking urgent legal advice about its options. In a Press Release issued 26 August 2009, the Minister for Defence, Senator John Faulkner announced:

> The Minister for Defence, Senator John Faulkner, said the Government respected the Court's decision and will move military justice to a judicial system that meets the requirements of Chapter III of the Constitution.
>
> As an interim measure, the Government will reinstate, by legislation, the pre-2007 military justice machinery to give Defence a level of certainty in military justice matters.
> ...
>
> Senator Faulkner said: 'The Senate Committee had recommended a Chapter III court with oversight by the Attorney-General, and greater independence from the military. The legislation establishing the AMC fell short of these recommendations.'
>
> 'The Government will review the High Court's decision carefully and consider alternative models for establishing the jurisdiction in a Chapter III court. I will work closely with the Attorney-General given his responsibilities in this area', Senator Faulkner said.[849]

The last paragraph gives some insight into why the military had resisted this reform – to work with the Attorney-General required Defence to move beyond the autonomous and unilateral control it had had with respect to the military justice system, and work with others not only outside the chain of command, but outside the ADF too.

[849] Senator the Hon John Faulkner, Minister for Defence 26 Aug 2009, 'Australian Military Court' Press Release, 26 August 2009.

The Opposition's Shadow Attorney-General, Senator George Brandis was reported as blaming the Howard Government Defence Minister, Senator Robert Hill for 'bungled' military justice law reforms.[850] In a separate article, Senator Brandis referred to the views of the Defence Department prevailing:

> Opposition legal affairs spokesman George Brandis yesterday backed the plan to make any new body part of the Federal Court system.
>
> He said a 2005 report by the Senate's defence and foreign affairs committee had proposed such a course and had warned of the issues of not setting up the AMC as a Chapter III court.
> 'But the views of Defence that there wasn't a problem prevailed and we can now see that the Senate was right and the Defence Department was wrong,' Senator Brandis said.[851]

On 9 September 2009, the Government tabled two bills to revive the pre-AMC service tribunal courts martial system: *Military Justice (Interim Measures) Bill (No. 1)* and *Military Justice (Interim Measures) Bill (No. 2) 2009*. The Explanatory Memorandum to the No. 1 Bill advised:

> The purpose of this Bill is to return to the service tribunal system that existed before the creation of the AMC. This is an interim measure until the Government can legislate for a Chapter III court.[852]

In the second reading debates, members were keen to identify the military as the master of its own demise; for example the Opposition member for Paterson said:

> As I previously said, this decision was inevitable, and that is because the Australian Military Court was claiming to exercise a judicial power of the Commonwealth that did not meet the requirements of Chapter III of the Constitution. ... .

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[850] Christian Kerr, 'George Brandis blames Robert Hill for military court bungle', *The Australian*, 27 August 27 2009.
[851] Patrick Walters, 'Vow to fix military courts', *The Australian*, 28 August 2009.
[852] *Military Justice (Interim Measures) Bill* (No. 1) 2009, *Explanatory Memorandum*, 9 September 2009 (emphasis added). See also Commonwealth of Australia, House of Representatives, *Parliamentary Debates*, 'Second Reading Speech', 14 September 2009, 57-58 (Kelly).

> There is now some debate about why the decision was made to ignore the advice of the parliament and proceed with the establishment of the Australian Military Court without regard to Chapter III considerations. For the record, Defence was advised that the hybrid form of court they sought to establish would be problematic, as you cannot have or exercise judicial power other than pursuant to Chapter III of the Australian Constitution.
> ...
>
> The situation the ADF now finds itself in is regrettable. [853]

Similarly, the Member for Forrest summarised the ADF's role in the invalidated Court as follows:

> In 2007, the ADF dismissed the advice of the Senate Foreign Affairs, Defence and Trade References Committee when establishing the Australian Military Court. The ADF were informed at the time that they could not have judicial power other than pursuant to Chapter III of the Australian Constitution. Subsequently, the ADF were informed that the 'hybrid' form of court they sought to establish was problematic. The parliament charted a course so that Australia could have a standalone, independent military judicial arm comparable to those of the United States, Britain and Canada. Unfortunately, this was ignored by the ADF.[854]

Government members were quick to identify that when they were in Opposition, they had rallied against the hybrid system ultimately adopted by Defence; for example:

> As I have said, this outcome, with the uncertainty that it has created for the Australian military justice system, is an outcome which could have been avoided had the words of caution expressed by opposition Labor members in this place at the time been heeded.[855]

That Defence was responsible for the now impugned Australian Military Court was in no doubt. As the Opposition member for Herbert succinctly stated:

> As the previous speaker indicated, there were certainly some concerns about the form of that court, and it is now history that the form adopted by the former government did not in fact withstand the scrutiny of the law. Part of the problem was that the former government took the advice of Defence.

[853] *Parliamentary Debates,* above n 852, 58-59 (Baldwin) (emphasis added).
[854] Ibid, 67 (Marino) (emphasis added).
[855] Ibid, 60 (Dreyfus).

> I am not being critical of Defence - I am just stating the facts. Defence wanted this particular arrangement and Defence got this particular arrangement, but it was not an appropriate arrangement at law. Perhaps in hindsight the former government should have accepted wider advice, but that was not to be the case ...[856]

At the time of the High Court's decision, the Australian Military Court had convicted 171 persons. The *Military Justice (Interim Measures) Act (No. 2)* 2009 sought to validate those earlier decisions by imposing disciplinary sanctions in lieu of AMC findings. The *Explanatory Memorandum* said this:

> The principal mechanism by which the Bill seeks to maintain the continuity of discipline within the ADF is by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC and, to the extent necessary, summary authorities in the period between the AMC's establishment and the declaration of invalidity by the High Court.
>
> As explained below, the Bill does not purport to validate any convictions or punishments imposed by the AMC. Nor does the Bill purport to convict any person of any offence. Rather, the Bill, by its own force, purports to impose disciplinary sanctions.

While section 6 of the Act (No. 2) protects a person from further trial under the *DFDA* (the common law principles of autrefois acquit and autrefois convict), one could well anticipate that at least one of the 171 convicted by the AMC will challenge the validity of this Act when passed. Indeed, the *Explanatory Memorandum* foreshadows as much:

> The Bill recognises that there may be circumstances in which a person affected by a disciplinary liability imposed by the Bill wishes to contest whether that liability should remain imposed. The Bill gives affected persons a right to seek review of whether they should remain liable under the Act, and the reviewing authority is given power to discharge persons from such liability. In cases where the disciplinary liability imposed by the Bill relates to detention - a serious disciplinary measure peculiar to the ADF - the Bill requires automatic review by the reviewing authority to determine whether that disciplinary liability should be discharged.

[856] Ibid, 61-62 (Lindsay) (emphasis added).

The Constitutionality of these provisions will be tested soon, with Notices of Appeal being drafted to challenge convictions and sentences handed down by the AMC and the validity of these transitional provisions.

On 24 May 2010, the Government announced the establishment of the Military Court of Australia, which is to be a court created pursuant to Chapter III of the Australian Constitution. In a joint press release, Attorney-General, Robert McClelland and Minister for Defence, Senator John Faulkner announced:

> 'Judicial officers appointed to the new Military Court of Australia will have the same independence and constitutional protections that apply in other federal courts,' Mr McClelland said.
>
> To ensure that the new court has the necessary understanding of the requirements and critical nature of military discipline, all judicial officers appointed to the court must have either past military experience or a familiarity with the services. They may not, however, be serving ADF members, nor members of the Reserves.

The press release indicated that the new court should commence in operation in 2011.

However, the joint press release from the government did more than just announce the creation of a new military court. The joint press release also took the opportunity to announce that the civilian Federal Court, Family Court and Federal Magistrates Courts would be merged and divided into a trial tier and appeal tier.[857] This is something which the Opposition

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> 'The new Military Court of Australia will form part of a restructured federal court system in which the Federal Magistrates Court will continue to hear general federal law matters,' Mr McClelland said.
>
> Existing Judges of the Federal Court and Federal Magistrates Courts with the requisite background may be offered dual commissions to the new military court.
>
> 'Under the new arrangements, a lower tier of the Family Court will be established and commissions offered to Federal Magistrates who undertake mainly family law work,' Mr McClelland said.

opposed prior to the Federal election of August 2010. However, while the Opposition was opposed to the idea of a re-structure of the entire federal court system, it was supportive of a Chapter III Constitutional Court for the military. For example, when the *Lane v Morrison* decision was handed down, Senator Brandis, then Shadow Attorney-General, announced that the court should have been created as a Chapter III Constitutional court.[858]

With the commissioning of the new Gillard minority Government, the Bill will need to be re-introduced into the House of Representatives and pass though both Houses. In the meantime, until and unless the Bill is enacted, the military justice system within Australia will remain within the chain of command, convened in an *ad hoc* fashion, with participants appointed on an *ad hoc* basis, and reliant upon the defence power of the Constitution which has received less than overwhelming approval in previous High Court decisions. The total institution remains intact.

5. Evaluating the response to the *2005 Senate Report* - establishing a DMP

After the JAG paper in 1994,[859] his Annual Report of 1995, the Abadee Report of 1997, the Military Justice Report 1999, the 2001 Burchett Report and the Rough Justice Report also of 2001, along with developments in comparative and international law jurisprudence, the Government announced in March 2002 that an independent office of the Director of Military Prosecutions would be established.[860] In that same March 2002 Response, the government indicated that legislation to amend the *DFDA* would be introduced after the relevant heads of the military services had

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'This new structure will achieve a more integrated and efficient system in order to effectively deliver legal and justice services to both the civilian and defence community'.

[858] Kerr, above n 850.

[859] Judge Advocate General, Rear Admiral Rowlands, 'The Civilian Influence on Military Legal Structures' (1995) cited in *Burchett Report 2001*, paragraph 107.

[860] 'Response to Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion', *The Australian,* 3 March 2002.

considered the functions of the DMP. Within the year, in February 2003, the ADF and government had reached agreement to establish the office.[861]

However, the actual implementation beyond that agreement was one of torpid languor.[862] The next announcement was from The Hon Danna Vale, Minister Assisting the Minister for Defence, who stated in a media release dated 30 June 2003 that:

> I have directed Defence to expedite the development of the necessary legislation required to establish this position as a statutory appointment providing independent prosecutorial decision-making similar to that of Commonwealth, State and Territory Directors of Public Prosecution. [863]

"To expedite" would suggest the legislation was to be advanced, hurried up or accelerated; but this was not to be. In his submission to the Senate Committee Inquiry, which ultimately produced the 2005 Report, General Cosgrove said that the legislation required establishing the DMP would be introduced in 2004.[864] Similarly, evidence before the Committee was also given by the Director-General of the Defence Legal Service, Air Commodore Harvey, in March 2004 that the legislation was 'imminent'.[865]

However, by the time of the Senate Report tabled on 16 June 2005, the establishment of a statutorily independent Director of Military Prosecutions

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[861] Cosgrove, Chief of Defence Force *Official Committee Hansard,* above n 814.
[862] A phrase borrowed from Heydon J in a completely unrelated matter: 'The torpid languor of one hand washes the drowsy procrastination of the other.' *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27, paragraph 156.
[863] The Hon Danna Vale MP, 'Media Release', 30 June 2003; also noted in *2005 Senate Report*, paragraph 4.21.
[864] Cosgrove*, Submission 16*, above n 765, 18; also noted in *2005 Senate Report*, paragraph 4.22.
[865] Air Commodore Simon Harvey, Director General Defence Legal Service, *Official Committee Hansard,* above n 814, 55; also noted in *2005 Senate Report*, paragraph 4.22.

(DMP) was 'in limbo'[866] - hardly a status consistent with expedition and imminence.

It is noted that by the time of the 2005 Report, a DMP of a kind had been created but not with the unfettered discretion and statutory independence as would be conferred by legislation. Instead, the DMP was still within the chain of command and the office only acted in an advisory capacity, with the power to prosecute still held by the Convening Authority. The unsatisfactory nature of this arrangement was highlighted by the officer holding this advisory position when he gave evidence before the Committee in August 2004. Not only did Colonel Gary Hervey speak to the unsatisfactory nature of his office, but to his frustrations with the Government's inaction:

> I am caught between a rock and a hard place, where people demand statutory independence of me and do not give it to me.
>
> I have just sat in the other room and watched the discussion concerning independence and how people can be said to be independent. The claim can be made of me: don't you have to report to the Chief of the Defence Force? The answer is, 'Yes, I do.' Why? Because he is my boss. Then the next question comes: 'When you chose to prosecute or not to prosecute Private Bloggs, General Smith, Admiral Jones or whoever it may be, were you influenced in that decision?' Until I am removed from the chain of command by the office being established properly, I cannot be independent. I must be a person who is within a chain of command somewhere. So, no, the position is not statutorily independent. Would I like it to be? Yes, please. How quickly? As quickly as you can possibly do it.[867]

The lack of priority which the military ascribed to creating a statutorily, independent DMP is highlighted in two ways in addition to that described by the incumbent officer-holder above. First, the advisory position was established at the rank of Colonel, which meant that the advising DMP would find him/herself advising upon prosecutorial decision making for those much higher up the chain of command, including one and two star

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[866] *2005 Senate Report*, Executive Summary, paragraph 5; Cosgrove, *Submission 16*, above n 765.
[867] *2005 Senate Report*, paragraph 4.23.

general-equivalents.[868] Second, the pay of $275 per day suggested the military was neither serious about attracting high quality personnel,[869] nor did they ascribe to the role any significant value.

Keeping in mind that the *Effectiveness of Military Justice Report* was published in mid-2005, and that the relevant Minister had issued one press release in 2002 that a statutory DMP would be established and another press release in 2003 that the legislation would be 'expedited', the Committee asked Colonel Hervey about the delay in producing draft amendments. It further asked whether the delay in promulgating the amendments could be due to complexity:

> A committee member asked Colonel Hevey if the delay might be due to the complexity of the legislation. Colonel Hevey told the committee that a bill could be easily modelled on current statutes creating the various Commonwealth, State and Territory Directors of Public Prosecutions, adding 'this is not a massive task'. [870]

Ultimately, the Committee was scathing in its assessment of the delay in failing to enact legislation to provide for an independent DMP:

> The committee holds the opinion that a statutorily independent DMP is a vital element of an impartial, rigorous and fair military justice system. It finds the Government's inaction unsatisfactory. Until such time as the promised legislation is passed, decisions to initiate prosecutions are not seen to be impartial, the DMP is not independent, and fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes. [871]

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[868] Ibid, paragraph 4.40.

[869] Which is not to say the Committee was in any way critical of the DMP Colonel Hevey; at paragraph 4.41, the Committee observed:

> The current DMP indicated to the committee that he considers the work to be a 'labour of love' and does it 'because I am silly enough to think it is worthwhile'.[fn] If the DMP's remuneration rate is not pegged at a level more commensurate with private rates, it cannot always be assumed that the position will attract personnel as experienced, committed and altruistic as Colonel Hevey.

[870] *2005 Senate Report*, paragraph 4.25 (emphasis added).

[871] Ibid, paragraph 4.27 (emphasis added).

Finally, on 12 December 2005, legislation was passed which created the Office of DMP. The amendments relevant to the creation of the DMP comprised a trifling 18 clauses, many of which were modelled on existing Commonwealth DPP legislation. The drafting exercise simply could not have been a three- year problem; for example:

Table 7
DPP and DMP provisions

Director of Public Prosecutions Act 1983	*Defence Legislation Amendment Act* (No.2) 2005
Section 5 **Office of the Director of Public Prosecutions** (2) There shall be a Director of Public Prosecutions and an Associate Director of Public Prosecutions.	Section 188G **Director of Military Prosecutions** There is to be a Director of Military Prosecutions.
Section 6 **Functions of Director** (1) The functions of the **Director** are: (a) to institute prosecutions on indictment for indictable offences against the laws of the Commonwealth; and ...	Section 188GA **Functions of the Director of Military Prosecutions** (1) The Director of Military Prosecutions has the following functions: (a) to carry on prosecutions for service offences in proceedings before a Defence Force magistrate or a court martial, whether or not instituted by the Director of Military Prosecutions; ...
Section 22 **Director or Associate Director not to undertake other work** The Director or the Associate Director must not: (a) engage in practice as a legal practitioner outside the duties of his or her office; or (b) without the consent of the Attorney-General, engage in paid employment outside the duties of his or her office.	Section 188GM **Outside employment** The Director of Military Prosecutions must not: (a) engage in practice as a legal practitioner outside the duties of his or her office; or (b) without the approval of the Minister, engage in paid employment outside the duties of his or her office.

Director of Public Prosecutions Act 1983	*Defence Legislation Amendment Act* (No.2) 2005
Section 26 **Acting appointments--Director** (1) The Attorney-General may appoint a person who is eligible for appointment as the Director to act in the office of Director: (a) during a vacancy in that office, whether or not an appointment has previously been made to that office; or (b) during any period, or during all periods, when the person holding that office is absent from duty or from Australia or is, for any other reason, unable to perform the functions of that office.	Section 188GP **Acting appointments** (1) The Minister may appoint a person to act as the Director of Military Prosecutions: (a) during a vacancy in the office, whether or not an appointment has previously been made to that office; or (b) during any period, or during all periods, when the Director of Military Prosecutions is absent from duty or from Australia, or is, for any other reason, unable to perform the functions of his or her office.

It is difficult to see how the drafting of these provisions could have taken three years.

When comparing the two offices, it is also of note that while the Commonwealth DPP is appointed by the Governor-General (s.18 *Director of Public Prosecutions Act* 1983 (Cth)), the military's DMP was to be appointed by the Minister; s188GF DFDA. Accordingly, the perception of command influence remained, with the DMP remaining as part of and responsible to the Executive.

H. A summary of the Australian reviews

In tracing the military's resistance to the establishment of a DMP, we see a doctrinal resistance to, and an apprehension about, change. Both positions highlight the closed, total institutional status of the ADF and in particular, its efforts to thwart, ward off or frustrate any reforms that would be inconsistent with the first feature of total institutions whereby a single authority controls all aspects of the organisation.

A consistent theme that emerges throughout these reviews is that the military was keen to impress upon those conducting the various inquiries that its military justice was working well; 'the military justice system is sound …'[872] and that 'none of the five inquiries conducted since 1998 has concluded that the military justice system or aspects of it are broken'.[873] The theory of total institutions and the idea of myth making within that theory assists in understanding why the ADF would promote what can only be called fables about the efficacy of its justice system. If we accept that the Australian military is highly institutionalised – and one need only return to a pro-exceptionalist arguments of the separate community and that discipline can only be ensured though an in-house justice system – then, we see support for both Lynne Zucker's and Ronald Jepperson's hypotheses[874] that the greater the degree of total institutionalisation, the greater the entity's resistance to change or social intervention. Further to Jepperson's theory (see Chapter 3, Part B), social intervention was less likely to be successful where an institution had been in place for a long time, where it worked within a framework based on common principles and rules, and where it has the moral authority or the ability to constrain its members. These characteristics described by Jepperson are all uniformly

[872] *Official Committee Hansard*, above n 814, 13; see Report xxvi paragraph 7, with contrary views expressed by Committee at paragraph 8.
[873] *Official Committee Hansard*, above n 814, 12.
[874] Zucker in Powell and DiMaggio (1991), above n 288, 99; Jepperson in Powell and DiMaggio (1991), above n 288, 151-152.

found in the military: it has been in place for as long as Australia has been federated, has common principles and rules, promotes its own moral authority and has the ability to sanction. According to Jepperson, an institution exhibiting these features will not be readily vulnerable to external intervention. Thus, recommendations from *one* Inquiry to create, for example, a DMP was not sufficient to cause change. Indeed, the recommendations of two JAGs and two civilian judges as well as a Senate Inquiry was insufficient to cause change. In the mean time, the military sought to create institutional legitimacy for itself, through the concept of myth making, as referred to by John Meyer and Brian Rowan.[875] We see this theory in action through the repeated submissions made by the military to each successive Inquiry, to the effect that the military justice system is efficient, effective and reliable. Those submissions were, however, contrary to the weight of the evidence.

Yet, some civilianising reform has occurred; for example, a DMP was eventually introduced after significant delay and successive recommendations by consecutive inquiries. A permanent military court was eventually established, but the service tribunal model adopted by the Department of Defence – contrary to the 2005 Senate recommendations - was held to be invalid by the High Court of Australia.

The substantive and relevant changes that did occur in response to the 'decade of rolling inquires' shows little evidence of mimetic isomorphism, which concerns modelling or mimicry of another apparently successful entity when dealing with uncertainty. This is not surprising because a constant theme presented by the military was a certainty that its military justice system was sound; more so, in 2004 the then CDF called comparisons to the civilian system 'unhelpful'.[876] Similarly, there is little evidence that normative isomorphism, being change which is associated

[875] Above n 731.
[876] *Official Committee Hansard*, above n 814, 4.

with the transmission of norms via a professional, decision-making class with similar education/training, and cross-organisational networking, caused any civilianising reform within the military justice system. There can be little doubt that both Abadee and Burchett would have brought their decades of common law values and norms with them when inquiring into the military justice system, but the military eschewed substantive change in each case.

What is apparent, however, is coerced isomorphism, with substantive change to the military justice system occurring when imposed. The ADF's only response to the various inquires was to make the smallest change possible, thereby protecting its closed institutional status, whilst mythologizing (in the institutional isomorphic sense) that its system was fair. However, a DMP was eventually created but only after a succession of external Inquiries made it increasingly impossible for the military to avoid the issue any longer. In 2001, Justice Burchett referred to a softening of approach with respect to the military's 'doctrinal' opposition to a DMP expressed before previous inquires, and that he now perceived within the ADF 'a sense of inevitability' that a DMP would at some point in the future be implemented.[877] However, it took another 4 years before legislation was finally introduced in to the Parliament. It may be that a Chapter III permanent military court will now be created, but only because the Australian Military Court was declared to be invalid by the High Court of Australia.

The 2005 Senate Inquiry aptly described the military's resistance to civilianising reform as a 'hangover from a time when the battlefield was so far removed from the normal world that the Defence Force needed to be self contained …'.[878] We see precisely that attitude of isolation, which is a feature of a total institution, in the military's disinclination to accept

[877] *Burchett Report*, paragraph 221.
[878] *2005 Senate Report*, paragraph 5.31.

international law obligations of independent and impartial adjudication as a model of 'best practice' to aspire to, instead treating international law norms as a nuisance to be ignored, or relying upon technical arguments about the inapplicability of international law in the domestic Australian setting.

In similar circumstances, and in a sentiment equally applicable to the attitude of the Australian Defence Force to civilianising reform, Justice Lamer of the Supreme Court of Canada urged the Canadian military as follows:

> Constitutionality is a minimum standard…those responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied.[879]

[879] Lamer, above n 44, 21.

CHAPTER SIX

COMPARATIVE MILITARY JUSTICE CIVILIANISATION

A. Background

If independent and impartial adjudication are values worthy of observance, the previous Chapter painted a gloomy picture of the Australian military justice system and external efforts to impose such values upon it. Instead, the decade of rolling inquiries revealed a prevailing attitude in ADF leaders whereby a premium was placed on discipline over independence and impartiality, and where those leaders were protective of the military's insular status and supposedly separate community. However, in contrast to the Australian experience

> One country after another has in recent times focussed on issues of independence and impartiality in the administration of military justice.[880]

> ... the growing number of countries in which military jurisdiction is being reformed is encouraging. Many countries have abolished military courts in peacetime. ... Several countries have amended their laws to ensure that members of the military who commit military offences enjoy the safeguards that are necessary for a fair trial.[881]

This Chapter compares and contrasts the Australian experiences of civilianising reform with comparable jurisdictions: the United Kingdom, Canada, the United States of America and New Zealand. However, even though military justice civilianisation in those countries will be the subject of further assessment in this Chapter, it is worthy to note (albeit it by way of background) that civilianisation is a phenomenon of greater reach than just those countries. For example, the 1980s and 1990s saw many predominantly European countries abolishing military tribunals in peace

[880] Eugene R. Fidell, 'A World-Wide Perspective on Change in Military Justice' (2000) 48 *The Air Force Law Review*, 195–209.
[881] *ICJ Report*, above n 2, Part 1, 13.

time, including Austria, Denmark, France, Guinea, Norway, Sweden,[882] Germany, Slovenia, Estonia, the Netherlands, the Czech Republic and Senegal.[883]

Similarly, as a consequence of entering into the Inter-American Convention of Human Rights as well as various Inter-American human rights conventions (for example, the *Inter-American Convention on Forced Disappearances of Persons*), several Latin American countries introduced reforms in the 1990s resulting in the exclusion of serious human rights violations from military tribunals (Bolivia, Haiti, Venezuela, Colombia) and the abolition of military courts to try civilians (Colombia, Haiti, Guatemala and Nicaragua). In Paraguay, the use of military courts to try civilians was abolished in all instances, apart from allegations arising from international armed conflict when civilians could still be tried in the military court system.[884] In countries such as China and Cuba, military courts have been abolished and service personnel tried by the civilian system. By dint of history, Japan had its military courts completely abolished when the new Constitution was adopted in May 1946. For entirely different historical reasons, when Costa Rica abolished its Army in 1948, the abolition of the military courts followed. [885]

In yet another historical moment in another country, the 1996 post-Apartheid Constitution of the Republic of South Africa[886] enshrined equality and independence for all. It did not take long for two members of the South African National Defence Force (SANDF), who had been convicted before an ordinary court martial to bring a constitutional challenge to the court martial process. Specifically, the Appellants contended that: courts martial lacked independence of the court martial; that the Executive could interfere in the proceedings of a court martial; the

[882] Above n 213.
[883] *ICJ Report*, above n 2, 158-159.
[884] Ibid, 161.
[885] Ibid, 158.
[886] *Constitution Act* 1996 (RSA).

insufficiency of the appellate process; and, that the ordinary court martial lacked the basic essentials of an 'ordinary court' as envisaged in the relevant provisions of the new Constitution.[887]

The Full Bench of the Cape of Good Hope High Court held that the challenged provisions of the Defence Act and the Military Code were unconstitutional, invalid and of no force or effect. The military appealed to the Constitutional Court.[888] The appeal before the Constitutional Court was to be heard in March 1999, but was then postponed to May 1999 to allow the parties to consider their positions given that the government had, on the eve of hearing, introduced the *Military Discipline Supplementary Measures Bill* of 1999. The Bill was enacted in April 1999 and thereby repealed and amended certain of the provisions of the Defence Act and the Code, including those which had been impugned in the High Court proceedings.

Due to the enactment of the amending legislation, the Constitutional Court held that 'no useful purpose would be served by deciding the issues raised in the appeal or the declarations of invalidity made by the High Court'.[889]

Ultimately in 2001, and in an unrelated matter, the High Court of South Africa ordered that the Code of Military Justice be suspended. The Court held that:

> The military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure.[890]

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[887] *President of the Ordinary Court Martial and Others v Freedom of Expression Institute* [1999] ZACC 10, paragraph 4.
[888] Ibid, paragraphs 4-5.
[889] Ibid, paragraph 8.
[890] 28 Order dated 29 March 2001, paragraph 14.6, cited in *ICJ Report,* 161.

Subsequently, the continuing process of post-Apartheid law reform led the South African Minister of Defence to appoint a Ministerial Task Team to review South African military justice and ensure it met constitutional requirements of independence, impartiality and equality for all.[891]

Even in Iran, a country not often associated with the principle of separation of powers or the human rights of a fair trial, reform has occurred. Since 1991, ordinary criminal law allegations against a member of the military, offences which are not service or duty-related have fallen to the ordinary courts. More recently, the military justice system was relocated as part of the general system of justice under the direction of the Head of the Judiciary and has no ties with the army command. [892]

Of course, it is not suggested that the Australian military justice system or the process of law reform can be compared with these other countries, such as Iran, Senegal and Guinea. The point however is that military justice law reform is not a phenomenon peculiar to Australia. More particularly, the overview[893] of comparable countries provided in the following sections of this Chapter will assist in understanding the circumstances of or motivators for reform where it has occurred. This will provide a basis for establishing a predicative framework in the following and final Chapter which sets out the conditions precedent for civilianisation: a framework which will assist in identifying when a total institution will isomorph.

[891] Tshivhase, above n 157, 97.
[892] *ICJ Report*, above n 2, 284.
[893] It is stressed that what follows is an *overview* and does not purport to be a detailed assessment of reform as occurred in the previous Chapter with respect to Australia.

B. The United Kingdom

For a period of more than 40 years, military justice in the United Kingdom's armed services was conducted pursuant to the *Naval Discipline Act* 1957, the *Army Act* 1955 and the *Air Force Act* 1955, with little or no inquiry. However, two events were to cause momentous change to that system of justice: first, the courts martial Alex Findlay, Dean Morris and Mark Grieves culminating in the decisions of the European Court of Human Rights in 1997, 2003 and 2003 respectively;[894] and, second, the introduction of the domestic *Human Rights Act* 1998.

Both were examples of the military being coerced to change. The former, the *Findlay* outcome, was an example of a judicial decision requiring change. The latter was an example of a new Government imposing change upon the military as part of a wider policy mandate to introduce European human rights law into domestic English law.[895]

As a means of attempting to pre-empt the consequences of the European Court's decision if it were to find in favour of Lance Sergeant Findlay,[896] the three military Acts of the 1950s were amended by the *Armed Forces Act* 1996 to make the military justice system more consistent with the *European Convention on Human Rights*. After *Labour's* landslide victory in 1997, the new Blair Government set out to implement its plan to introduce the *European Convention on Human Rights* into domestic law. The *Human Rights Act* was introduced and passed in 1998, to take effect in October 2000. The *Armed Forces Act* 1996 was not consistent with the *Human Rights Act* 1998, and thus, a process of reform commenced, culminating in the *Armed Forces Discipline Act* 2000 which came into force on the same date as the *Human Rights Act* in October 2000. These

[894] *Findlay v United Kingdom* (1997) 24 EHRR 221; *Morris v United Kingdom* (2002) 34 EHRR 1253; *Grieves v United Kingdom* (2004) 39 EHRR 2.
[895] Simon P Rowlinson, 'The British system of military justice' (2002) 52 *Air Force Law Review* 17, 20.
[896] Ibid; see discussion of *Findlay* at Chapter 4.

amendments in the year 2000 included a new appeals system, the enactment of custodial rights, and appointment procedures for courts martial members aimed at ensuring independence and impartiality.

Further reforms were to occur. Dean Morris' matter is discussed in Chapter 4, Part F above. The European Court dismissed most of his complaints, but found that the courts martial process offended the Convention because a non-judicial authority automatically reviewed convictions and sentences, and could substitute its own findings of guilt or innocence, and findings as to sentence in lieu of that reached by the court martial. Following further review, the Armed Forces Act 2006 was passed, Most significantly the Act abolished the three, previously separate service discipline Acts, unifying military justice under the one system with tri-service application. With respect to the *Morris* outcome, the act also abolished the Reviewing Authority's power to amend a finding or sentence, and conferred upon all convicted persons a right of appeal to the Court Martial Appeal Court.

However, the *Morris* decision was not to be the final word on military justice law reform. Five years after the *Findlay* decision and a year after Morris, Mark Grieves and Graham Cooper[897] separately challenged the ad hoc nature of the respective naval and air force courts martial as offending their right to an independent hearing and incompatibility with Article 6 of the *European Convention*. The *Grieves* and *Cooper* matters were heard in Strasbourg together. The Court upheld their complaints. As a result, *ad hoc* courts martial were replaced by a standing court martial.[898]

[897] The two matters were heard together: *Grieves v United Kingdom* (2004) 39 EHRR 2; and, *Cooper v United Kingdom* (2004) 39 EHRR 8.
[898] British Ministry of Defence *Memorandum: Tri-service Armed Forces Bill*, 8 cited in the *2005 Senate Report*, 94, paragraph 5.61.

The matter of *R v Stow,*[899] has also been discussed in Chapter 4, Part F. That was a decision which challenged the objective lack of independence and impartiality of the Prosecuting Authority, because the prosecutor's performance as a prosecutor was reported upon. The Court upheld Stow's appeal and quashed his conviction as having violated his Article 6(1) rights.

However, prior to the matter being argued in the Court of Appeal, the 'shortcomings'[900] which were argued by Stow and found to be justified by the Court were removed. By the time of appeal hearing, the practice of reporting on a Prosecuting Authority's performance had ceased, and, by the time of hearing, naval practice had also changed so that the Prosecuting Authority was in his or her final posting.

The outcome in this matter was similar to the reform that had occurred in the *Findlay* matter – changes were made *before* the Court gave judgment. Such an approach is explained by mimetic isomorphism, which highlights that in times of uncertainty, an entity will copy what happens or occurs within other entities as a means of reform. In these cases, the services in the United Kingdom made civilianising reform. It would, however, be too simple to just lays these reforms at the door of mimetic isomorphism. The wider context is that the UK military operated in an environment where the domestic *Human Rights Act* applied to it, as did the *ECHR*. Thus, in those instruments, there was an ability of the courts to coerce change too – had the military not acted pre-emptively, change would have been compelled or imposed upon it anyway.

Public attention has also featured in the UK path to civilianising reform, particularly with respect to the trials of service personnel accused of war crimes or other offences arising out of the British deployment in Iraq. For

[899] [2005] EWCA Crim 1157.
[900] Ibid, paragraph 39.

example, perhaps the most prominent case concerned the court martial of seven service personnel with respect to the beating and death of Baha Musa, an Iraqi prisoner held in British detention in Basra in 2003.[901] One corporal was convicted after pleading guilty, but the balance were acquitted. The 1 January 2009 civilian appointee to the office of DMP for all services, Mr Bruce Houlder QC, has been reported as saying

> there had been evidence of 'regimental amnesia' – what the High Court judge in the court martial in 2007 described as 'a closing of the ranks'. 'Witnesses forgot where their loyalties lay,' he said. 'They thought their loyalty lay with the soldiers on trial, not with the regiment as a whole.' [902]

Mr Houlder's appointment in 2009 was itself a significant departure from military tradition. Until his appointment, the decision to prosecute had been an in-house decision firstly made by the commander, and then more recently, within the jurisdiction of a DMP, but a DMP drawn from military ranks. Bruce Houlder QC was appointed on 1 January 2009 as the first civilian to hold the position of independent DMP for all three services; he came from the private criminal bar. Upon his appointment he announced

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[901] See for example, all at 17 September 2010:

- David Charter, 'British troops face war crime charges over Iraq prisoners', *The Times*, 20 July 2005, http://www.timesonline.co.uk/tol/news/world/iraq/article545963.ece
- 'Why we still need justice for Baha Musa', *The Observer,* 17 June 2007, http://www.guardian.co.uk/commentisfree/2007/jun/17/leaders.humanrights
- Mark Townsend, 'How army's £20m trial failed to find the killers', *The Observer*, 18 March 2007, http://www.guardian.co.uk/uk/2007/mar/18/iraq.military
- Marcus Leroux, 'Minister 'misled MPs over torture' of Iraqi Baha Musa', *The Times*, 28 July 2008, http://www.timesonline.co.uk/tol/news/uk/article4412771.ece
- 'Baha Musa inquiry: Chief officer 'punched detainee'', *BBC News*, http://news.bbc.co.uk/2/hi/uk_news/8467516.stm

[902] Michael Evans and Frances Gibb, 'Accused troops will face more robust courts martial, says prosecutions chief', *The Times*, 2 January 2009, at 17 September 2010, http://business.timesonline.co.uk/tol/business/law/article5430038.ece

a range of reforms, and notably, by reference to normative and mimetic isomorphism, it was reported:

> Mr Houlder said that he would push for a closer working relationship between his prosecuting authority and the military investigators in the same way that the Crown Prosecution Service liaised with the police in criminal cases.
> …
> As part of his strategy for creating a robust, more effective prosecuting authority, Mr Houlder said that he was hoping to persuade the three Service secretaries who are responsible for career structures to allow his team of 40 prosecuting lawyers to serve for three years, to build up experience [903]

With respect to the special expertise argument, it was also reported in the same interview:

> Mr Houlder appreciated that the Armed Forces operated in a different environment and he had written to all commanding officers to reassure them that although he had no military background, he was fully cognisant of the special requirements and expectations of an armed forces justice system.
>
> He said that he understood the 'paramount importance' of effective discipline in the Services and that there were many offences, such as absence without leave and neglect of duty, that had no place in civilian courts. 'I can honestly say I have not faced any expression of resentment about a civilian being appointed to this job', Mr Houlder said.

C. Canada

Consistent with the experiences in the United Kingdom (with its *Findlay, Morris* and *Grieves* decisions along with the introduction of the *Human Rights Act* 1998), the sources of Canadian military justice law reform can also be traced to a human rights instrument and a court decision - the introduction of the Canadian *Charter of Rights and Freedoms* and the

[903] Ibid.

decision of the Supreme Court of Canada in *Généreux,*[904] which rested upon the justiciable rights in the *Charter*.

Also like the situation in the United Kingdom, from the introduction of the Canadian *National Defence Act* in 1952 and then for a period of almost 40 years concluding with the decision in *Généreux,* not much altered with military justice in Canada. [905] However, unlike UK experiences, a further source of significant reform to the Canadian military justice system occurred as a consequence of the media attention paid to the involvement of Canadian forces in Somalia,[906] and in particular, the allegations that Canadian troops had committed gross violations of human rights.

As already discussed,[907] the 1992 decision of the Supreme Court of Canada in *Généreux* determined that the courts martial structure was incompatible with section 11(d) of the *Charter of Rights and Freedoms*. The *National Defence Act* was then amended to separate the functions of convening courts martial and the appointment of judges and panel members; to require the random selection of panel members; to provide for tenure, financial security and institutional independence of judges; and, to discontinue the use of judicial performance for pay and promotion purposes.[908]

The decision in *Généreux* brought about significant change to the Canadian military. However, further wide-ranging and systemic reforms occurred as an outcome of a Commission of Inquiry and a Special Advisory Group which had been established to deal with the public outrage at some 'particularly egregious acts of misconduct committed by members of the Canadian Forces involved in peacekeeping in Somalia,

[904] Fidell and Sullivan (eds), above n 21, 237.
[905] Ibid, 237.
[906] United Nations Security Council Resolution 794 (1992).
[907] Chapter 4.
[908] Fidell and Sullivan (eds), above n 21, 239.

and to a lesser extent, Bosnia'.[909] In October 1993, the first of six soldiers charged following the incidents involving the Canadian Airborne Regiment in Somalia had been court martialled. However, the media raised issues about some of the courts martial, alleging that lower ranking personnel were made scapegoats while senior officers escaped significant penalties. There were also accusations in the news media that officers from National Defence Headquarters were over-represented on the panel of officers in these courts martial (the entity similar to a jury) in order to protect the interests of the military. [910] Additionally, the court martial of an officer charged with the accidental death of Corporal Neil MacKinnon during a military exercise in 1995 kept military law in the public arena, as did the courts martial of soldiers involved in the falsification of invoices.[911]

The Canadian military justice system remained in the public spotlight not only because of the alleged war crimes said to have occurred in Somalia by Canadian troops, but also due to the conduct of some of those convicted under the court martial process. For example in 1996, Lieutenant-Commander (Navy) Dean Marsaw held two hunger strikes to protest against the sentence in his court martial and dismissal from the service. Marsaw had been found guilty by a court martial of physically and verbally abusing the sailors under his command and had been demoted to the rank of Lieutenant (Navy). However, in 1996, the Canadian Broadcasting Commission's *Fifth Estate* program raised question about the military police investigation leading up to the court martial and the inadequacy of the conduct of the trial itself. [912]

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[909] Ibid, 241.
[910] Michel Rossignol, *National Defence Act: Reform of the Military Justice System,* Political and Social Affairs Division, Depository Services Program, Government of Canada, *22 January 1997,* http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/961-e.htm at 14 January 2009.
[911] Ibid.
[912] Ibid.

With the media and public attention continuing, in November 1996, the then Minister of National Defence announced the establishment of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. The theory of isomorphism explored in Chapter 3, Parts D and E, demonstrates that public pressure can question the legitimacy of an organisation, and, in turn, cause change in that organisation. Yet, the Australian perspective shows that public and media pressure alone were not sufficient to cause civilianising change to the military as a total institution. The Canadian experience, as will continue to be examined, is thus instructive on informing what kinds of pressures are necessary to cause change.

In January 1997, the Department of Defence released a report which confirmed Canadian peacekeepers had been involved in allegations of misconduct at the Bakovici hospital in the former Yugoslavia. However, the furore increased when it was also announced that the statute of limitations on disciplinary proceedings had expired and the soldiers involved would thus not face courts martial.[913]

The Commission of Inquiry's report 'Dishonored Legacy' summarized the Somalia incidents as follows:

> During the deployment of Canadian troops, events transpired in Somalia that impugned the reputations of individuals, Canada's military and, indeed, the nation itself. Those events, some of them by now well known to most Canadians, included the shooting of Somali intruders at the Canadian compound in Belet Huen, the beating death of a teenager in the custody of soldiers from 2 Commando of the Canadian Airborne Regiment (CAR), an apparent suicide attempt by one of these Canadian soldiers, and, after the mission, alleged episodes of withholding or altering key information. Videotapes of repugnant hazing activities involving members of the CAR also came to light. Some of these events, with the protestations of a concerned military surgeon acting as a catalyst, led the Government to call for this Inquiry. It is significant that a military board of inquiry investigating the same events was considered insufficient by the Government to meet Canadian standards of public accountability, in part because the board of

[913] Ibid.

> inquiry was held in camera and with restricted terms of reference. A full and open public inquiry was consequently established. [914]

With respect to the military justice system, the Report concluded:

> In spite of the time constraints facing the Inquiry, it has been possible to examine the full range of in-theatre and post-deployment disciplinary incidents relating to Somalia. Having done so, it is abundantly clear that the military justice system is replete with systemic deficiencies that contributed to the problems we investigated. Without substantial change to this system, it will continue to demonstrate shortcomings in promoting discipline, efficiency, and justice. [915]

The Commission found the military justice system had inadequately handled the allegations that had been made, and that the court martial process had also been devoid of integrity. Amongst the 160 recommendations made by the Commission, were recommendations that military judges be replaced by civilian judges and that military police be excluded from the chain of command.[916]

At the same time, the recently retired Chief Justice of the Supreme Court of Canada, the Rt Hon Brian Dickson, was appointed to chair a Special Advisory Group on Military Justice and Military Police Investigation Services. The 'Dickson Group', as it was called, issued two reports containing 53 recommendations in total. With the Prime Minister publically supporting the recommendations917 an almost overwhelming program of reform began.

As a response to the recommendations made by both the Dickson Group and the Somalia Commission of Inquiry, Bill C-25 was enacted in November 1998 containing a raft of reforms that effectively abolished the

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[914] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy: the lessons of the Somalia Affair* (1997).
[915] Ibid, 23 (emphasis added).
[916] Ibid, Recommendations 40.35 and 40.6 respectively.
[917] *ICJ Report*, above n 2, Vol 2 196.

multiple roles of the convening authority by separating the investigative, prosecution, defence and judicial functions within the court martial system. In 2003, the Rt Hon Antonio Lamer, formerly Chief Justice of the Supreme Court of Canada, was commissioned to review the provisions and operations of Bill C-25.[918] He too made recommendations including the creation of a permanent trial level military court, 'to further ensure judicial independence'.[919] The *National Defence Act* was amended accordingly. However, in what would cause great problems for the Canadian military several years later, Lamer also recommended that the accused have the right to select the mode of trial; that is, in civilian law parlance, judge and jury or judge alone. In his Report, Lamer wrote:

> I have been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency. When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail. The only possible exception warranting a change to this default position might be during times of war, insurrection or civil strife.
>
> It is my belief that an accused charged with a serious offence should be granted the option to choose between trial by military judge alone or military judge and panel prior to the convening of a court martial.
>
> And this observation leads me to recommend that the Act be amended to give the accused the option as to mode of trial. [920]

This recommendation was not implemented. Five years later, the failure to allow the accused to select the forum resulted in the whole court martial system in Canada being brought to a standstill. As previously discussed in Chapter 4 Part F, the Court Martial Appeal Court of Canada handed down its decision in *Trépanier.*[921] The Court struck down the provisions of the *National Defence Act* that provided for the Director of Military Prosecutions to select which type of court martial would hear proceedings

[918] Lamer, above n 44.
[919] Ibid, 2.
[920] Ibid, 40.
[921] *R* v *Trépanier* (2008) CMAC 3.

for a specific case. The Court held that the DMP's power to select the forum violated the rights of the accused to full answer and defence, as guaranteed by sections 7 and 11(d) of the *Charter*.

Upon the *Trépanier* decision being handed down, the Canadian Government acted relatively swiftly, introducing Bill C-60 in September 2008 to comply with the court's findings, and in particular, to define what kind of court martial would hear what kind of matter. It did this by creating a three-part regime where general courts martial would be mandatory for offences such as treason and piracy, whilst a standing general court martial would be mandatory for matters where the offence alleged was punishable by imprisonment for less than two years. Where the offences did not mandate trial before a general or standing court martial, the accused made the election as to the preferred forum.

Bill C-60 made further amendments to the Canadian military justice system, including the re-organising of courts martial from four different types of court martial, to two. The Bill also required that General Courts Martial decisions were to be made unanimously.

The Canadian experience demonstrates coerced isomorphism causing civilianisation as a result of court decisions adverse to the military and its justice system. That country's experience also shows the importance of the public and media calling into question the legitimacy of an institution, and in this case, the military. Certainly in Australian, media and public attention led, or assisted in leading to, the institution of inquires such as the 2005 Senate Inquiry Report, but it could not be said that that attention was instrumental in actually causing the kinds of change as occurred in Canada. The point of difference though is that the extent of the revulsion in Canada was of a much higher order than occurred in Australia – the war crimes allegations in Canada were said to bring dishonour to the nation,[922]

[922] Above n 914, 'Executive Summary'.

which is a whole other level of value laden opprobrium harder for a military to ignore than a couple of newspaper articles about individuals as occurred in Australia. Not only that, but in Canada, the then Prime Minister publicly brought the weight of his office to the need for reform.

D. United States of America

As in Canada and the United Kingdom, in the United States statute law concerning military justice was enacted after World War II. The mass mobilisation of troops during the war period exposed a significant body of 'ordinary people' to the vagaries of the military justice system that existed during this war period, but

> ... when those citizen-soldiers returned from World War II, a hue and cry went up in the nation to dramatically reform the system of military criminal law. As a result, the Uniform Code of Military Justice (UCMJ) was enacted and signed into law by President Harry Truman on 5 May 1950.
>
> Many of the over 16 million men and women who served in the United States armed forces during World War II, including civilian lawyers, left the services with a poor view of the Articles of War. The American Bar Association, American Legion, and other private organizations spoke out for reform, as did citizenry across the nation. The result was a significant reformation of the system with the creation and enactment of the UCMJ.[923]

Since then, however, there has not been any reform to the *UCMJ* of the scale and significance that lead to its introduction in the first place. The prevailing theme in the United States is the phenomenon known as 'judicial deference' previously discussed in Chapter 2. This concept rests on the division of power whereby it is the United States Congress that is vested with the power to make rules for and to regulate the armed forces of its nation. As a consequence, civilian courts have long been reluctant

[923] Lisa L Turner 'The Articles of War and the UCMJ - widespread court martial cases in World War II led to the enactment of the Uniform Code of Military Justice', (2000) *Aerospace Power Journal* http://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/turner.htm at 1 October 2010.

to interfere in military matters, particularly where the method and mode by which the military operates is under attack:[924]

> It is difficult to conceive of an area of government activity in which the [civilian] courts have less competence.[925]
>
> Judges are not given the task of running the Army. ...Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate army matters as the Army must be scrupulous not to intervene in judicial matters.[926]
>
> Judicial deference to ... congressional authority is at its apogee when legislative action is under the congressional authority to raise and support armies and make rules and regulations for their governance.[927]
>
> In determining what process is due, courts 'must give particular deference to the determination to Congress, made under its authority to regulate the land and naval forces'.[928]
>
> We have adhered to this principle of deference in a variety of contexts ... where the constitutional rights of servicemen were implicated.[929]

Thus, whilst individual service personnel in the United States have challenged the independence and impartiality of courts martial, such challenges have not been successful;[930] there are no *Généreux* or *Findlay* equivalents invoking the language of fair trial human rights jurisprudence perhaps until the decision in *Hamdan v Rumsfeld*[931] but in that matter, the source of law was not the UCMJ, but imported international law (the Geneva Conventions). Certainly Amendments I-X of the *Constitution*, which are collectively known as the *Bill of Rights*, contain a due process clause and right to a speedy, impartial trial, but those Constitutional

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[924] Groves, above n 36, 373; John O'Conner, 'The Origins and Application of the Military Deference Doctrine' (2001) 35 *Georgia Law Review* 65.
[925] *Gilligan v Morgan*, 413 US 1 at 10 (1973).
[926] *Orloff* v *Willoughby*, 345 US 83 at 93-94 (1953).
[927] *Rostker v Goldberg,* 453 US (1981).
[928] *Weiss v United States,* 510 US 1085 (1994) quoting *Middendorf v Henry,* 425 US 25 (1976).
[929] *Solorio v United States*, 483 US 435, 447-8 (1987).
[930] *United States v Graf,* 35 MJ 450; Weiss *v United States,* 510 US 1085 (1994); see also Groves above n 36, 374-5.
[931] 548 US 557 (2006). This matter concerned the validity of military commissions, not courts martial, created by Executive Order to try a particular class of enemy combatants detained at Guantanamo Bay.

guarantees are not applied to the benefit of service men and women in the same way as applied to civilians.[932] In 1955 in *United States ex rel Toth v Quarles,*[933] Justice Black observed:

> [M]ilitary tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

Similarly, in 1969, the Supreme Court held that the expansive military jurisdiction denied service personnel fundamental rights. [934]

Another distinguishing feature that sets the United States approach to military law apart from other jurisdictions is its long history of ignoring foreign military law developments and jurisprudence[935] (indeed, the ignoring of foreign and international jurisprudence is not limited just to military law, but all law). In the *United States v Graf*,[936] the US Court of Military Appeals considered the decision in *Généreux,* but then rejected its relevance. In the companion case of *Weiss v United States,*[937] comparative foreign military justice developments were not mentioned at all.[938] In *Solorio v United States*,[939] several *amicus curiae* briefs were filed

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[932] The Hon Justice Earl Warren, 'The Bill of Rights and the Military' (1962) 37 *New York University Law Review* 181, 187.
[933] 350 US 11 (1955), 17.
[934] *O'Callahan v Parker* 395 US 258 at 265 (1969), which held that a military tribunal may not try a serviceman charged with a crime that has no 'service connection'. In *Relford v Commandant, U.S. Disciplinary Barracks*, 401 US 355, numerous factors were set out to guide the determination of whether an offence was service-connected.
[935] Fidell and Sullivan (eds), above n 21, 210.
[936] 35 MJ 450 (1992), 466.
[937] 510 US 1085 (1994).
[938] Fidell and Sullivan (eds), above n 21, 211.
[939] 483 US 435 (1987), 435-451, overruling *O'Callahan*:

> O'Callahan's service connection test is predicated on the Court's less-than-accurate reading of the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries, which history is far too ambiguous to justify the restriction on Clause 14's plain language which the Court imported to it. Clause 14 answers concerns about the general use of military courts for the trial of ordinary crimes by vesting in Congress, rather than the Executive, authority to make rules for military governance. The Clause grants Congress primary

urging the Court not to allow an accused person's status as a member of the military as the determiner of jurisdiction, arguing instead for the 'service connection test'.[940] Eugene Fidell, for the American Civil Liberties Union, invited the Court to consider the experiences of other countries, but Fidell reports the Court found this proposition to be 'unworthy of comment'.[941]

To be fair, the insular approach of US courts to comparative jurisprudence is not limited to military matters. In response to a minority judgment of Breyer J on gun control litigation, Scalia J, for the majority held:

> Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.[942]

In contrast, Ginsberg J, in the 1999 Benjamin N. Cardozo Lecture to the New York Bar, observed

> In the area of human rights, experience in one nation or region may inspire or inform other nations or regions. When India's Supreme Court has judged the constitutionality of affirmative action measures, for example, it has considered U.S. precedents. The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The U.S. Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times and only twice in a majority decision. The most recent citation appeared 29 years ago, in a dissenting opinion by Justice Marshall. Nor does the U.S. Supreme Court note the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to

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> responsibility for balancing the rights of servicemen against the needs of the military, and Congress' implementation of that responsibility is entitled to judicial deference. That civil courts are 'ill equipped' to establish policies regarding matters of military concern is substantiated [483 US 435, 436] by the confusion evidenced in military court decisions attempting to apply the service connection approach, even after Relford.

[940] Eugene Fidell was part of the team who argued the cause for the American Civil Liberties Union as amicus curiae urging reversal. Briefs of amici curiae urging reversal were filed for the Defense Appellate Division, the United States Army and the Vietnam Veterans of America.
[941] Fidell and Sullivan (eds), above n 21, 211.
[942] Ibid.

> federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: 'We think such comparative analysis inappropriate to the task of interpreting a constitution.'
>
> In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavours to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.[943]

For US military personnel, the phenomenon of judicial deference and insulation from comparable developments and jurisprudence means they have limited prospects of successfully challenging the independence and impartiality of US courts martial, or indeed any other alleged Bill of Rights violations. The US courts have, in other words, sponsored or protected the status of the military and its justice system as a total institution.

Putting 'ordinary' courts martial aside, in 2001 the Bush Administration created military commissions to try 'enemy combatants' detained at the Guantánamo Bay Naval Base in Cuba. With disregard for fundamental and universal human rights, even the Geneva Conventions, President Bush established special military commissions for this select class of accused, but in doing so prevented the accused from petitioning the United States Supreme Court on any interlocutory points prior to the military commission hearing. This also included petitions to the court asserting that these special military commissions violated the *Uniform Code of Military Justice* and the *Geneva Conventions 1949*. A key feature of these special commissions was their creation by presidential fiat, and not by Congress. The President's source of power to establish these commissions was said to be:

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[943] Ruth Bader Ginsburg and Deborah Jones Merritt, 'Affirmative action: an international human rights dialogue' (Speech delivered at the Benjamin N. Cardozo Lecture) reproduced in (1999) 54 *The Record of the Bar of the City of New York*.

> Congress' Joint Resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided' the September 11, 2001, al Qaeda terrorist attacks (AUMF), U.S. Armed Forces invaded Afghanistan.[944]

Notwithstanding the efforts of the Administration to restrict an accused person's access to the Supreme Court, the validity of these special commissions found its way to the United States Supreme Court.

In 2001, Salim Ahmed Hamdan, a Yemeni citizen, was captured in Afghanistan by militia forces and handed to the US military a year later. He was then transported to a prison at the Guantánamo Bay Naval Base in Cuba. On 3 July 2003, the President announced that Hamdan and five other detainees were eligible for trial before the military commission. No charges had been particularised. When his counsel applied for particulars, 'the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ'.[945]

In July 2004, Hamdan was charged with conspiracy to 'to commit . . . offenses triable by military commission' – almost a year after the President had declared he was eligible for trial. Prior to the charges being laid, Hamdan had already filed a petition in the District Court with respect to the validity of the commission. He was successful at first instance, but then unsuccessful in the government's appeal in the US Court of Appeal. He then brought a writ of Certiorari before the Supreme Court. In each instance, Hamdan argued that the military commissions lacked authority to try him because:

> (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate

[944] *Hamdan v Rumsfeld*, 548 US 557 (2006), Supreme Court Syllabus, 1.
[945] *Hamdan v Rumsfeld*, 548 US 557 (2006).

> basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.[946]

Hamdan was successful before the District Court, which granted the habeas relief for which he had petitioned. The Government was then successful on appeal before the Court of Appeals for the District of Columbia Circuit. Hamdan prevailed in the Supreme Court. By a 5-3 majority, Stevens J for the Court held, first, that it did have jurisdiction to hear the matter, despite s1005(e)(1) of the *Detainee Treatment Act* 2005, which provided 'no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay'.[947] Second, the government could not rely upon the principle that the military operates efficiently without regular interference from civilian courts, because Hamdan was not a service member. Further, the government could not ask the court to respect and abstain from interfering in the 'integrated system of military courts and review procedures' because the commission convened to try Hamdan was not part of that integrated system.[948]

Third, Stevens J (for the Court) held that 'The military commission at issue is not expressly authorized by any congressional Act', [949] and finally, the military commission lacked power to proceed because its structure and procedures violated both the UCMJ and the four Geneva Conventions signed in 1949.[950]

Stevens J was also joined by Souter, Ginsburg and Breyer JJ in finding that 'the Government has not charged Hamdan with an 'offense . . . that by the law of war may be tried by military commission'[951] and 'the procedures adopted to try Hamdan deviate from those governing courts-martial in

[946] *Hamdan,* Syllabus, above n 944.
[947] Ibid, point I, 2-3.
[948] Ibid, point II, 3.
[949] Ibid.
[950] Ibid, point IV, 4.
[951] Ibid, point 1, 7.

ways not justified by practical need, and thus fail to afford the requisite guarantees'.[952]

The Court ordered that the matter be remanded. Any trial of Hamdan and his fellow detainees would now have to be conducted by either a court martial or a military commission which respected and provided for the court-like protections required by the UCMJ and Geneva Conventions.

Nevertheless, the charges against Hamdan (and others) were pursued and a new military commission process authorised by the *Military Commission Act* 2006. However, in 2007, judges presiding over these new military commissions held that because Hamdan (and Omar Khadr, who was due to stand trial at the same time) were only 'enemy combatants' as opposed to '*unlawful* enemy combatants' as required under the *Military Commission Act* 2006, the commission had no jurisdiction to hear their matters. In June 2007, the charges against Hamdan (and Khadr) were dropped.

Upon the change of administration, President Obama moved quickly, proclaiming in an Executive Order of 22 January 2009 (just two days after his inauguration) that the Guantánamo Bay Naval Base would be closed, and to quickly transfer, release or try its detainees - the latter to occur 'before a court established pursuant to Article III of the United States Constitution'.[953] In his Order, the new President recited:

> 2(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in

[952] Ibid, point 2, 8.
[953] Presidential Documents, *Executive Order 13492 of January 22, 2009*, Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities, Federal Register, 74(16), section 4(c)(4).

> which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. [954]

Of course, the 800 or so individuals whom the US Department of Defense has held at the Guantánamo Bay Naval Base were 'enemy combatant' nationals of many countries other than the United States. We know from our experiences in Australia that the tide of public opinion with respect to David Hicks' detention – one of those 800 – eventually turned against his prolonged detention. US military personnel subject to ordinary, internal court martial proceedings do not have an international constituency to agitate for their fair treatment.

However, in the United States, for the 'ordinary' military member the doctrine of judicial deference has enabled the military to continue as a total institution without any, or any real fear of court decision imposing change.

E. New Zealand

New Zealand has not had the kind of critical, pivotal court decisions directly impugning its military justice systems (or aspects thereof) as has occurred in Canada, the United Kingdom, the United States with its Guantanamo Bay military commissions, and most recently, in Australia with the Australian Military Court. But, with the Court Martial Appeal Court finding the *NZBORA* applied to the New Zealand military justice system and the Court of Appeal making analogous findings with respect to the penal discipline offence system,[955] the military could have had no doubt that if challenged, its military justice system was more likely than not to suffer the same kind of outcome as occurred for correctives services in the matter of *Drew*.

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[954] Ibid, section 2 (emphasis added).
[955] See Chapter 4 Part F.

Thus, the New Zealand government introduced changes which it took from other jurisdictions that had been the subject of judicial review. This is an example of mimetic isomorphism where the New Zealand military was reformed through a process of imitating and incorporating the changes that had been imposed though court decision in other jurisdictions, most notably Canada and the United Kingdom.

F. Summary

This Chapter has shown the importance of human rights instruments as motivators for change. Thus, in Canada and the United Kingdom, for the enemy combatants in the United States, and to a lesser degree in New Zealand, where a military justice system can be held to account or measured against human rights standards which have direct domestic effect, the courts have reached decisions which have required reform. This is to be contrasted with military members in Australia and the 'ordinary' defence members in the United States who do not have a cause of action founded on justiciable human rights.

A further noteworthy factor to arise from this Chapter is the impact of mass mobilisation as a motivator for reform - the United States with its UCMJ in 1951, the United Kingdom with its various post World War II military justice enactments and the *National Defence Act* in Canada also introduced in the aftermath of the war. The world has not (thankfully) seen the conscription and enlistment of vast bodies of men and women to the level and extent as occurred between 1939 and 1945. As a result, since World War II, these military justice systems have remained within the province of these separate communities and total institutions. Mass exposure to the mass populace has not since occurred, and as a result, there has not been the same kind of impetus to reform as occurred 60 years ago. The

sweeping reforms that have since occurred in the United Kingdom and Canada were not the product of widespread disquiet, but where individuals have been able to institute proceedings founded on jusiticiable human rights.

The following chapter brings together these domestic and comparative experiences to identify when and in what context civilianisation of the military justice system will occur.

CHAPTER SEVEN

CONCLUSION: WHAT DOES ALL THIS MEAN?

*A. **The Steps along the Way***

The central research proposition in this thesis is that the nature of the military as a total institution is such that civilianising reforms to the Australian military justice system only occur when the military is coerced to do so by external forces. Within that overall research question, two subsidiary themes arose and were addressed. First, whether the separate system of military justice could be justified; and, second, to understand the process of civilianising change, despite the military's resistance to any such reforms.

After introducing the Australian military justice system in Chapter One, the process of examining and testing the research question and subsidiary themes followed a number of steps. The **first step** addressed the first theme and asked whether the exceptional status of the military justice system could be justified. This proposition was answered in two parts. First, by assessing the arguments offered for and against exceptionalism, and, second by measuring courts martial against the fair trial rights and standards as accepted in civilian courts and in human rights jurisprudence.

Step 1(a): Could the separate system be justified – the arguments for and against: the analysis of the literature in Chapter Two revealed that the arguments made in support of the separate military justice system included that the maintenance of morale, disciple and efficiency could only be achieved through a separate military justice system. Further, it was argued by proponents of exceptionalism that civilian courts do not have the special expertise to understand the particular demands of the separate military community. In addition, those favouring the separate military justice system highlighted that command discipline could only be enforced

if the commander had the power to prosecute his or her subordinates. However, it was concluded in Chapter Two that the arguments said to favour the separate military justice system did not stand up to independent rigorous scrutiny. For example, there was such commonality between offences created under the *DFDA* and offences in the civilian, criminal law that the idea of special expertise did not hold true. Equally, the commonality between DFDA offences and civilian offences, along with the numerous Australian judicial officers also holding, or having held, military rank dispelled the cogency of the special expertise argument. Given the diversity and complexity of subject matters which are heard in courts around Australia each day, it was also an affront to the skills of civilian judges to assert they could not 'understand' alleged military offences.

The analysis in that Chapter revealed that those arguing *for* a separate military justice system were more focused on having a tool of human resource management at a commander's disposal than a justice system that complied with international and common law fair trial standards.

Arguments against the need for a separate military justice system included that the military community was no longer separate from civilian life, and that the multiple roles of the convening authority gave rise to a perception of command influence; an influence, which even if just perceived, taints the fair operation of this separate military justice system. The final part of this analysis broadly surveyed relevant human rights literature and found that in many cases, military justice systems offended those international norms and principles requiring independent and impartial adjudication.

Importantly, those arguing against exceptionalism showed that in jurisdictions where the military justice system had been subsumed within the civilian justice system, morale, discipline and efficiency did not suffer. The military's predictions of anarchy and doom did not accord with reality.

Simply put, the separate military justice system could not be justified by reference to the arguments offered in its support.

Step 1(b): Could the separate system be justified when measured against common and international law fair trial principles: this part of the analysis commenced with a detailed examination in Chapter Four considering what constituted a fair trial, with particular emphasis on independent and impartial trials at common law, comparative domestic law and international law. The Australian military justice system was then measured against those principles and norms. It was concluded that courts martial violate the accused person's rights to a fair trial, especially the right to a tribunal that was not only independent and impartial, but was perceived to be so. The case law examined in Chapter Four demonstrated that the multiple roles of the convening authority violated human rights principles, especially the right to a trial before an independent and impartial tribunal; for example, the matters of *Findlay,*[956] *Morris,*[957] *Grieves,*[958] *Stow,*[959] *Généreux,*[960] *Forster,*[961] and *Trépanier.*[962]

The Chapter then proceeded to examine the Australian court martial system and the Australian Military Court against the component parts of independence and impartiality as had been identified in the review of common law, comparable law and international principles. With respect to independence, that examination considered: the manner of the appointment of its members, including the procedures and qualification for appointment; members' terms of office, including security of tenure and security of pay; where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions; the existence of

[956] *Findlay v United Kingdom* (1997) 24 EHRR 221.
[957] *Morris v United Kingdom* (2002) 34 EHRR 1253.
[958] *Grieves v United Kingdom* (2004) 39 EHRR 2.
[959] *R v Stow* [2005] EWCA Crim 1157.
[960] *R v Généreux* [1992] 1 SCR 259.
[961] *R v Forster* [1992] 1 SCR 339.
[962] *R* v *Trépanier* (2008) CMAC 3.

effective guarantees against outside pressure; the actual independence of the decision makers from political interference by the executive branch and legislature; and, whether the body presents an appearance of independence and impartiality.

The Australian courts martial system and the now invalidated Australian Military Court were found to offend these well-accepted civilian and international principles.

With respect to impartiality and the notion of bias, the problem for the military court system is that its location within the chain of command, and the perception of command influence renders courts martial liable to the appearance of bias. It may be that the recently commissioned Gillard minority Government will re-introduce the *Military Court of Australia Bill*, which will largely abolish courts martial and in their place create a Chapter III constitutional court, save for a residual jurisdiction for courts martial to be enlivened when the Military Court of Australia is unable or unwilling to sit, for example, to hear matters at short notice overseas.[963] If the Bill is re-introduced and passes through both houses (where the government is in minority in each Chamber) the result will be a court whose decision makers will no longer be a part of the chain of command and the adjudicative body itself removed from defence powers. However, until and unless that or other analogous change is imposed upon the military, the flawed courts martial system will survive.

The first theme in this research asked whether the separate military justice system could be justified. The answer to this question is found by combining (a) the conclusions reached with respect to the arguments for and against exceptionalism, along with (b) the conclusions reached with

[963] The Hon. Robert McClelland**,** Member for Barton, Attorney-General*, Military Court of Australia Bill 2010, Second Reading*, 24 June 2010: 'Where the interests of justice require the trial to be heard overseas but the Military Court is unable to deploy, a court martial or Defence Force magistrate will be convened to conduct the trial overseas'.

respect to the fair trial flaws of courts martial; accordingly, the question is answered in the negative - the separate system cannot be justified. Thus, from a fair trial perspective, the recommendations for civilianising reform did not represent change for the sake of change, but were recommendations designed to remedy wrongs.

The **second step** introduced two sociological theories to provide a foundation to appreciate and understand the second theme: the process of civilianising a total institution despite its resistance. The theory of total institutions provided an explanation of and insight into the nature of the military as an insular, self-contained establishment in which that single authority regulates all aspects of the inmate's life so as to fulfil the official aim of the institution. As a total institution, the official aim is achieved through the chain of command constituting the single authority which controls all within it, whilst the military justice system provides the means of punishing those who fall outside of expectations or ensuring compliance through threat of prosecution. The military's argument that it is a separate community finds resonance in this theory.

However, the theory provided more than just a depiction of the military. Instead, the theory with its emphasis on insularity and internal control also explains why the military was adverse to change which it perceived as a threat to its authority structures and its means of coercing and punishing those who deviate from the single authority's regulation. Yet, it is also the case that civilianising reform has occurred to the Australian military justice system, with the theory of institutional isomorphism explaining this phenomenon.

For institutional isomorphism, change is said to occur in three ways: *normative* isomorphism, where norms are transmitted between organisations by a professional, decision-making class who share their values and experiences; *mimetic* isomorphism, which arises when an

entity is faced with uncertainty and thus it mimics or follows the lead of an apparently successful entity; and, most relevantly for this research, *coercive* isomorphism, where change is imposed by external mandate and/or external pressure to conform with societal expectations. Not surprisingly, given the nature of a military as a total institution, coercive isomorphism has greater prospects of causing change to the military than normative or mimetic isomorphism. Indeed, the latter two forms of isomorphic change are anathema to the very idea of change to the military – as a total institution, and desirous to remain so, the military did not consider itself to be in a time of uncertainty and therefore had no need to look to other successful and analogous entities to mimic their successes. The idea of value exchanges between entities as occurs with normative isomorphism would involve value exchanges between military leaders and civilian counterparts, which, for the military, would run contrary to the insular nature of its operating environment and view of itself as a separate and special community and its view of civilians as incapable of understanding the military environment. At best, the values expressed by senior civilian lawyers (and civilian judicial officers), such as Abadee and Burchett, in recommending there be a DMP may have created pressure on the military for reform, but did not cause change of itself.

The theory of isomorphism also brings with it the concept of myth making: that, as a means of publicly asserting its legitimacy, an institution would say it was operating well, irrespective of the reality. The military engaged in myth making, for example, when it told the 1999 Joint Standing Committee that its justice system was working well when, in fact, the 3RAR allegations were being internally investigated. Whilst the military's myth making to the 1999 Committee appeased that Committee, the subsequent 2001 *Rough Justice Report* by the Joint Standing Committee on Foreign Affairs, Defence and Trade expressed concern that the allegations and investigation may have been withheld from the 1999

Committee, adding that the 3RAR evidence 'could have materially affected the recommendations made in the 1999 report'.[964]

Thus, in this second phase of analysis, the theory of total institutions provided a basis to understand the insular nature of the military and its resistance to civilianising reform which it perceived as affecting its ability to control its inmates through internal means. The theory of institutional isomorphism, and in particular, coercive isomorphism, explained the mechanics of change to this total institution despite its opposition. Yet, when regard is had to the inordinate delay in implementing a statutorily independent DMP and the uncertain fate of a constitutionally separate military court as recommended by the 2005 Senate Committee, it must be said that even coercive isomorphism has had limited success in changing this Australian total institution.

The **third step** in the process of examining the research question and the second of the subsidiary themes (the process of civilianisation despite resistance) was to critically analyse, by reference to the theories of total institutions and isomorphism, the Australian military's responses to the recommendations emanating from the decade of inquiries into the military justice system. Commencing with the Abadee Inquiry, and concluding with the 2005 Senate Inquiry, this analysis demonstrated that as a total institution, the military was disinclined to accept civilianising recommendations that it considered would negatively impact upon its status as a separate community and upon its ability to control those within its dominion. What that analysis also showed was that military *justice* system was plainly not a justice system observant of the separation of powers as exists in civilian spheres, but was, in reality, an instrument of human resource control in the hands of commanding officers and within the chain of command.

[964] *Rough Justice Report*, paragraph 1.4.

The commander's power to prosecute finds articulation in the first feature of a total institution, which is to have all aspects of an inmate's life conducted under the one, single authority. Thus, the commander embodies this first feature of a total institution and the military justice system is his/her weapon to ensure compliance and punish deviance. It is also the commander who, according to the third feature of a total institution, controls and imposes the explicit rules upon his or her subordinates. Understood in this way, any recommendations which would have removed the commander's power to prosecute and replaced that power with an independent DMP outside of the chain of command are recommendations which the military, as a total institution, had to reject.

It did precisely that; by explicitly rejecting the recommendation that there be a DMP in response to the 1997 *Abadee Report* and then subsequently embarking upon a myth-making process of 'going to' thereafter, yet culminating in advice to the 2005 Senate Inquiry that implementation was 'in limbo'.

The theory of coercive isomorphism explains the eventual yet reluctant implementation of a statutorily independent DMP, a civilianising reform. Essentially, the military made its submissions to the succession of inquiries to the effect that the military could not operate unless the commanders retained the power to prosecute; that is, they engaged in myth making. However, the inquiry bodies each rejected the veracity of the military's submissions and determined that for the military justice system to be, and to be perceived as, legitimate, it needed a statutorily independent DMP.

The idea of replacing courts martial with a Chapter III Constitutional court was also the subject of various inquiries in the decade of rolling inquiries. Even when the final report in the suite of inquiries - the *2005 Senate Report* - specifically recommended the creation of a Chapter III

Constitutional court, the military objected and rejected the recommendation on the basis that justice must remain in-house otherwise discipline will not be maintained, and that special expertise was required to determine military matters. Chapter Two considered both of these arguments and rejected their validity.

For the military to have voluntarily accepted the creation of an independent and impartial Chapter III constitutional court would have contemporaneously required the military to accept a breakdown in the barrier between it as a supposedly separate community and the civilian community and its institutions. Instead, total institutions surround themselves with barriers to keep their inmates under the command and control of that single authority. For the military, its in-house military justice system is a means – a means with punitive sanction – to keep defence members under control and removed from the justice system available to the wider society and the fair trial rights of independent and impartial adjudication it has to offer. Certainly, the ability to lawfully order a person to do or not do something and to require that person to follow a lawful order in time of war or armed conflict is clearly important. But the Australian military justice system does so much more than just threaten punishment for disobedience to those lawful orders. As a total institution, it aims to regulate every aspect of the lives of service personnel.

Not surprisingly, the military declined to cede this power to an entity outside its control, and in particular to an independent and impartial Chapter III Constitutional Court.

Instead, the military's response to the 2005 Senate Inquiry recommendations was to propose the Australian Military Court under the guise of improving the appearance of independence and impartiality. Despite the name, the Australian Military Court was not a constitutionally independent court, but remained a creature created pursuant to the

defence power of the Constitution and thus still part of the executive. In an example of coerced change, this half-way-house of a 'court' was declared by the High Court to be invalid, but the consequence of that August 2009 decision was that courts martial were revived as an interim measure. While the *Military Court of Australia Bill* was introduced and read for the second time in the lower House on 24 June 2010, Parliament was prorogued on 19 July 2010. Whether the Bill is to be re-introduced into the House is now a matter for speculation. If it does pass though both Houses of Parliament, the consequent change will be the product of coerced isomorphism.

External scrutiny, and particularly scrutiny which invokes the fair trial language as understood in civilian human rights law, has the potential to erode or even abolish the very system by which the military can conveniently control its personnel from within. Thus, to divest that internal source of power and control to an external justice system was seen by the military as a path to apocalypse, mutiny and riot.[965] When change was recommended, the military responded with predictions of anarchy and outright rejection of the proposal, for example, the commander's power to prosecute was apparently not negotiable.[966] The predictions were simply not well-founded. Based on the experiences of numerous other countries, discipline has not been prejudiced where courts martial have been replaced by a civilian judicial system. Equally, the military's prediction that discipline, efficiency and morale would fail if the convening authority's role was replaced by a DMP also did not come to fruition. To the contrary, when the statutorily independent DMP was eventually created in Australia, the office was inundated[967] with references from commanders who could pass on that supposedly 'pivotal' and 'not negotiable' power to prosecute to another entity. The military's repeated submission that foretold of

[965] Per Sherrill, above n 3, 211-212.
[966] *2005 Senate Report*, 23.
[967] *2005 Senate Report*, xxxviii, paragraph 60.

disaster if the power to prosecute was removed from commanders has been seen for the myth that it really was.

Burchett found that the troops will respect a fair justice system, irrespective of its location within the military, or otherwise. The emphasis in Burchett's findings was on the perceived fairness of the system, not on the location of the forum. Further, there is no data which supports the contention that discipline will fail if the threat of punishment comes from a civilian court, as opposed to an in-house court. Given the experiences in Canada as the Somalia allegations came to light, and given the 3RAR experiences of extra-judicial punishment in Australia, it could well be that the threat of public trial through the civilian courts in fact offers that fair system which troops respect, as opposed to in-house justice which can be applied in an arbitrary way, largely without scrutiny and without the guidance of precedent.

The **fourth and final step** provided an overview of military justice civilianisation in comparative jurisdictions. Chapter Six illustrated that our military's approach to civilianisation has more similarities with the US experience and doctrine of judicial deference (save for the Guantanamo Bay detainees) than with the succession of changes that have occurred in jurisdictions such as Canada, and the United Kingdom. Structurally neither Australian nor US courts martial are created as constitutionally independent as respectively provided for in Chapter III of the *Australian Constitution* and Article III of the *US Bill of Rights*. Instead, they are both created pursuant to the defence power of the Australian Constitution and the enumerated powers of Congress under Article I respectively. What this means though is that neither these military courts nor their participants have the benefit and protection of being part of the judicial arm of government within the separation of powers doctrine. It might be thought that the High Court of Australia has pulled away from the doctrine of judicial deference in its 2009 *Lane* decision. However, that would be a

superficial view of the reasons; the Australian Military Court legislation was simply too ambitious. It was drafted to look and feel like a Chapter III Court without actually being so. The legislation overreached and invalidity was the result. However, there is nothing in that judgment to suggest that the High Court would have overturned the *Bevan*, *Cox* and *Tracey* trilogy of authorities had the model under challenge been a service tribunal of the former style. Obiter in the *Alpert* transcript confirms as much.[968] Whether the long term outcome of the High Court's decision is the passage of a Bill creating a Chapter III court remains a matter for speculation in a very uncertain legislative environment.

In countries where significant reform has occurred, it has been the result of coerced isomorphic change arising out of justiciable human rights.

B. What does all this mean?

Having reviewed the arguments for and against the separate military justice system, having examined the theories of total institutions and isomorphism, and having applied those theories to the Australian military's responses to the six inquiries, there can be no doubt that the Australian military is averse to change. Yet, civilianising change to the Australian military justice system has occurred, but in a reactive, coerced manner as opposed to the military's prospective embracing of fair trial rights.

The Australian military justice system is not alone in having reform imposed upon it by external sources. Thus, whilst the Canadian and English armed forces' legislation attracted little attention for the three to four decades following their enactment in the aftermath of World War II, the advent of human rights instruments creating justiciable human rights for military personnel was to cause profound change. The Supreme Court

[968] Refer Chapter 2, Part B(9) above for extract of transcript.

of Canada, the Court Martial Appeal Court of Canada and the European Court of Human Rights have all been the source of significant, externally driven reforms – reforms where the military had no choice but to comply.

Court decisions, however, have not been the only source of civilianisation in the comparative jurisdictions considered in the previous Chapter. In Canada, the sustained publicity and public scrutiny of its military arising out of the horrendous war crimes allegations and public disquiet with its justice system led to two external inquiries that, with the Prime Minister's public support,[969] caused an on-going raft of reforms to the Canadian military justice system. Likewise, when the Republic of South Africa introduced a Constitution providing for equality for all, the South African military justice system - which was based on the English military justice system - was unable to meet those Constitutional requirements.[970] In New Zealand, the government implemented reform to its military justice system before it was challenged in court, but that being said, it was clear from an allied decision concerning the prison discipline system that the military justice system was most unlikely to survive a human rights challenge. Mimetic isomorphism appears as a possible explanation for the recent New Zealand law reforms to the military justice system, where they were able to see that their own system had the same failings and limitations that had been identified in England and Canada. Rather than dismiss these comparable examples as having only remote theoretical application as did the Australian military, the New Zealand government engaged with the human rights-driven changes and proactively introduced change. Pre-emptive coerced isomorphism is a more likely explanation – given the decisions of the New Zealand courts in analogous matters, the military managed its own change before changed was forced upon it.

[969] *ICJ Report*, above n 2, 196.
[970] *President of the Ordinary Court Martial and Others v Freedom of Expression Institute* [1999] ZACC 10, paragraph 4.

Service men and women in the United States find themselves in a different position, however, where they are required to defend the Constitution but its most basic protections are 'beyond their reach'.[971] These military men and women also have little access to the civilian courts, and even where they do, the doctrine of judicial deference to the military and the reticence of US civilian courts to consider comparative developments in other common law countries leaves those military personnel without access to the Bill of Rights in the same way US civilians have its protection as both a shield and a sword. Like in the Australian context, courts martial in the United States are Article I courts (the power of Congress) not Article III courts (created as an independent judiciary). As Article I courts, they are specialist tribunals which Congress controls.

The hypothesis for this research identified 'external forces' as the impetus for change:

> Because of the nature of the military as a total institution, civilianising reforms to the Australian Military Justice System only occur when the military is coerced to do so by external forces.

Having surveyed the experiences in Australia and comparable jurisdictions, those 'external forces' are able to be identified.

We know from Australian and Canadian experiences that sporadic public concern (as opposed to sustained concern) and media attention is not sufficient to cause change, but can be a motivator for establishing a government inquiry. Thus, the 1999 Senate Inquiry arose out of the loss of the HMAS Sydney and media scrutiny that followed.[972] The 2001 *Rough Justice Report* referred to the media stories alleging extra-judicial punishments in the 3RAR Battalion.[973] The 2005 Report was motivated, in part, by concern expressed about the death of Private Jeremy Williams,

[971] Hillman, above n 55, 2.
[972] *Military Justice Report 1999*, paragraph 1.7.
[973] See for example articles above n 725.

the fatal fire on the HMAS *Westralia,* the suspension of Cadet Sergeant Eleanore Tibble, the allegations of misconduct by members of the Special Air Service in East Timor and the disappearance at sea of Acting Leading Seaman Gurr in 2002.[974] Similarly, in Canada, after the atrocities alleged to have been committed by certain Canadian forces were made public, the government established two inquiries. However, unlike the sporadic nature of media reporting in Australia, the public criticism of the Canadian military justice system was sustained, with the Commission of Inquiry running for four years with its proceedings broadcast daily and nationally. This is to be contrasted with the more sporadic nature of public disquiet in Australia.

Evidently, official inquiries are the source of recommendations for civilianising change; yet, as occurred in Australia, the acceptance of those recommendations was far from assured. There was more ready acceptance of the recommendations made by the two inquiries in Canada in the aftermath of the Somali allegations, but there, the Prime Minister personally and publicly supported the proposed reforms. It was also the case that the war crimes allegations weakened the Canadian military's public legitimacy and consequent ability to argue against change. However, in Australia, any recommendations that threatened the commanders' 'non-negotiable' power to prosecute, or recommendations that made courts martial 'courts' within the framework of Chapter III of the Constitution were not embraced.

To this point, the analysis indicates that in Australia, media attention and publicity can provide the motivation for government inquiry, but are not, of themselves, motivators for civilianising change. We also see that while recommendations flowing from those official inquiries can exert pressure upon the military to reform, the recommendations alone were also not

[974] *2005 Senate Report*, xxv paragraph 4.

causative of civilianising change where the proposed change was perceived by the military as weakening its status as a total institution.

The significant reforms that have occurred, be it in the Canadian military, the United Kingdom, and if reform occurs in Australia as a consequence of the High Court's *Lane* decision, have happened as a result of court judgments. However, the review conducted in the Chapters Five and Six revealed two kinds of court cases that can lead to civilianising reform. The first instance, which occurred in Australia, was a challenge to the constitutional validity of legislation. But, by definition, causes of action based upon the constitutionality of legislation do not present to litigants with frequency. The second example of court cases which have led to civilianising reforms of military justice systems, arise out of cases where human rights are justiciable. Certainly, the latter class of case can be within constitutional framework, but the point of this second class of case is that service members can initiate proceedings alleging a violation of human rights as contained in a specific human rights instrument such as the *Canadian Charter*, the *Human Rights Act* (UK) or the *European Convention*.

Unlike Australian military personnel (as well as civilians too), service men and women in Canada and the United Kingdom have personal causes of action based upon the *Canadian Charter* and the *Human Rights Act* and *European Convention*, respectively. Thus, Mr Grieves could allege a violation of his Convention rights, as could Mr Généreux with respect to his Charter rights. Conversely, Australian service personnel do not have justiciable human rights set out in human rights legislation and Australia is not subject to the jurisdiction of a regional or international human rights court (such as the European Court of Human Rights) that can render binding judgments against it.

In the review of the Australian and comparable military justice systems, six potential motivators for civilianisation can be identified:

1. Public concern;
2. Media attention;
3. Official inquiry;
4. Human Rights instruments
5. Court decisions based upon constitutional invalidity;
6. Court decisions based upon a violation of justiciable human rights, as contained in a specific human rights instruments; and
7. War.

The last of these, war, is not a matter immediately apparent from the preceding analysis. However, it will be recalled that in the United States, the UK and Canada, their respective military justice systems were overhauled in the immediate aftermath of World War II. The unprecedented levels of mass conscription of civilians, the War exposed an unparalleled number of civilians to the 'drum head justice' that constituted military justice systems prior to the post-War amendments. Andrew Effron[975] says that for US troops during World War II, 1.7 million courts martial were held, with 45,000 service personnel remaining in jail at the conclusion of the war.

The next most significant period of reform to the UCMJ occurred in 1968, with the Military Justice Act of that year. This was, of course, at the height of the Vietnam War where conscripts were asserting their opposition to the War and the draft with acts of civil disobedience. The 1968 Act strengthened the accused person's right to counsel, provided for bail and gave better opportunities to convicted personnel to appeal.[976]

[975] Fidel and Sullivan (eds), above n 21, 169.
[976] Hillman, n 55, 27.

With similar experiences in the United Kingdom and Canada (and indeed, elsewhere too[977]), their respective military justice legislative regimes were re-drafted in the years after the War. In Australia, public pressure for change was also apparent, but was

> effectively dispersed by the referrals of the question of reform to a seemingly endless series of inquiries and boards. ... It was not until the Vietnam War and the concomitant increase in the number of civilian draftees rendering compulsory temporary service that the question of disciplinary reform once again regained impetus.[978]

These sentiments are consistent with the observations of the then Minister for Defence, Sir Jim Killen, in his second reading speech for the Defence Force Discipline Bill in 1982. He advised the House that 'repeated efforts' had been made since World War II 'to consolidate and modernise the disciplinary law of this country which applies to the Services.'[979] Yet, even when the 1982 Act was introduced, we saw in previous chapters that the Australian military was loathe to see its implementation, calling it 'inappropriate [and], time consuming'.[980]

Nevertheless, the effect of War, or mass mobilisation more particularly, led to the introduction of the *UCMJ* in the United States, the *Naval Discipline Act* 1957, the *Army Act* 1955 and the *Air Force Act* 1955 in the United Kingdom, and the Canadian *National Defence Act* in 1952. Eventually, and despite three decades of post-World War II 'repeated efforts', Australia introduced the *DFDA* in 1982.

As noted, instances of negative publicity, media concern and even parliamentary inquiries are not enough on their own to cause change if

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[977] Edward F Sherman, 'Military Justice Without Military Control' (1972) 82 *Yale Law Journal* 1398: Germany, France, Belgium, the Netherlands, Luxemburg, Switzerland, Italy, Norway.
[978] Roberts-Smith, above n 42, 3.
[979] Commonwealth of Australia, House of Representatives, *Parliamentary Debates*, 29 April 1982, 2083 (emphasis added),
[980] Judge Advocate General-ADF, *Defence Force Discipline Act 1982 Report for the period 1 July to 31 December 1985* (1986), 29.

that change is perceived by the military to affect its total institutional status. Instead, three preconditions are required for significant civilianisation to occur: either:

1. a court decision finding Constitutional invalidity such as occurred in Australia with the recent High Court decision invalidating the Australian Military Court (but as has occurred, that decision has not ensured civilianising reform as a consequence), or,
2. a court decision finding justiciable human rights were violated as occurred in the many examples examined in the UK and Canada, or,
3. as identified above, in the aftermath of war involving mass-mobilisation.

Six of the seven matters have been set out visually in the Table below. War has been excluded from the table as its impact on civilianisation is more a matter of historical incidence than contemporary causation.

This Table is not intended to be a scientific representation weighing the importance or impact of each of the five potential motivators for coercive change; indeed, each factor has been given equal weighting. Instead, the table is a visual representation demonstrating why and under what conditions civilianisation will occur.

Table 8
Potential motivators for contemporary coerced civilianisation

	Public concern	Media attention	Official inquiry (a)	Human Rights instrument	Court:(b) Constit. Invalidity	Court:(c) human rights violations	Civilianising reform (d)
Canada	✓	✓	✓	✓	(e)	✓	✓
UK	✓	✓ (f)		✓		✓	✓
US (Military comms.)	✓	✓		✓ (g)		✓	✓
US (courts martial)			(h)	✓ (i)			
Australia Chap III	✓	✓	✓ numerous		✓	Re a Chap. III Court	? (j)
Australia DMP	✓	✓	✓			Re a DMP albeit much delayed	✓
New Zealand				✓		✓ (k)	✓

Notes to Table:

(a) Official inquiry arising out of media attention and public concern;

(b) Meaning a court has struck down a provision for Constitutional invalidity;

(c) Meaning a court has found a provision to violate a human rights provision;

(d) In the sense concentrated upon in this thesis, being, civilianising reform with respect to independence and impartiality;

(e) There is some overlap in Canada between Constitutional invalidity and court declared human rights violations; even though the genesis of the complaint is a human rights violation, those grounds themselves are Constitutional;

(f) With respect to the 2005 reforms, the Defence Minister at the time, the Hon. Don Touhig denied the Bill 'was a reaction to a series of

controversial military trials arising from the conflict in Iraq.'[981] However, upon the appointment of the tri-services' first civilian DMP, Mr Houlder QC, 'robust' reforms to the courts martial process were announced, and it was reported:

> The reforms, being implemented by a criminal lawyer rather than a military figure, come after the collapse of charges over the death of an Iraqi held by British Forces in Basra.[982]

(g) In the sense of the relevant Geneva Conventions;

(h) This is a reference to *official* inquiries borne of media attention and public concern, as opposed to say the reports and recommendations for reform produced by the Cox Commission which is sponsored by the National Institute of Military Justice, a private non-profit organization;

(i) with respect to the Bill of Rights, but noting courts martial find their power in Article I of the Constitution, not Article III which creates an independent judiciary;

(j) Whether a Chapter III constitutional court will be implemented will depend upon the legislative priorities of the minority Gillard Government. On 24 June 2010, the *Military Court of Australia Bill* 2010 was introduced and read for the first time and second time in the House of Representatives. This was to be the last sitting day of the House of Representatives and Senate prior to the Federal election being called on 21 July 2010. In the meantime, the courts martial system persists;

(k) While the decision with respect to a violation of human rights concerned the prison discipline system in New Zealand, the principles and findings in the decision were directly applicable to the military justice system.

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[981] 'Military justice reforms planned', *BBC* (on-line), at 17 September 2010, http://news.bbc.co.uk/2/hi/uk_news/4487240.stm.
[982] Evans and Gibb, above n 902.

What the table visualises is that the presence of *more* motivators for change does not irreducibly result in the implementation of civilianising reform. For example, on one hand, New Zealand, with its justiciable human rights, has sought to bring its military justice system in-line with its *Bill of Rights Act*, without the precursors of public concern, media attention, official inquiries or court decision striking down or invalidating elements of the military justice system for inconsistency with *NZBORA*. However, the military justice system would, in all likelihood, suffer the same fate as the prison discipline system which was found to violate the *NZBORA*. On the other hand, with the doctrine of judicial deference, justiciable human rights, in the form of the Bill of Rights, have not been enough to cause civilianising reform to US courts martial.

If Canada and the UK are compared, there are significant similarities in the civilianisation that has occurred. In Canada, reform has been the product of sustained public concern, media inquiry, and courts adjudicating upon justiciable rights. The media reporting in the UK does not seem to be of the sustained kind that occurred in Canada but nevertheless, several high profile courts martial of UK troops arising out of the Iraq deployment have still resulted.[983]

For Australia, the detailed examination in the previous Chapters and the visual distillation of the factors which cause civilianisation to the military as a total institution demonstrates that fundamental change to the independent and impartial nature of courts martial requires court intervention or sustained recommendations made by a succession of inquiries which have the cumulative effect of weakening the entity's public legitimacy and rendering its arguments to the contrary ineffectual. If we

[983] For example, the beating and death of Baha Musa in Basra in 2003 and the subsequent collapse of the prosecution cases against 6 of the 7 accused (the seventh pleaded guilty). In 2005, a separate case concerned the trial of seven paratroopers accused of murdering an Iraqi citizen. In what the judge advocate described as a weak prosecution case and flawed investigations, they were found not guilty; see references at n 991.

return to the hypothesis, then the proposition that civilianising reforms only occur when the military is coerced to do so by external forces is answered in the affirmative. But that 'yes' must be qualified. When change has occurred, it has been dependent upon either unrelenting external pressure from a succession of official inquiries, such was the case with the creation of an independent DMP in Australia, or court decisions. Yet, court decisions do not necessarily guarantee reforming change either. For example, the High Court decision declaring the Australian Military Court invalid in 2009 was an example of coercive change. However, it is yet to be seen whether the Bill to create the Military Court of Australia (a court created pursuant to Chapter III) will be re-introduced into the House of Representatives by the minority Gillard Government. In the meantime, the old courts martial system remains in place – the military's status quo has prevailed and will continue to do so unless the minority government can impose its will.

What can also be extrapolated from this visualisation and the previous analysis is an assessment of values. Where a nation chooses to express fundamental human rights in justiciable form, significant reform has occurred, most particularly in Canada and the United Kingdom. However, where a nation does not elect to express human rights in judicially actionable form, change is slow to come, if at all; Australia and the United States being examples. Australia and the United States also stand together in having a constitutional separation of powers, but with the respective military justice systems *not* falling within the judicial branch. It is the defence power of the Commonwealth Constitution which has supported the military justice system since its inception. Similarly, it is Congress' enumerated powers in Article I which support the US military justice system.

The emphasis above on justiciable human rights ought not be understood as an argument favouring or opposing a Bill of Rights for Australia; that is

a perennial debate in the Australian context[984] and not the subject of this research. Instead, the presence of justiciable human rights is identified as the critical precursor *favouring* civilianisation, but their absence militates *against* reform where such instruments are not in place or are not available to the military.

As a total institution whose public persona is defender of our shores and our democracy, the military has 'authority, significance and visibility'.[985] In turn, these features provide the military with apparent public legitimacy. The theory of institutional isomorphism instructs that an entity steeped in public legitimacy and adept at myth making to further or cement its position is an entity which is less likely to be vulnerable to intervention.[986]

This is precisely what occurred with the Australian military and its justice system; cloaked in the public legitimacy of defender of the nation, the walls around the military as a total institution were erected and maintained almost insurmountably high. As a total institution, the military has a number of tactics to thwart proposed change: myth making, obfuscation, delay, and rejection. Given these tactics available to the military, its very public face of power, and its public authority as defender of the nation, if civilianising changes were and are to be successfully imposed on the military against its will, the mechanism of change needs to be of equal, if not greater, force than all those combined factors which aid resistance.

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[984] See for example:

- Joel Gibson, 'Bill of rights desirable but not urgent: voters', *Sydney Morning Herald* (Sydney), 10 October 2009;
- George Williams, 'A clear voice crying for dignity for our fellow beings', *The Age* (Melbourne), 9 October 2009;
- Paul Kelly, 'Human rights report poisoned chalice', *The Australian*, (Sydney), 10 October 2009.

[985] Hillman, n 55, 3.

[986] See Lynne Zucker and Ronald Jepperson in particular, both in Powell and DiMaggio (eds), above n 288.

Consistently, as has been shown, public concern, critical media attention and recommendations from a parliamentary inquiry were largely insufficient and ineffectual in causing civilianising change to the military justice system where the military saw such proposals as threatening its perceived, closed social order.

Those agitating for reform to the Australia military justice system also cannot rely upon frequent intervention by the courts as a means of change. Australia's constitutional structures are such that successful challenges to the military justice system as occurred in *Lane v Morrison*[987] should be understood as relatively rare incidents. Instead, Australian military members are contained within a total institution which itself eschews reform. In turn, those military inmates find themselves (like civilians in Australia too) in a legal context devoid of justiciable human rights of the kind that were available to Ms Forster and Messrs. Généreux, Trépanier, Findlay, Morris, Grieves, Cooper, and others. The difference of course between civilians and military members in this regard is that the civilians are not captives of a total institution.

Returning to the central research question, civilianisation will only occur in the Australian military if it is coerced by external forces. But more than that, the mechanism of coerced change needs to be of equal, if not greater, force, than the military's ability to resist and retain its total institutional stance. Repeated recommendations from a succession of inquiries did end up causing the implementation of a statutorily independent DMP, but such an approach lacks efficiency and is reliant upon a succession of inquires being commissioned and in relatively contiguous timing.

[987] [2009] HCA 29.

What is clear though is that the factor of great magnitude which can alter an otherwise self-determining, autonomous total institution, is justiciable human rights.

> Let us be clear that, for human rights to have true legal protection, it is not enough - on the contrary, it is dangerous - simply to satisfy formal legal requirements [and] maintain a semblance of legal protection which reduces vigilance and, what is more, only gives the illusion of justice. [988]

[988] Dalmo De Abreu Dallari, cited in *ICJ Report*, above n 2, 9.

Appendices

Appendix 1

Sentencing options: Summary Authorities
Defence Force Discipline Act 1982, Schedule 3, as at May 2010

1 Punishments that may be imposed by a superior summary authority

Punishments that may be imposed on certain officers

(1) A superior summary authority may impose a punishment set out in column 2 of an item of Table A of this Schedule on an officer referred to in column 1 of that item who has been convicted of an offence.

Table A - Punishments that may be imposed by a superior summary authority on certain officers		
Item	**Column 1** **Convicted person**	**Column 2** **Punishment**
1	Officer: (a) of or below the rank of rear admiral but above the rank of lieutenant commander; or (b) of or below the rank of major-general but above the rank of major; or (c) of or below the rank of air vice-marshal but above the rank of squadron leader	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand

Punishments that may be imposed on other persons

(2) A superior summary authority may impose an elective punishment, or a punishment set out in column 3 of an item of Table B of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).

(3) A superior summary authority may impose a punishment set out in column 3 of an item of Table B of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.

(4) A superior summary authority may impose an elective punishment on a person referred to in column 1 of an item of Table B of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

Table B - Punishments that may be imposed by a superior summary authority on other persons			
Item	**Column 1 Convicted person**	**Column 2 Elective punishment**	**Column 3 Other punishment**
1	Officer of or below the rank of lieutenant commander, major or squadron leader Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
2	Person who is not a member of the Defence Force	Fine exceeding $100 but not exceeding $250	Fine not exceeding $100

2 Punishments that may be imposed by a commanding officer

(1) A commanding officer may impose an elective punishment, or a punishment set out in column 3 of an item of Table C of this Schedule, on a person referred to in column 1 of that item who has been convicted of an offence (other than a Schedule 1A offence).

(2) A commanding officer may impose a punishment set out in column 3 of an item of Table C of this Schedule on a person referred to in column 1 of that item who has been convicted of a Schedule 1A offence.

(3) A commanding officer may impose an elective punishment on a person referred to in column 1 of an item of Table C of this Schedule who has been convicted of a Schedule 1A offence (other than a custodial offence) only in accordance with subsection 131AA(8).

Table C - Punishments that may be imposed by a commanding officer on convicted persons			
Item	**Column 1** **Convicted person**	**Column 2** **Elective punishment**	**Column 3** **Other punishment**
1	Officer of or below the naval rank of lieutenant, the rank of captain in the Army or the rank of flight lieutenant Warrant officer	Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
2	Non-commissioned officer	Reduction in rank by one rank or, in the case of a corporal of the Army, reduction in rank by one or 2 ranks Forfeiture of seniority Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 14 days	Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Reprimand
3	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was on active service	Detention for a period exceeding 14 days but not exceeding 42 days Fine exceeding the amount of the convicted person's pay for 14 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 14 days Fine not exceeding the amount of the convicted person's pay for 14 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a

			period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand
4	Member below non-commissioned rank who, at the time he or she committed the service offence of which he or she has been convicted, was not on active service	Detention for a period exceeding 7 days but not exceeding 28 days Fine exceeding the amount of the convicted person's pay for 7 days but not exceeding the amount of the convicted person's pay for 28 days	Detention for a period not exceeding 7 days Fine not exceeding the amount of the convicted person's pay for 7 days Severe reprimand Restriction of privileges for a period not exceeding 14 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand
5	Person who is not a member of the Defence Force	Fine exceeding $100 but not exceeding $250	Fine not exceeding $100

3 Punishments that may be imposed by a subordinate summary authority

A subordinate summary authority may impose a punishment set out in column 2 of an item of Table D of this Schedule on a person referred to in column 1 of that item who has been convicted of an offence.

Table D--Punishments that may be imposed by a subordinate summary authority on convicted persons		
Item	**Column 1** **Convicted person**	**Column 2** **Punishment**
1	Non-commissioned officer of, or below, the rank of leading seaman or corporal	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Reprimand
2	Member below non-commissioned rank	Fine not exceeding the amount of the convicted person's pay for 3 days Severe reprimand Restriction of privileges for a period not exceeding 7 days Stoppage of leave for a period not exceeding 7 days Extra duties for a period not exceeding 7 days Extra drill for not more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

***Defence Force Discipline Act* 1982, s 169F**

Powers of discipline officer in respect of disciplinary infringements

(1) A relevant discipline officer, in relation to a prescribed defence member referred to in column 1 of an item of the following table, may impose on the prescribed defence member, in respect of a disciplinary infringement, a punishment set out in column 2 of that item.

Punishments that may be imposed in respect of disciplinary infringements		
Item	**Column 1** **Prescribed defence member**	**Column 2** **Punishment**
1	Junior officer Warrant officer Non-commissioned officer	Fine not exceeding the amount of the defence member's pay for one day Reprimand
2	Officer cadet Member below non-commissioned rank	Fine not exceeding the amount of the defence member's pay for one day Restriction of privileges for a period not exceeding 2 days Stoppage of leave for a period not exceeding 3 days Extra duties for a period not exceeding 3 days Extra drill for no more than 2 sessions of 30 minutes each per day for a period not exceeding 3 days Reprimand

(2) A discipline officer may decide not to impose a punishment in respect of a disciplinary infringement that the discipline officer considers trivial.

(3) If a discipline officer thinks a disciplinary infringement is too serious to be dealt with under this Part, the discipline officer may decline to deal with the defence member under this Part.

(4) A discipline officer exercising jurisdiction under this section is not to be taken to be a service tribunal for the purposes of this Act.

(5) A discipline officer must not impose a punishment except in accordance with this Part.

Appendix 2

Defence Force Discipline Act 1982, Schedule 7 (as at 2006 amendments, being Act no 159 of 2006, since suspended)

Class 1, class 2 and class 3 offences

(1) Classes of offences
The following table sets out whether a service offence is a class 1 offence, class 2 offence or class 3 offence.

Class 1, class 2 and class 3 offences		
Item	An offence against this provision:	is the following class of offence:
1	subsection 15(1)	class 1
2	subsection 15A(1)	class 1
3	subsection 15B(1)	class 1
4	subsection 15C(1)	class 1
5	subsection 15D(1)	class 1
6	subsection 15E(1)	class 1
7	subsection 15F(1)	class 1
8	subsection 15G(1)	class 1
9	subsection 16(1)	class 1
10	subsection 16A(1)	class 1
11	subsection 16B(1)	class 1
12	subsection 17(1)	class 3
13	subsection 18(1)	class 3
14	subsection 18(2)	class 3
15	subsection 19(1)	class 3
16	subsection 19(2)	class 3
17	subsection 19(3)	class 3
18	subsection 19(4)	class 3
19	subsection 20(1)	class 1
20	subsection 20(2)	class 1
21	subsection 21(1)	class 3
22	subsection 21(2)	class 1
23	subsection 22(1)	class 1
24	subsection 22(2)	class 1
25	subsection 23(1)	class 3
26	subsection 23(2)	class 3
27	subsection 24(1)	class 3
28	subsection 25(1)	class 3
29	subsection 26(1)	class 3
30	subsection 26(2)	class 3
31	subsection 27(1)	class 3

Class 1, class 2 and class 3 offences		
Item	An offence against this provision:	is the following class of offence:
32	subsection 28(1)	class 3
33	subsection 29(1)	class 3
34	subsection 30(1)	class 3
35	subsection 30(2)	class 3
36	subsection 31(1)	class 3
37	subsection 31(2)	class 3
38	subsection 32(1)	class 3
39	subsection 32(3)	class 3
40	section 33	class 3
41	subsection 34(1)	class 3
42	subsection 35(1)	class 3
43	subsection 36(1)	class 2
44	subsection 36(2)	class 3
45	subsection 36(3)	class 3
46	section 36A	class 3
47	section 36B	class 3
48	subsection 37(1)	class 3
49	subsection 38(1)	class 3
50	subsection 38(2)	class 3
51	subsection 39(1)	class 3
52	subsection 39(2)	class 3
53	subsection 39(3)	class 3
54	subsection 40(1)	class 3
55	subsection 40(2)	class 3
56	subsection 40A(1)	class 3
57	subsection 40A(2)	class 3
58	subsection 40C(1)	class 3
59	subsection 40D(1)	class 3
60	subsection 40D(2)	class 3
61	subsection 41(1)	class 3
62	section 42	class 3
63	subsection 43(1)	class 3
64	subsection 43(2)	class 3
65	subsection 43(3)	class 3
66	subsection 44(1)	class 3
67	subsection 45(1)	class 3
68	subsection 46(1)	class 3
69	subsection 47C(1)	class 3
70	subsection 47P(1)	class 3
71	subsection 48(1)	class 3
72	subsection 48(2)	class 3
73	subsection 49(1)	class 3
74	subsection 49A(1)	class 3

Class 1, class 2 and class 3 offences		
Item	An offence against this provision:	is the following class of offence:
75	subsection 50(1)	class 3
76	subsection 50(2)	class 3
77	section 51	class 3
78	subsection 52(1)	class 3
79	subsection 53(1)	class 3
80	subsection 53(2)	class 3
81	subsection 53(4)	class 3
82	subsection 54(1)	class 3
83	subsection 54(2)	class 3
84	subsection 54(3)	class 3
85	subsection 54(4)	class 3
86	subsection 55(1)	class 3
87	subsection 56(1)	class 3
88	subsection 56(4)	class 3
89	subsection 57(1)	class 3
90	subsection 57(2)	class 3
91	subsection 59(1)	class 1
92	subsection 59(3)	class 2
93	subsection 59(5)	class 2
94	subsection 59(6)	class 2
95	subsection 59(7)	class 2
96	subsection 61(1), if clause 2 of this Schedule is satisfied	class 1
97	subsection 61(1), if clause 3 of this Schedule is satisfied	class 2
98	subsection 61(1), if clause 4 of this Schedule is satisfied	class 3
99	subsection 61(2), if clause 2 of this Schedule is satisfied	class 1
100	subsection 61(2), if clause 3 of this Schedule is satisfied	class 2
101	subsection 61(2), if clause 4 of this Schedule is satisfied	class 3
101A	subsection 61(3), if clause 2 of this Schedule is satisfied	class 1
101B	subsection 61(3), if clause 3 of this Schedule is satisfied	class 2
101C	subsection 61(3), if clause 4 of this Schedule is satisfied	class 3
102	subsection 62(1)	class 1
103	subsection 101QA(1)	class 3
104	subsection 101QA(2)	class 3

(2) Section 61 offences that are class 1 offences

This clause is satisfied if:

(a) for an offence against subsection 61(1)--section 63 applies to the offence; or

(b) for an offence against subsection 61(2) or (3)--section 63 applies to the offence, or would apply if the offence were committed in Australia.

(3) Section 61 offences that are class 2 offences

This clause is satisfied if clauses 2 and 4 are not satisfied.

(4) Section 61 offences that are class 3 offences

This clause is satisfied if:

(a) section 63 does not apply to the offence; and

(b) any of the following apply:

(i) the offence has a maximum penalty of not greater than 5 years imprisonment;

(ii) the offence is not punishable by imprisonment;

(iii) the offence may be heard and determined by a civil court of summary jurisdiction.

Appendix 3

Defence Force Discipline Act 1982, Class 3 offences and civilian equivalents (as at 2006 amendments; class system since suspended)

[All civilian Act references are to Commonwealth Acts unless otherwise stated]

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
17	Leaving a post, abandoning equipment or otherwise failing to perform duty	5 years	*Public Service Act* 1999 - s13(5) failing to comply with directions - s13(2) failing to act with care and diligence *Fair Work Act* 2009 - ss43-45, 50 contravening terms and conditions of employment, including leave without approval	- s15 terminate employment; reduction in classification; re-assignment of duties; fines; reprimand - s539 up to 60 penalty units. (1 *pu* = $110, s 4AA Crimes Act 1914)
18	Endangering morale	2-5 years	*Australian Federal Police Act* 1979 - s40K(1) conduct or behaviour that is serious misconduct and is having, or likely to have, a damaging effect on the professional self-respect or morale of employees	- s28 employment terminated

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
19	Conduct after capture by the enemy	5 years	While there is no specific equal, 'capture' is well known to the common law, e.g. - ss27 & 33 *Shipping Registration Act* 1981 - s270.3 *Criminal Code*	
21(1)	Failing to suppress mutiny	2 years	While there is no specific equal 'mutiny' features in the *Crimes Act 1914*, eg, s25.	
23	Absence from duty	12 months	*Public Service Act* 1999 - ss 13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
24	Absence without leave	12 months	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
25	Assaulting a superior	2 years	*Crimes Act* 1900 - s26 common assault	- 2 years
26	Insubordinate conduct	6 months	*Public Service Act* 1999 - ss13(2) and (5) as above	- s15 as above

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			Fair Work Act 2009 - ss43-45, 50 as above	- s539 as above
27	Disobeying a lawful command	2 years	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
28	Failing to comply with a direction in relation to a ship, aircraft or vehicle	2 years	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
29	Failing to comply with a general order	12 months	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
30	Assaulting a guard	2-5 years	*Criminal Code Act* 1995 - s149.1 obstruct C'th public officials	- 2 years
31	Obstructing a police member	12 months	*Criminal Code Act* 1995 - s149.1	

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			- obstruct C'th public officials	- 2 years
32	Person on guard or on watch sleeps, drunk etc	12 months-5 years	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
33	Assault, insulting or provocative words etc	6 months	*Crimes Act* 1900 - s26 Common assault	- 2 years
34	Assaulting a subordinate	2 years	*Crimes Act* 1900 - s26 Common assault	- 2 years
35	Negligence in performance of a duty	3 months	*Public Service Act* 1999 - ss13(2) and (5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
36	Dangerous conduct	2-10 years	*Crimes Act* 1900 s27 acts endangering life	- 10 years
36A	Unauthorised discharge of weapon	6 months	*Crimes Act* 1914 - s89A discharge firearms	- 6 months
36B	Negligent discharge of weapon	6 months	*Crimes Act* 1914 - s89A discharge of firearms	- 6 months
37	Intoxicated while on duty etc	6 months	*Public Service Act* 1999	

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			- ss13(2) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
38	Malingering	12 months	*Public Service Act* 1999 - ss13(5) as above *Fair Work Act* 2009 - ss43-45, 50 as above	- s15 as above - s539 as above
39	Loss of, or hazard to, service ship	6 months – 5 years	*Crimes (Aviation) Act* 1991 - s22 endanger safety of aircraft	- 7 years
40	Driving while intoxicated	12 months	*Road Transport (Alcohol and Drugs) Act* 1977 - s24A driver etc intoxicated	- 6 months
40A	Dangerous driving	6 months	Crimes Act 1900 - s29 culpable driving of motor vehicle	- 5-9 years
40C	Driving a service vehicle for unauthorised purpose	3 months	*Public Service Act* 1999 - s13(8) use of C'th resources in a proper manner	- s15 as above
40D	Driving without due care and attention	7 days' pay	*Public Service Act* 1999 - ss13(2) and (5) as above	- s15 as above

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			Fair Work Act 2009 - ss43-45, 50 as above	- s539 as above
41	Low flying	12 months	*Civil Aviation Act* 1988 - s20A reckless operation of aircraft	
42	Inaccurate certification in relation to ships, aircraft, vehicles etc	12 months	*Shipping Registration Act* 1981 - s25 use of improper certificate - s73 false statements	- $1000 fine and/or six months
43	Destroying or damaging service property	6 months – 5 years	*Crimes (Aviation) Act* 1991 - s17 destruction of aircraft *Crimes (Ships and Fixed Platforms) Act* 1992 - s10 destroy or damage a ship *Crimes Act 1*914 - s29 destroy or damage C'wealth property	- 14 years - Life - 10 years
44	Losing service property	6 months	*Public Service Act* 1999 - s13(8) as	

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			above	- s15 as above
45	Unlawful possession of service property	6 months	*Public Service Act* 1999 - s13(8) as above	- s15 as above
46	Possession of property suspected of having been unlawfully obtained	6 months	*Public Service Act* 1999 - s13(8) as above *Summary Offences Act* 2005 (Qld) - s16 unlawful possession of suspected stolen property	- s15 as above - 20 penalty units or 1 year prison
47C	Theft	5 years	*Criminal Code 1995* - s131.1 theft	- 10 years
47P	Receiving	5 years	*Criminal Code* 1995 - s132.1 receiving	- 10 years
48	Looting	5 years	*Criminal Code* 1995 - s268.54 pillaging	- 15 years
49	Refusing to submit to arrest	12 months	*Criminal Code* 1899 (Qld) - s340 serious assaults includes preventing lawful arrest of self	- 7 years
50	Delaying or denying justice	12 months	*Crimes Act* 1914 - s43 attempting to pervert	- 5 years

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
			justice - s42 conspire to defeat justice	- 5 years
51	Escaping from custody	2 years	*Crimes Act* 1914 - s47 escape from custody	- 5 years
52	Giving false evidence	5 years	*Crimes Act* 1914 - s35 giving false testimony	- 5 years
53	Contempt of service tribunal	6 months	*Criminal Code* 1995 - s261.2 contempt of court	- Jailed until contempt purged
54	Unlawful release etc. of person in custody	12 months – 2 years	*Crimes Act* 1900 - s163 permit escape	- 5 years
55.	Falsifying service documents	2 years	*Criminal Code* 1995 - s145.4 falsification of documents etc.	- 7 years
56	False statement in relation to application for a benefit	12 months	*Criminal Code* 1995 - s136.1 false or misleading statements in applications	- 12 months
57.	False statement in relation to appointment or enlistment	3 months	*Criminal Code* 1995 - s136.1 false or misleading statements in applications	- 12 months
61(1), (2) & (3)	Territory offences		These offences import civilian criminal law in to the military, thus they are directly referable.	

Section	Description	Penalty	Civilian equivalent	Civilian Penalty
101QA	refusing to submit to medical examination etc	6 months	*Road Transport (Alcohol and Drugs) Act* 1977 - s23 refusing blood test etc, include medical exam	- 30 penalty units

Appendix 4

Civilian judicial officers having served or serving in the military
(as at June 2010)[989]

Federal Courts

- The Hon. Justice Logan RFD, Federal Court of Australia
- The Hon. Justice Tracey RFD, Federal Court of Australia and Judge Advocate General of the Australian Defence Force
- The Hon. Justice Dowsett, Federal Court of Australia
- The Hon. Justice Cowdry OAM, Federal Court of Australia
- The Hon. Justice Coleman, Family Court of Australia (Appeal Division)
- The Hon. Federal Magistrate Burnett, and Deputy Judge Advocate General
- The Hon. Federal Magistrate O'Dwyer
- The Hon. Federal Magistrate Scarlett
- The Hon. Federal Magistrate Emmett

New South Wales Courts

- The Hon. Justice Tobias AM RFD, Supreme Court of New South Wales, Judge of Appeal
- The Hon. Justice Grove RFD, Supreme Court of New South Wales
- The Hon. Justice Hoeben AM RFD, Supreme Court of New South Wales
- The Hon. Justice Brereton RFD, Supreme Court of New South Wales
- The Hon Justice Slattery, Supreme Court of New South Wales
- The Hon. Judge Taylor AM RFD, District Court of New South Wales
- The Hon. Judge Finnane RFD QC, District Court of New South Wales

  Magistrate Cook, Local Court New South Wales

Queensland Courts

- The Hon. Chief Justice de Jersey AC, Chief Justice of the Supreme Court of Queensland
- The Hon. Mr Justice Chesterman RFD, Supreme Court of Queensland
- The Hon. Justice Byrne RFD, Supreme Court of Queensland, Judge Administrator
- The Hon. Justice Margaret White, Supreme Court of Queensland

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[989] This list is not exhaustive, but is gleaned from each Court's biography of the respective judges and from swearing in speeches. I also acknowledge the assistance of the Supreme Court of Queensland library, in identifying Queensland Supreme and District Court judges with military service. I also acknowledge the assistance of Federal Magistrate Burnett who assisted with broader, federal jurisdiction inquiries.

- The Hon. Senior Judge Trafford-Walker, District Court of Queensland
- The Hon. Judge Brabazon, District Court of Queensland
- The Hon. Judge Wall RFD, District Court of Queensland
- Magistrate Strofield, Magistrates Court of Queensland
- Magistrate Verra, Magistrates Court of Queensland

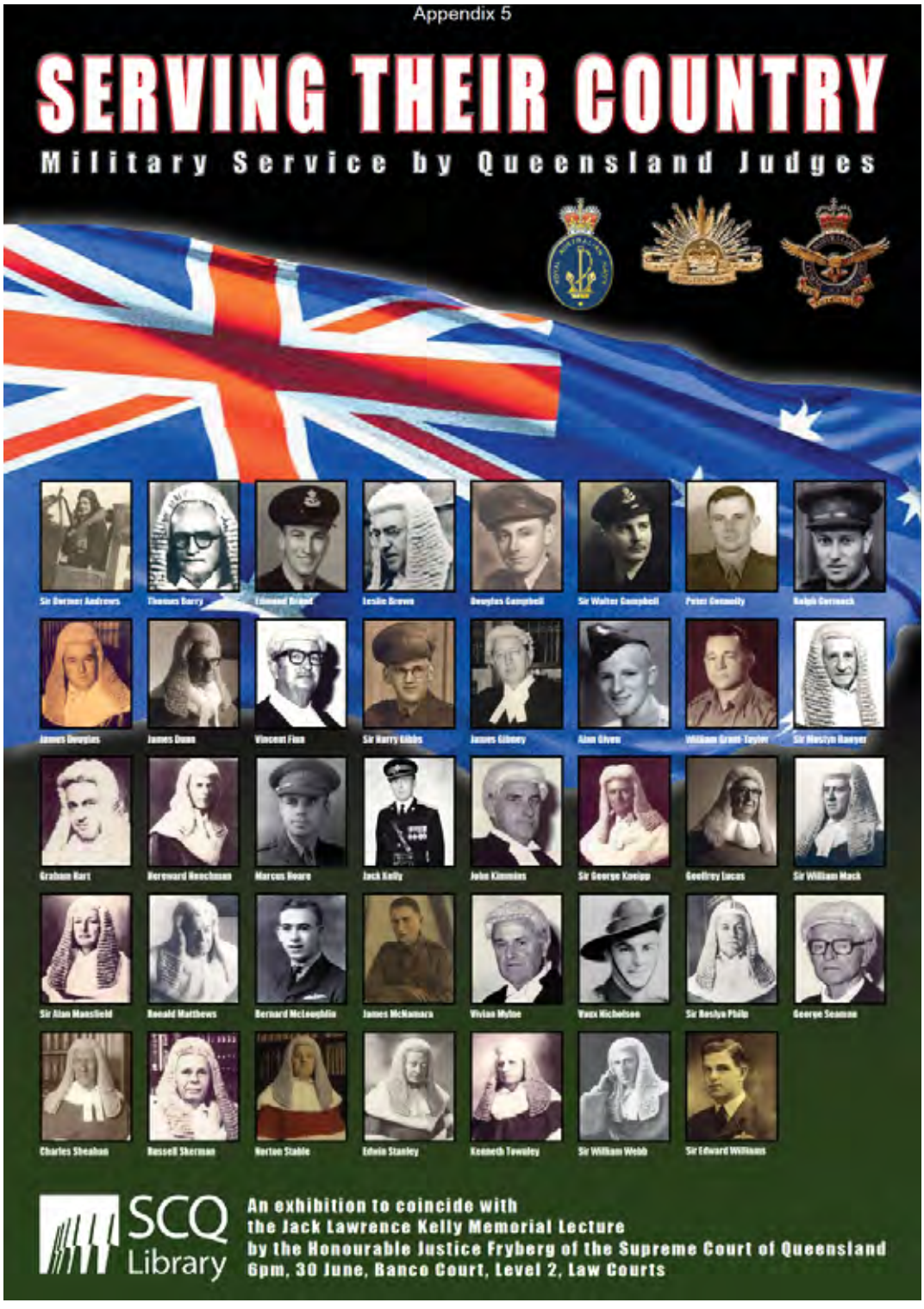
Victorian Courts

- The Hon. Judge Wood, County Court of Victoria

Western Australian Courts

- The Hon. Judge Stevenson, District Court of Western Australia

Appendix 5


SERVING THEIR COUNTRY
Military Service by Queensland Judges
SCQ Library
An exhibition to coincide with
the Jack Lawrence Kelly Memorial Lecture
by the Honourable Justice Fryberg of the Supreme Court of Queensland
6pm, 30 June, Banco Court, Level 2, Law Courts

Appendix 6

Summary of Abadee recommendations & ADF response

Source: Joint Standing Committee on Foreign Affairs, Defence and Trade Report on Military Justice Procedures in the Australian Defence Force, Appendix E

1 The standard of military justice should not vary according to whether is a time of peace or war. Because the Defence Force must constantly train for war, there should be no different approach for the conduct of tribunals in peace time to those conducted in war, overseas or during a period of civil disorder in Australia.

ADF Response - *This recommendation is fully supported by the ADF.*

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

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

3 Prosecution guidelines similar to those in operation in the various States or the Commonwealth (with suitable modifications) should be introduced.

ADF Response - *Prosecution policy to guide Convening Authorities is to be introduced. DGDLO has been tasked with developing the policy.*

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

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

5 The matter of any such appointment, if at all, whether it should be tri-service, the role and duties of any Director and the matter of the responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. A DMP will not be established (See Recommendation 4).*

6 The present system of the JAG nominating officers to the JA's panel, appointing DFMs and recommending s.154(1)(a) reporting officers should be retained.

ADF Response - *In line with this recommendation, no change to the present procedure will be made.*

7 There should be no command or control (except of an administrative nature) exercised over JAs, DFMs and s.154(1)(a) reporting officers in the performance of their judicial duties. This would involve amendment to such provisions as AMR Reg 583 and even AMR Reg 585 (or their service equivalents, if any).

ADF Response - *These appointments will be assigned under the technical control of the JAG. In effect they will be managed by the JAG.*

8 On the assumption that by convention would continue to be a military officer, the JAA should remain under the command of the JAG.

ADF Response - *The JAA will be placed under command of the JAG.*

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

ADF Response - *There will be no reporting on these appointments in respect of their judicial duties.*

10 There should be a separate administrative authority in respect of non-judicial duties of the JAs, DFMs and s.154(1)(a) reporting officers and reporting on such duties by their respective 'Head of Corps'.

ADF Response - *A separate administrative authority will be established with respect to non-judicial duties of these appointments.*

11 Duties of a judicial nature, including the appointment of JA or DFM to a particular trial be allocated to JAs, DFMs and s.154(1)(a) reporting officers by the JAG. This could be done through a Judge Advocate Administrator.

ADF Response - *Selection of these appointments for a particular trial will be transferred to the JAG to be undertaken in consultation with the services.*

12 The JAA should be under command of and reported on by the JAG and the DGDLO.

ADF Response - *The JAA will reside in the office of the JAG and consequently, in these circumstances the DGDLO will not command or report upon the JAA.*

13 Convening orders issued by convening authorities should include a request for the JAG to appoint a JA or DFM, or alternatively a statement (if it be the case) that a particular JA or DFM has been appointed by the JAG.

ADF Response - *Convening Authorities will continue to decide whether to prosecute and will hand appointment aspects to the JAG. Convening Authorities will no longer issue convening orders but will order a member to face a court martial or DFM and the JAG's office will then make the necessary appointments after consulting service authorities.*

14 The subject of fixed tenure (for JAs, DFMs and s.154(1)(a) reporting officers) should be further considered. Whilst I do not consider it essential, the notion of fixed tenure (with a virtual right of extension) is not opposed. It may provide a means of ensuring that appointees perform duties and should not hold office for the sake of it, whilst remaining inactive or unavailable for one reason or another.

ADF Response - *JAs, DFMs and s.154(1)(a) reporting officers will have a specified tenure.*

15 Subject to the constraints, inter alia, discussed, I do not see why those who are appointed as JAs, DFMs and s.154(1)(a) reporting officers should not generally be able to perform duties of a non-judicial or duties not inconsistent with the performance of the type of judicial duties or functions that they may be called upon to perform from time to time.

ADF Response - *These appointments should not be restricted from performing other tasks of a non-judicial nature not inconsistent with their judicial duties.*

16 Consideration should be given to the establishment of the equivalent of a Court Administration Unit, independent of the convening authority and outside his chain of command or independent tri-service officer to perform the function of selecting members for a court martial. (This is said upon the assumption that there is not strong support for the U.K. scheme of a Court Administration officer who has taken over many of the convening authority's powers).

ADF Response - *The duty of selecting members of a court martial or DFM will be transferred to the JAG's office in consultation with the services.*

17 If the present system [of convening authorities] is to be retained, then:

- convening authority should wherever possible appoint, subject to service exigencies, persons from outside his command and at least outside the accused's unit. The matter of some members outside the convening authority's command being included is likewise a matter that could be considered.
- Such selection should be from a 'large pool' and as a desirable objective, as random as possible. The matter of the tri-service pool situation could even be considered for the few courts martial in fact held.

ADF Response - *The decision has been made that the JAG and not the convening authority will make appointment of members of courts martial. (See Recommendation 16)*

18 Reviews of court martial proceedings and DFM trials should be conducted by an authority other than the convening authority.

ADF Response - *Reviews of court martial proceedings and DFM trials will be conducted by authorities other than convening authorities.*

19 There should be a prohibition upon consideration of an Officer's performance as a member of a court martial being used determine qualifications fro promotion or rate of pay or appointment. Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members of any court martial. Section 193 protects such a member during performance of his/her duties as a member. There is a case for implementing the spirit of such a section generally.

ADF Response - *An officer's performance as a member of a court martial will not be reported upon for promotion or pay purposes.*

20 Whilst the matter of whether the JA should be involved in the imposition sentence, could be the subject of further study, it is not necessary presently to recommend a change in the current system. Indeed at the service level, in serious cases where a CM is justified, that there would be considerable opposition to taking powers of sentencing away from the court itself.

ADF Response - *The present system whereby the court and not the JA imposes sentence will be retained.*

21 Despite what I have said above, I do not consider that one should ignore the argument for the trial JA imposing sentence and giving reasons for such. I believe that support for his doing so would be strengthened where appeal rights in respect of a CM sentence to be conferred. The issue should thus be further considered.

ADF Response - *This has been noted. The decision has been taken, in line with the previous recommendation, that the present system whereby the court and not the JA imposes sentence will be retained.*

22 A good case should be established for now considering the conferring of rights of appeal (by leave) in relation to sentences imposed by court martial or DFM. There is no pressure for change from those interviewed or who had put in submissions. However, it is observed that were appellate rights given in relation to sentence, the justification for requiring stated reasons for particular sentence would be considerably increased. Amendments would also need to be made to s.20 of the DFD Appeals Act to deal with the rights of appeal in relation to sentence.

ADF Response - *The present system of reviews, appeals and petitions are comprehensive and far exceed what is available through the civil court system. Consequently, the introduction of further appeals (on sentence) is unnecessary and would cause administrative delays to the finalisation of disciplinary matters.*

23 No case is made for a prosecution appeal as of right or by leave appeal against sentence. Whether there should be a limited right of appeal in respect of sentence would be a highly controversial issue. The situation with a disciplinary tribunal exercising disciplinary power is not quite analogous with the position of the prosecution in relation to prosecution appeals against sentence on the grounds of manifest inadequacy I the ordinary criminal courts. The position in the civil courts is that the Crown may address on sentence at trial, and does in some cases, have a duty to do so.

ADF Response - *This recommendation was noted and agreed. No change to the present procedure is appropriate.*

24 That consideration be given to the inclusion of a 'no conviction' option in respect of an offence charged under the DFDA. Such would recognise that there may be good reasons for no conviction being recorded.

ADF Response - *Amendments to the relevant legislation are to be developed to provide for the recording of 'no conviction' under the DFDA.*

25 There is a good case for amending s.116 to make warrant officers eligible for membership of courts martial. Whether or not, after a period of time, lower ranks could/ should be involved may depend upon experience involving the significant change proposed and how, if made, it works out in practice.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. It is considered important that the boundaries between commissioned and non-commissioned officers be preserved. Warrant officers firmly believe*

that their role is to administer and decide discipline. Consequently, warrant officers will not be eligible for membership of courts martial.

26 Specifically that non-commissioned members of the rank of Warrant Officer be eligible to serve upon a General or Restricted Court Martial provided that the non-commissioned member is equal or senior in rank to the accused.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. This recommendation provides conditions under which warrant officers might serve on courts martial but the proposal that they do so was rejected in the outcome of the previous recommendation.*

27 That although arguments exist for a limited right of appeal in some cases from decisions of a commanding officer or other summary authorities, no action should be taken, at this stage, to introduce any such appeal rights.

ADF Response - *This recommendation was noted and agreed. No change to the present procedure is appropriate.*

28 In view of the arguments advanced during this study, the issue of conferring rights of appeal, if any, should be the subject of further consideration, particularly in the classes of cases which have been identified (eg elective punishments involving reduction in rank).

ADF Response - *The decision was made, in accordance with the previous recommendation, that no appeal system be introduced.*

29 The present review system has generally proved to be efficacious and provided appropriate protections for defence members and benefits to the Service in streamlining the administration of justice.

ADF Response - *This recommendation was noted and agreed.*

30 The advantages of any system of appeal from decisions at the summary authority level are outweighed by the disadvantages. The study lends support to the views of the senior officers who opposed the introduction of an appeal system.

ADF Response - *This recommendation was noted and agreed.*

31 Concern is felt regarding submissions that suggest that some s.154(1)(a) reporting officers may not have sufficient experience or training properly to report for the benefit of the reviewing authority. The difficulty could be addressed by training, exposure to criminal law eg by way of secondment to offices of the DPP, and/or by the employment of reserve officers. The Army particularly does well in this area, frequently using

reserve legal officers to do reports under s.154(1)(b). Perhaps a certificate of qualification and suitability to be s.154(1)(b) reporting officer could be given by the newly established Military Law Centre.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

32 Subject to the exigencies of service s. 154(1)(b) reporting officers should be legal officers totally independent of the prosecution process and of the reviewing authority.

ADF Response - *Officers appointed as s.154(1)(b) reporting officers will be legal officers independent of the prosecution process and the reviewing authority.*

33 To assist particularly Commanding Officers, that increased formalised training and education be furnished to them before they take up their position as Commanding Officer and exercise service tribunal jurisdiction as a summary authority. Steps be taken to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. The new Military Law Centre could play a significant 'supportive' role in this are of education, even awarding a 'certificate' on completion of a course.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation an resource issues.*

34 In respect of elective punishments, provision be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him the opportunity to elect trial by DFM or court martial.

ADF Response - *This has been agreed and amendments to the relevant legislation will be developed.*

35 The punishment of reduction in rank should be removed as an elective punishment.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. Reduction in rank is a punishment essential to the maintenance of discipline especially at the lower rank levels and is of particular importance during operations. Consequently, it is to be retained as an elective punishment.*

36 In the absence of appeal rights, the range of elective punishments presently available should be reviewed.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. Like reduction in rank, the full range of elective punishments is important in maintaining discipline especially at the lower rank levels and during operations. Consequently, in deciding to retain reduction in rank as an elective punishment, the need to review elective punishments as a whole has not been agreed.*

37 That provisions (probably by way of regulations) be introduced requiring that an election be in writing and further dealing with the obligations upon an officer to provide explanations to the accused when giving him the opportunity to elect.

ADF Response - *Amendments to legislation will be developed to require summary authorities to provide explanations in writing to an accused regarding the election.*

38 That a structured and in depth course of teaching and training in relation to the DFDA be implemented for all officers about to be appointed as commanding officers. That course should be the same irrespective of service.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.*

39 That ongoing education and instruction be given to those who act in the capacity of a summary authority.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.*

40 That sentencing statistics and guidelines in relation to summary punishments be prepared, published and made available from time to time.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

41 The legal principles discussed in reports of the JAG/DJAGs (and in s.154(1)(a) reports) should be the subject of reporting and dissemination to commanding officers.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

42 [This recommendation is identical to Recommendation 33].

43 That the Military Law Centre provide uniform training and education to commanding officers before such officers commence to sit as summary authorities, to ensure they are knowledgeable about their roles in the military justice system as a summary authority. The matter of certification by the Military Law Centre or some other body could be addressed.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.*

44 There is a case for providing some basic legal training and work materials to those [who] may be called upon to participate as a prosecuting or defending officer at a summary trial.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.*

45 That instructions be given, if necessary by statutory amendment, that any summary authority (including CO, SUPSA and SUBSA) who has been involved in the investigation or the preferring of a charge against an accused shall not hear or deal with any such charge against that accused.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

46 Absent a compelling need or legal requirement, there is no need to change the present system of reporting on commanding officers in relation to the performance of duties in maintaining and enforcing service discipline.

ADF Response - *It is agreed that no change to the present arrangements is necessary.*

47 There should be no reporting upon a commanding officer in respect of the performance of duties as a service tribunal in a particular case.

ADF Response - *A commanding officer's performance of duties as a service tribunal in a particular case will not be reported.*

48 Consideration should be given to extending the discipline officer jurisdiction (with appropriate modifications) to deal with officers holding the rank of major and below.

ADF Response - *The discipline officer scheme will be extended to apply to officers up to the rank of Captain (Army) equivalent undergoing initial training.*

Appendix 7

Summary of Ombudsman's recommendations & ADF response

Source: Joint Standing Committee on Foreign Affairs, Defence and Trade Report on Military Justice Procedures in the Australian Defence Force, Appendix D

2.67 Investigating officers conducting administrative investigations under Defence (Inquiry) Regulations should not be entitled to find that a criminal offence has been committed, although it may be necessary to inquire into the circumstances of the criminal allegation in order to deal with a matter appropriately. Accordingly the ADF should consider:

- amending Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* to the effect that it is not appropriate for Investigating Officers, Boards or Courts of Inquiry to make a finding that a criminal offence has been committed, and where there is sufficient evidence to suggest that an offence has been committed, the matter should be referred to the appropriate authority for investigation under the DFDA and/or the civil criminal law; and

ADF Response - This recommendation has been incorporated, for BOI and Investigating Officers in the draft manual *Administrative Inquiries in the ADF*.

- amending the sample Terms of Reference in Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* (and in single Service instructions where they exist) to the same effect.

ADF Response - This recommendation has been incorporated **part** in the draft manual *Administrative Inquiries in the ADF*. Model Terms of Reference for BOI and Investigating Officers advise that recommendations may be made 'whether the conduct of any person warrants further investigation by service or civilian police.'

2.68 The ADF consider whether amendments are necessary to the guidance on when to choose a BOI rather than an Investigating Officer, in order to encourage consistency and to minimise any perceptions that complaints are not being treated sufficiently seriously.

ADF Response - Specific guidance, both in descriptive and tabular form is provided in the draft manual *Administrative Inquiries in the ADF*.

2.70 The ADF:

- consider the adequacy of the training in the use and value of alternative dispute resolution techniques;
- review the Defence Instructions on the management of complaints to HREOC of sexual and racial discrimination, or under Redress of Grievance procedures to ensure that a consistent emphasis is placed on resolving complaints by alternative dispute resolution mechanisms;
- collect data (in a format similar to that for unacceptable sexual behaviour) for all complaints of discrimination and harassment, and when reported, require units to indicate whether resolution of the complaint by alternative dispute resolution mechanisms was considered, and if not, why not; and
- expand the reporting requirements for incidents of unacceptable sexual behaviour to require the same data for incidents of that nature.

ADF Response - The ADF has agreed that a greater emphasis should be placed on alternative dispute resolution techniques in general and on mediation in particular. The issue of alternative dispute resolution is addressed in the draft manual *Administrative Inquiries in the ADF*. Advice on various types of alternative dispute resolution, including mediation, has been included in the latest amendment of Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

3.31 To ensure that the preliminary inquiry processes are managed properly in the future, the ADF should:

- consider removing all reference to 'informal investigations' in the guidance;

ADF Response - This recommendation has been incorporated in the draft manual *Administrative Inquiries in the ADF*. Such investigations are now called 'Routine Inquiries'. 'Situations will occur when this level of inquiry will resolve the matter without the need to initiate a further, formal inquiry under D(I)R.

- amend the Defence Instructions to provide clear guidance on the purpose of preliminary inquiries and the extent to which they can be used; and

ADF Response - Clear guidance on the use of 'Routine Inquiries' is provided in the draft manual *Administrative Inquiries in the ADF*.

- amend the Defence Instructions to provide clear guidance on accountability requirements for preliminary inquiries.

ADF Response - Accountability requirements for 'Routine Inquiries' have been incorporated in the draft manual *Administrative Inquiries in the ADF*.

4.51 The ADF revise its Instructions:

- on the handling of complaints and grievances, and on the conduct of investigations to include reminders of the factors to be considered when selecting or appointing an Investigating Officer. Where particular expertise may be required, the Commanding Officer should be advised to ensure that the Investigating Officer has the appropriate expertise, or that the Investigating Officer consults with individuals with the relevant expertise (preferably before commencing the investigation);

ADF Response - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the selection of appropriate Investigating Officers and members of BOI.

- to require that all Investigating Officers, under both the DFDA and Defence (Inquiry) Regulations (and members of Board or Courts of Inquiry), declare any actual or potential conflict of interest before commencing an investigation; and

ADF Response - Advice on conflict of interest and prior involvement in matters under inquiry is detailed in the draft manual *Administrative Inquiries in the ADF*.

- to ensure that Commanding Officers are provided with guidance on how to develop terms of reference, and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues.

ADF Response - Context management issues are explained and general advice is provided in the draft manual *Administrative Inquiries in the ADF*.

5.57 (a) The ADF should develop a training strategy for officers who conduct investigations under the Defence (Inquiry) Regulations.

ADF Response - A study of the needs and requirements for the training of Investigating Officers under D(I)R has been completed by an ADF joint training needs analysis team. Pilot courses were scheduled for the period March June 1999 with the initial courses planned for September October 1999. The four levels of training which have been identified are:

- General awareness for all Service personnel;

- Training for Investigating Officers who will conduct 'simple inquiries';
- Training for Investigating Officers who will conduct 'complex inquiries'; and
- Training for Appointing Authorities.

5.57 (b) Officers should not be appointed to conduct investigations under the Defence (Inquiry) Regulations unless they have received training or have other experience or expertise which makes them suitably qualified to do so.

ADF Response - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the selection of appropriate Investigating Officers including requirements for qualification, experience, competence and other qualities.

5.58 Guidance on investigations under Defence (Inquiry) Regulations should be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.

ADF Response - The draft manual *Administrative Inquiries in the ADF* provides advice on scoping and planning inquiries.

5.61 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* (and in single Service instructions where they exist) should be amended to clearly indicate that an Investigating Officer investigating under Defence (Inquiry) Regulations cannot compel a witness to answer questions where the answer may tend to incriminate them for a criminal or Service offence, and to indicate that assistants to an Investigating Officer do not have the power to question witnesses.

ADF Response - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the rights of a witness before an Investigating Officer regarding excuse provisions for not answering questions. Self incrimination is one reasonable excuse. The draft manual also includes advice for Investigating Officers should a witness decline to answer a question. The ADF no longer appoint assistants to Investigating Officers.

6.36 The ADF should:

- implement a process whereby investigating bodies report periodically on the progress of the investigation (if the investigation is to take more than one month), and which allows for an assessment of whether the investigation is being conducted appropriately; and

ADF Response - Detailed requirements for the monitoring and reporting of inquiries have been incorporated in the draft manual *Administrative Inquiries in the ADF*.

- amend the present guidance to investigators to provide advice on the development of investigation reports and recommendations, and the limitations to their authority in this respect.

ADF Response - Detailed guidance on the development of reports and recommendations has been incorporated in the draft manual *Administrative Inquiries in the ADF*.

7.68 The ADF amend relevant Instructions to:

- provide Commanding Officers with information regarding the particular support requirements of survivors of sexual incidents or offences and a list of contact points or organisations where the necessary specialist help can be obtained;

ADF Response - The ADF provides personnel with support services, such as counsellors and psychologists in their normal professional capacity. In addition the draft manual *Administrative Inquiries in the ADF provides for the provision of such services, including to the next of kin of deceased members*. The issue has also been addressed in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

- advise Commanding Officers that, in relation to sexual incidents or offences, evidence can be collected up to 72 hours after the event, and within that time frame the survivor (and the alleged offender, if appropriate) should be referred to the authorities immediately so that forensic evidence can be collected;

ADF Response - This recommendation has been incorporated in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

- clearly state the ADF's policy on compassionate travel for members (and their partners or next of kin) where serious offences occur;

ADF Response - This recommendation has been incorporated, **in part**, in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 'Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force' which refers to ADF policy INDMAN 2603 'Leave for

Special Purposes'. Entitlement to compassionate leave where serious sexual offences occur is not clearly articulated in INDMAN 2603 'Leave for Special Purposes'

- advise Commanding Officers of the need to allow survivors of sexual incidents or offences to make their own decisions whenever possible, and particularly in relation to their movement after an offence has occurred; and

ADF Response - There is no evidence to suggest that this recommendation has been addressed in either in the draft manual *Administrative Inquiries in the ADF* or Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

- provide a critical incident stress management checklist for managers and supervisors to assist with observing personnel after an incident to ensure they are receiving adequate support.

ADF Response - In her 1998 report, the Ombudsman noted that the *Operational Stress Management Manual* issued in 1997 incorporates appropriate stress management procedures.

8.69 The ADF should:

- extend its monitoring of trends in the incidence of sexual harassment and offences to include comparisons among the Services;
- undertake regular trend analysis of DFDA and Defence (Inquiry) Regulations investigations;
- consider analysing any correlation between alcohol and/or drug abuse and serious incidents; and
- ensure that information and expertise can be readily shared between the Services.

ADF Response - In her 1998 report, the Ombudsman acknowledged that the trend monitoring and analysis mechanisms in place for DFDA matters were adequate. Trend monitoring of D(I)R inquiries have been established in the draft manual *Administrative Inquiries in the ADF*. This will allow the Defence Legal Office to monitor trends and provide advice on an ADF wide basis. For discrimination, harassment, sexual offences, fraternisation and other unacceptable behaviour reporting mechanisms are detailed in Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*. The Defence Equity Organisation is responsible for maintaining statistical data and identifying trends within the ADF.

8.69 The ADF should:

- spell out in Defence (Inquiry) Regulations and Instruction, and particularly for Investigating Officers, the principles of procedural fairness and rights of review; and

ADF Response - Issues of procedural fairness and review within the inquiry system have been addressed in the draft manual *Administrative Inquiries in the ADF*.

- ensure that members are advised of the outcome of any DFDA proceedings which affects them.

ADF Response - Amendments to the Discipline Law Manual ADFP 201 have been drafted to include a requirement that members be advised of any DFDA proceedings that affect them.

8.69 The ADF should consider including in the guidance advice about the desirability of forewarning a member of any public statement which may affect him/her personally.

ADF Response - As noted in the Ombudsman's 1998 report it is standard practice not to mention the names of individuals in statements to the press. Where the media requests information about an individual, that person is contacted and advised by the Directorate of Public Information. With respect to Boards of Inquiry, the draft manual *Administrative Inquiries in the ADF* requires all persons, including the next of kin of deceased members who may be affected by the outcome of the inquiry, to be advised of all matters relevant to them as soon as possible after decisions have been made.

Appendix 8

Military Justice Report 1999 recommendations

Source: Military Justice Report 1999 Summary of Recommendations

Recommendation 46

The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

Recommendation 47

The Committee recommends that consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions.

Recommendation 48

The Committee recommends that the ADF ensure that existing guidelines on the right to privacy are adhered to in the conduct of DFDA action.

Recommendation 49

The Committee recommends that the ADF undertake a formal training needs analysis with respect to the use and implementation of the DFDA as a basis for the development and introduction of appropriate education and training courses.

Recommendation 50

The Committee recommends that the ADF consider the introduction of structured continuation training for Defence Force Magistrates and Judge Advocates on the DFDA.

Recommendation 51

The Committee recommends that, as part of a comprehensive public disclosure of the matter of AAT, the Meecham report, a comprehensive report on the matter of AAT and any relevant documents relating to AAT should be tabled in the Parliament.

Recommendation 52

The Committee recommends that the report on the operation of the DFDA should be tabled in a more timely manner.

Appendix 9

Summary of *Rough Justice Report* recommendations and Government response

Sources: Rough Justice 2001 Recommendations and ADF response of 2002

RECOMMENDATION 1
We recommend that educating Defence personnel of their rights and responsibilities be part of an ongoing program, commencing at recruit training.

RESPONSE
Defence provides extensive equity and diversity training, from recruit training to Commanding Officer Designate courses. Additionally, all ADF members and Departmental staff are required to undergo annual equity and diversity refresher training. The equity and diversity workplace competencies are currently being introduced into all through-career training.

Army has completed a major review of its equity and diversity training. This review has lead to the integration of equity and diversity competencies into training packages to be delivered to officers and soldiers on their career courses. This action will be completed by August 2002. As an interim measure, equity and diversity training is to be delivered to unit commanders and Regimental Sergeant Majors for them to deliver, in turn, to officers and soldiers under their command.

Formal equity and diversity courses have been part of Navy training since 1999. All Navy personnel must undergo such training on joining and annually thereafter. In 2001 an interim, tailored, course was introduced for senior officers. In addition, it is now mandatory that prior to consideration for appointment as Commanding Officers and Executive Officers and to most instructional appointments, Navy personnel have undergone equity training in the previous 12 months.

Air Force conducts equity and diversity training at all levels of its leadership and management continuum, from initial entry training to senior appointments. This training is fully integrated into broad competencies.

A major portfolio evaluation report of Equity and Diversity in Defence will shortly be tendered to the Departmental Inspector General. In due course once senior Defence managers have considered the evaluation report; the Committee may consider a briefing on the outcomes of this comprehensive evaluation.

RECOMMENDATION 2
We recommend that officers in the direct chain of command and SNCO's responsible for the discipline system in units not be appointed as Equity Officers. The two roles cannot be adequately reconciled.

RESPONSE
This recommendation is broadly supported. Equity Advisers are responsible for providing support, information, advice and options for resolution to ADF members who are complainants or respondents, and management on matters relating to all forms of unacceptable behaviour.

As far as practicable, those holding command appointments are not appointed as Equity Advisers, however, the vast majority of personnel holding rank are in the direct chain of command or are responsible for discipline. The Government believes that the intention of the Committee's recommendation can be accommodated if sufficient, appropriately trained, Equity Advisers are appointed to enable all members of a unit or ship access to an Equity Adviser outside of their own direct chain of command. Army's Land Command has established, as a benchmark, a ratio of one Equity Adviser to every 50 personnel, to accommodate the number of sources of equity advice to those involved in unacceptable behaviour issues.

RECOMMENDATION 3
We recommend that Army establish a pool of investigators held centrally for the conduct of larger investigations. These investigators should not be routinely drawn from outlying areas.

RESPONSE
The Government does not support the recommendation that a pool of investigators be established and held centrally for the conduct of larger investigations. Whilst the number and complexity of major investigations conducted over the previous year would warrant serious consideration being given to the establishment of a central pool of investigators, this need has not been evident in previous years. Prior to FY 2000/2001 there was an average of only two Major Investigations Teams (MIT) formed per year for investigations in excess of several months. The composition of a MIT is dependent on the type, sensitivity and complexity of the investigation. As required, Army has drawn on the investigative effort from Navy and Air Force to form a MIT, and on occasions, sought the technical assistance and advice of the Australian Federal Police. The Government believes that the current arrangement is more flexible in the use of these scarce and valuable resources.
The role and establishment of the 5th Military Police Company (SIB), headquartered in Canberra was examined in late 2001. At this point in time Army's preferred approach is to increase the number of more senior investigators on the staff of the 5th Military Police Company (SIB) which

should enable better co-ordination and management of investigations and continue to draw more junior and specialist investigators from regional areas as required. Action is subsequently in hand to increase the number of more senior investigators of Headquarters 5th Military Police Company (SIB).

RECOMMENDATION 4
We recommend that Army investigate the feasibility of placing MP's with Federal, State and Territory Police Forces as part of their training.

RESPONSE
The Government supports this recommendation. A Memorandum of Understanding has already been signed by Army and the Victoria Police. It is planned to enter similar agreements with other police services including the Australian Federal Police. Additionally, Army is looking to extending the range of civil police and tertiary training courses currently attended by Military Police (MP) personnel.

RECOMMENDATION 5
The Committee further recommends that Army review the conditions for reserve Military Police, with the view to better utilising the investigative skills in the Military Police Reserve units, especially for major cases.

RESPONSE
The Government agrees the Committee's recommendation. The Government values the contribution of Army Reserve MP's, many of whom have acquired specialist investigation skills in their civilian employment. Army is currently developing a Trade Management Plan for the Corps of Military Police, which will outline a framework for the employment of Reservists. In developing the Plan, Army will examine means to better utilise the investigative skills in MP Reserve and integrated units, especially for major cases. The Plan is due for completion in June 2002.

RECOMMENDATION 6
The Committee recommends there be a formal review of the Defence Legal Office, with terms of reference and timetable for completion, and that the review be made public.

RESPONSE
This recommendation by the Committee arose in the context whether the Military Justice System is too slow. At issue are the formal processes which comprise the Military Justice System; and the organisational arrangements for the in house delivery of legal services.

Military Justice System

The Government fully agrees that the entire legal process surrounding the incidents at 3 RAR took far too long. A much more efficient system is required to centrally track and monitor the progress of all matters dealt with in the Military Justice System. The most efficient way to achieve this is through the establishment of a *Registrar of Military Justice*. This has been implemented within the office of the Judge Advocate General, whose statutory responsibility it is to report annually to Parliament on the implementation of *Defence Force Discipline Act*. The *Registrar of Military Justice* is implementing a case management system (with requisite Information Technology support) to capture all ADF inquiries and matters of Defence Force discipline. This information also will be available to the Inspector General of the ADF to support that office in ensuring compliance with due processes, timeliness, transparency and standards in military justice.

In addition, the Judge Advocate General has implemented a standard step in the conduct of more complex disciplinary proceedings in the form of *Directions Hearings*. All those responsible for bringing matters to trial will be required to appear before a judicial officer for the purpose of explaining what is involved, and how long it should take to conclude. This will provide an additional process stimulus to expedite all disciplinary proceedings.
Coupled with strong recommendations by Mr Burchett for much enhanced training in military procedures (presently in the design phase through the Military Law Centre), these measures, when fully effective, should make for the more timely, streamlined and controlled administration of military justice.

Review of The Defence Legal Service

The Defence Legal Service has been undergoing a continuous program of integration and reform since the amalgamation of all in-house legal services in 1997.

In 1997 a military Director General was appointed in charge, to lead and manage the national in-house provision of legal services across Defence. A civilian General Counsel was appointed within The Defence Legal Service to provide high level legal advice across the Defence Organisation.

Studies were conducted into the provision of legal services to all bases, commands and regions in 1997. The central office in Canberra was fundamentally reviewed in 1998-99. The roles of Reserve Legal Officers were reviewed in 2001. This important review will result in a much closer relationship between the permanent and reserve officers of The Defence Legal Service. Moreover, the Reserve officers will be more closely integrated with their respective services, ideally through appointments within major formations and force element groups. The relevant Papers

from each of these studies can be made available to the Committee, should this be required.

Finally, the incoming Director General undertook a national field survey of the entire organisation in 2001 and has made substantial internal organisational changes aimed at uniting all the legal resources available to the Defence Organisation into arguably the largest national in-house law firm in Australia. The shaping vision is set at "professional excellence", in all aspects of performance. The Defence Legal Office was renamed *The Defence Legal Service* in March 2001.

The demand for in-house legal services seems to be outstripping available resources. Significantly, the Burchett Audit of Military Justice observed:

> *"It was frequently suggested that the Defence Force should have more lawyers because there are not enough in-house resources to meet the demand (para 180)."*

Burchett recommended that the total number of legal officers and their location and organisation required in the modern Defence Force be reviewed. This recommendation will be actioned as part of the general implementation of all the Burchett recommendations in 2002, with special emphasis accorded to the geographical placement of ADF legal officers to ensure that it reflects sufficiently the demands on The Defence Legal Service nationally.

Should the Committee require, an extensive briefing on the reform of the Defence Legal Service can readily be provided. The Government considers that these changes need to be given further time to take effect, before any further formal review is considered.

RECOMMENDATION 7
The Committee recommends that officers transferring to the Defence legal specialisation on completion of a law degree necessitate relinquishment of rank commensurate with their legal expertise and experience.

RESPONSE
This recommendation is broadly supported. The remuneration and professional development of the legal specialisation within the ADF elements of The Defence Legal Service is based on legal competencies. Clients are entitled to expect that rank and legal skills are reflective of actual experience. The most usual form of entry to the legal specialisation will remain through undergraduate and graduate recruitment to the most junior officer ranks.

Transfer to the legal specialisation as late as the rank of Major (or equivalent rank) would only be in exceptional circumstances. There will be

some officers at this level whose command and management experience has required them to deal extensively with legal issues as a matter of course. This experience, coupled with legal training, will enhance their capacity to contribute effectively to The Defence Legal Service. It may be necessary for certain of these officers to be held longer at the Major (or equivalent rank) level to enable them to consolidate their legal experience before they are eligible for promotion. All of these considerations would be taken into account by the Career and Professional Development Committee, which has been established to regulate the professional management of officers in the Defence Legal Service.

RECOMMENDATION 8

The Committee further recommends that legal officers' selection boards have a legal officer on the panel.

RESPONSE

This is fully endorsed.

DISSENTING REPORT RECOMMENDATION

In light of the recurrence of issues relating to brutality and Military Justice, and noting the recommendations of the committee's previous report into Military Justice procedures in the ADF, those dissenting members now strongly recommend that the ADF establish a statutory office of the Director of Military Prosecutions, for Defence Force Magistrate trials and Courts-Martial (for criminal and quasi criminal matters).

RESPONSE

As has been announced and advised to the Committee previously, a DMP will be established after selection of an appropriate model suitable to the ADF needs, and when the necessary legislation is in place.

Appendix 10

The *Burchett Report* recommendations

Source: The Report pp 29-41

Recommendations
It is recommended that:

Training in relation to the Defence Force Discipline Act
1. Common legal training courses in Disciplinary Law should be produced for Australian Defence Force personnel at all levels as soon as practicable.

2. In particular, a course for all officers covering basic legal principles should be introduced.

3. The training for officers about to assume command appointments should, for all services, include a component comparable to that presently provided in the case of the Air Force in respect of Disciplinary Law.

4. Competency Standards should be devised and introduced for personnel involved in the disciplinary process at the summary level (for example, Defending Officers might be required to complete an interactive module on pleas of mitigation and attend a summary hearing before being available to represent someone).

5. Steps should be taken to encourage a closer involvement of junior officers in the disciplinary process.

6. The introduction of annual awareness training in military justice issues should be considered.

Discipline Officer Scheme
7. Consideration should be given to making the appointment of a Discipline Officer mandatory in all units.

8. The ranks subject to the Discipline Officer Scheme should be all ranks to and including Captain equivalent.

9. The record of matters dealt with under the Discipline Officer Scheme for an individual member should be discarded not, as at present, upon departure from his or her unit or after twelve months, but upon promotion to a higher rank.

10. The period allowed for members to elect to be dealt with by a Discipline Officer should be reduced from 7 days to 1 day, subject to a discretion in the officer who would bring the formal charge (if one were to be brought) to extend the time up to 7 days.

11. The offences to which the Discipline Officer Scheme relates, and also the maximum penalties, should be reviewed if the scheme is extended to higher ranks.

Extras

12. The nature, purpose and sphere of extras should be clarified by triservice guidelines, so as to ensure that they may be lawfully imposed.

13. The guidelines should make it clear that, as a matter of policy, extras are to be regarded as an administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the *Defence Force Discipline Act.*

14. The guidelines should address the questions who may award extras, upon whom they may be imposed, monitoring arrangements, the types of activity covered and the nature of the failure on account of which an order for extras may be made.

15. The power to award extras should not be delegated below the rank of Corporal equivalent in respect of subordinates within his or her command.

16. All ranks up to and inclusive of Captain equivalent should be subject to orders for extras made by a superior.

Utility of Punishments

17. Consideration should be given to reviewing:

a. the nature of the punishments which may be imposed under the *Defence Force Discipline Act* in the light of contemporary standards;

b. whether some form of Service oriented community work could usefully be made an alternative sanction;

c. whether the Act should be amended to confer a power, not merely to impose no punishment, but also, for a special reason, to decline to enter a conviction.

18. The question be examined whether a separate scale of punishments for Navy members is any longer necessary.

19. A review be undertaken of the applicability of the present scale of punishments to Reservists who are not on full time service or undergoing periods of continuous training.

Time Taken for Commencement and Review of Summary and Other Trials

20. The feasibility be investigated of securing a "readiness" undertaking from Reserve legal officers offering themselves for Australian Defence Force work.

21. A mandatory requirement be introduced for a prosecutor to provide a statement specifying the time taken to bring a matter to trial, together with a statement of the reasons for any delay.

Training Charges

22. Consideration should be given to the establishment by regulation of the concept of a training charge, and to its definition and scope.

Administrative Consequences and Administrative Action in relation to Disciplinary Breaches

23. The policy work currently being undertaken to achieve standardisation of application and outcome of administrative sanctions, should be regarded as requiring an urgent resolution.

24. Steps should be taken to improve the dissemination of information upon the true career effects of convictions under the *Defence Force Discipline Act* and of various administrative sanctions.

Equity and Diversity Issues

25. Having regard to the repeated comments of NCOs, and particularly junior NCOs, about the influence of training in equity and diversity at initial entry institutions, consideration should be given to providing more balancing emphasis in that training on the obligations of discipline enshrined in the *Defence Force Discipline Act.*

Unequal Treatment and Consistency of Punishments

26. Consideration should be given to the institution of a system of traffic tickets in military bases for minor infringements of general orders and traffic regulations.

27. Consideration should be given to the issue of policy guidance on summary punishments including the dissemination of information as to the general level of punishments for particular offences while making it clear a CO's discretion would not thereby be limited.

28. Complete and accurate statistics concerning prosecutions under the *Defence Force Discipline Act* and administrative action having punitive effect be compiled on a common basis for all three services and be made available to legal and administrative agencies of the ADF.

Transparency and Victim Feedback

29. Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken.

30. Guidelines be issued to commanders designed to ensure effective feedback to complainants, victims and offenders in relation to administrative action or summary proceedings.

Access to Legal Advice

31. The policy regarding the provision of legal assistance to members be reviewed.

32. Steps be taken to reduce the incidence of conflict of interest situations arising out of the location of a single legal officer without an alternative.

33. The total number of legal officers and their location and organisation, required in the modern Defence Force be reviewed.

Legal Officers at Summary Proceedings

34. *The Defence Force Discipline Rules* be amended to provide that a member who desires to be legally represented at a summary trial must first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate.

35. Pre-command legal training of commanding officers should include guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.

Need of Commanding Officers to Seek Legal Advice During Trial

36. Pre-command legal training of commanding officers should include clear guidance on how legal assistance during the course of a summary trial may be sought without prejudice to the rights of the parties.

Effects of Defence Reorganisation

37. Command and line management responsibility for the discipline of personnel in joint and integrated organisations, and the dissemination of information about it, be reviewed.

38. Rationalisation of command and line management responsibility for the discipline of personnel in joint and integrated organisations take account so far as possible of geographic convenience.

39. Common familiarisation training on military justice issues and civilian disciplinary processes be developed for use in joint and integrated organisations.

Investigation Issues

40. The level of resources available for police investigative work across the three Services be reviewed.

41. A register of suitable persons to act as Investigating Officers under the *Defence (Inquiry) Regulations* be developed (as to which see the Role and Functions identified for the Military Inspector General).

Peer Group Discipline

42. Specific guidance on the use of peer group discipline be included in pre-command training of COs and in standing orders for training institutions.

Drug Policy

43. Section 59 of the *Defence Force Discipline Act* be reviewed in conjunction with DI(G) PERS 15-2, with a view to the amendment of the legislation to enable military tribunals to deal with charges in respect of small quantities of all appropriate illegal drugs.

44. In the meantime, consideration be given to prosecuting in cases involving cannabis where the civilian police regard the quantity as too small, limiting the military prosecution to the statutory quantity of 25 grams.

Presumption of Guilt

45. Greater emphasis should be placed on the concept of a prima facie case in the training of NCOs, WOs and officers in relation to summary proceedings under the *Defence Force Discipline Act*.

46. The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint so as to ensure fairness.

Director of Military Prosecutions and Administration of Courts Martial and Defence Force Magistrate Hearings

47. An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established.

48. A Registrar of Courts Martial be established for the Australian Defence Force.

Keeping Things "In-House"

49. Guidance be included in (a) Command Directives at all levels, and (b) pre-command training courses, designed to discourage any tendency to conceal potential military justice problems from higher authority.

Availability of Avenues of Complaint
50. Consideration be given to reviewing what means (if any) exist for achieving closure on the cases of chronic complainants.

Professional Reporting – The "Whistleblower" Scheme
51. Current policy covering treatment of "Whistleblowers" be reviewed as to its applicability to deal with more general military justice issues.

Regional DFDA Units
52. Consideration be given to the usefulness of establishing a regional DFDA unit in a particular location where the ordinary arrangements are difficult to implement in practice.

Medical Issues
53. General guidance be provided to Commanders (and included in appropriate training courses) concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.

Procedural Fairness and Command Prerogative
54. General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith.

Military Inspector General
55. A Military Inspector General be appointed with the following role and functions:

Role
The role of the Military Inspector General is to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the Australian Defence Force in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.

Functions
The functions of the Military Inspector General should be:

a. To investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system;

b. To provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint;

c. To take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities; and, following any referral, to receive and, if necessary, to report to the CDF upon, the response of the authority to whom the matter was referred;

d. To act as an Appointing Authority for investigations (not including Boards or Courts of Inquiry) under the *Defence (Inquiry) Regulations*;

e. To maintain a Register of persons who would be suitable to act as members of inquiries or as Investigating Officers;

f. To advise Appointing Authorities under the *Defence (Inquiry) Regulations* on the conduct and appointment of inquiries;

g. To monitor key indicators of the military justice system for trends, procedural legality, compliance and outcomes, including:

(1) Service Police investigation reports;
(2) Significant administrative inquiries and investigations;
(3) Service discipline statistics;
(4) Records of significant administrative action taken for disciplinary purposes;
(5) Records of Grievances;
(6) Reports of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process.

h. To conduct a rolling audit by means of spot checks of Unit disciplinary records, procedures, processes, training and competencies relevant to military justice;

i. To promote compliance with the requirements of military justice in the ADF;

j. To liaise with other agencies and authorities with interest in the military justice system in order to promote understanding and co-operation for the common good;

k. To consult with overseas agencies and authorities having similar or related functions;

l. To make to the CDF such reports as may seem desirable or as the CDF may call for;

m. To receive documents which were submitted to this Inquiry and finalise complaints brought to the attention of this Inquiry which may require further action.

Appendix 11

The *2005 Senate Report* recommendations & Government response

Sources**:** The 2005 Report, and *Reforms to Australia's military justice system - Second progress report*, Appendix 2, 29 March 2007, Senate Foreign Affairs, Defence and Trade Committee

Recommendations

The committee has made a number of major recommendations designed to restructure Australia's military justice system giving particular emphasis to ensuring the objectivity and independence of disciplinary processes and tribunals and administrative investigations and decision making. It has also made a number of additional recommendations intended to improve other aspects of the military justice system concerned mainly with raising the standards of investigations and decision making taken in the chain of command.

The discipline system

The major disciplinary recommendations provide for the referral of all civilian equivalent and Jervis Bay Territory Offences to the civilian authorities. The additional recommendations provide for the reform of current structures, in order to protect service personnel's rights in the event that the civilian authorities refer criminal activity back to the military for prosecution. The additional recommendations cover the prosecution, defence and adjudication functions, recommending the creation of a Director of Military Prosecutions, Director of Defence Counsel Service and a new tribunal system**. All recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.**

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

Government Response: Not Agreed.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

Government Response: Not Agreed.

Recommendation 3

3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Government Response: Not Agreed.

Recommendation 4

3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Government Response: Agreed in part. The Government agrees in part, noting that the ADF makes an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution. This determination is based on an assessment of whether dealing with the matter under the DFDA can be reasonably regarded as substantially serving the purpose of maintaining and enforcing Service discipline. Where civilian police do not pursue a matter and it can be regarded as substantially serving the purpose of maintaining and enforcing Service discipline, then the matter may be dealt with under the DFDA. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

Recommendation 5

3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- Fully implementing the recommendations contained in the Ernst & Young Report;
- Encouraging military personnel secondments and exchanges with civilian police authorities;
- Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;
- Increasing participation in civilian investigative training courses; and

Designing clearer career paths and development goals for military police personnel

Government Response: Agreed in part. The Government agrees this recommendation with one exception. The Ernst and Young Report was a review of the Army police investigation service and did not address the Navy and Air Force police investigation services. Army accepted 53 of the 55 of Ernst and Young recommendations. Two were not accepted on the basis that they appeared to infringe on the individual rights of ADF members. Work to implement the 53 agreed recommendations commenced in August 2004, and is progressing well. 33 recommendations, including the two that are not accepted, are complete, including establishment of the Provost Marshal - Army in January 2005. 22 recommendations are pending additional work which is being progressed by Army.

Some of the recommendations are specific to the Army and not directly relevant to the Navy and Air Force. The Government agrees that all Service police will act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.

Recommendation 6

3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

Government Response: Agreed. The Government will conduct a tri-service audit of Service police to establish the best means for developing investigative capability. Defence acknowledges that the current military police investigation capability has significant shortcomings and is inadequate for dealing with more serious offences that are not referred to civilian authorities. As identified by the Senate Committee, Defence has

begun to rectify shortfalls as part of the implementation of agreed recommendations from the recent Ernst and Young review into Army military police, including the establishment of the Provost Marshal

- Army. Navy and Air Force have completed or are conducting similar reviews to build on the outcomes of the Ernst and Young review. The recommended audit will bring together this work and establish the best way to develop the investigative capability of all Service police.

To supplement this, Defence will establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF began work to form a Serious Crime Investigation Unit in February 2004. Establishment of the unit has been in abeyance pending the outcomes of this Review. In-principle agreement has been reached with the AFP for a senior AFP officer to be seconded to mentor and provide oversight of this team, and implementation will now proceed. The unit will be headed by a new ADF Provost Marshal outside single Service chains of command. Service police may be supplemented by civilian investigators. The unit will deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Greater numbers of more skilled investigators will be available to investigate complex and serious issues in operational environments and contingencies inside and outside Australia.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Government Response: Not Agreed.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Government Response: NOT AGREED.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of

Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Government Response: Not Agreed.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Government Response: **Agreed**. The Government agrees, noting that action has already commenced to establish the Director of Military Prosecutions as a statutory position. The statutory appointment will allow the Director of Military Prosecutions to operate independently and free from perceptions of command influence. It will also promote confidence among ADF members in the independence and impartiality of the appointment and in the functions of the Office.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Government Response: Agreed. The Government agrees. The Office of Director of Military Prosecutions was established on an interim basis in July 2003; it is timely to review the Office to ensure that it has sufficient resources to meet current and future work loads and is able to respond to operational requirements.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Government Response: Agreed. The Government notes that the Committee recognised that the ODMP had been performing an admirable job and agrees to review the training requirements for permanent legal officers assigned to the Office of the DMP. The review will be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Government Response: Agreed. The Government notes that the ODMP has been actively engaged in increasing its profile over the last eighteen months, and agrees action should continue to raise the awareness and profile of the Office. Increased awareness and profile will help ADF members understand the role of the DMP, and ensure that Commanders have ready access to impartial and independent advice on the proper investigation and prosecution of Service offences, especially those that are serious criminal offences.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Government Response: Agreed. The Government agrees to the statutory appointment of the Director of Military Prosecutions at the one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Government Response: Agreed. The Government agrees to appropriate remuneration for the appointment of the Director of Military Prosecutions. In accordance with the Government's response to Recommendation 10, action is being taken to create a statutory appointment of the DMP. Remuneration of the statutory appointment will be determined by the Remuneration Tribunal (Cth).

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Government Response: Agreed in principle. The Government notes the Committee's underlying concern that the current ADF structures could give rise to a perception that ADF legal officers may not always exercise their legal duties independently of command influence.

The independence of the ADF permanent legal officers was criticised in the ACT Supreme Court in *Vance v The Commonwealth (2004).* In part, the case concerned legal professional privilege. A significant factor in the case was that ADF and Department of Defence legal officers do not normally have practising certificates and this was seen as an indication that they were not independent and impartial and entitled to legal professional privilege. In May 2005, the Commonwealth appealed the decision, and the ACT Court of Appeal unanimously upheld the appeal on 23 August 2005.

Although there are practical difficulties in implementing Practising Certificates, the legal officers in the office of the DMP will be required to hold them, and other permanent legal officers will be encouraged to take them out. The matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

Government Response: Agreed. The Government agrees to establish a Director of Defence Counsel Services (DDCS) to improve the availability and management of defence counsel services to ADF personnel. The DDCS will be established as a military staff position within the Defence Legal Division to coordinate and manage the access to and availability of defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Government Response: Agreed. The Government agrees to create a permanent military court to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court will be established under appropriate Defence legislation. The court will satisfy the principles of impartiality and judicial independence through the statutory appointment of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). During the period of their appointment, the judge advocates will not be eligible for promotion, to further strengthen

their independence from the chain of command. The appointments will be made by the Minister for Defence.

The appointment of new military judge advocates would see the need to consider further, during implementation, the position of the Judge Advocate General. The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate and the Registrar of Military Justice. The Australian military court would consist of a Chief Judge Advocate and two permanent judge advocates, with a part-time reserve panel. The panel of judge advocates would be selected from any of the available qualified full or part-time legal officers. The court would be provided with appropriate para-legal support sufficient for it to function independent of the chain of command. In meeting all of the requirements of military justice, the court would include options for judge advocates to sit alone or, in more serious cases, with a military jury. The use of a jury would be mandatory for more serious military offences, including those committed in the face of the enemy, mutiny, desertion or commanding a service offence.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- Judges should be appointed by the Governor-General in Council;

Judges should have tenure until retirement age.

Government Response: Not Agreed. In response to Recommendation 18, the Government agreed to the option to establish an Australian military court. The Government does not support the creation of a permanent military court under Chapter III of the Constitution. Current advice is that there are significant policy and legal issues raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.

Importantly, a military court is not an exercise of the ordinary criminal law. It is a military discipline system, the object of which is to maintain military discipline within the ADF. It is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The judicial authority must be able to sit in theatre and on operations. It must be deployable and have credibility with, and acceptance of, the Defence Force. The principal factor peculiar to the Defence Force is the military

preparedness requirements and the physical demands of sitting in an operational environment. The Chapter III requirements are not consistent with these factors, and the Government does not support the Chapter III features for a military court.

In addition, a Chapter III court would require its military judicial officers to be immune from the provisions of the DFDA subjecting them to military discipline. While this is appropriate regarding the performance of their judicial duties, the Government does not support making them exempt from military discipline in the performance of their non-judicial duties such as training.

The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.

The Government will instead establish a permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.

Advice to the Government indicates that a military court outside Chapter III would be valid provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

Government Response: Not Agreed. The Australian military court will have a permanent panel of military judge advocates with legislated independence. Appointment should be based on the same professional qualifications and experience that apply to other judicial appointments such as those applicable to a Federal Magistrate as set out in the *Federal Magistrates Act 1999* (Cth) Schedule 1 clause 1 (2). While recent civilian experience could be a factor to be taken into account, other qualified

military legal practitioners should not be excluded on the basis that they do not have recent civilian experience.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

Government Response: Agreed in principle. The Government agrees that judge advocates appointed to the Australian military court should have appropriate experience and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments, such as those applicable to a Federal Magistrate as set out in the *Federal Magistrates Act 1999* (Cth) Schedule 1 clause 1 (2).

The Australian military court will have a permanent panel of military judge advocates with legislated independence. The Government notes that military judge advocates will predominantly be drawn from the Reserve, and would have adequate civilian and military experience. Nevertheless, other qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience.

Recommendation 22

5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

Government Response: Agreed in principle. The Government agrees in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds will need to be determined once the structure of the Australian military court is established, but will be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

Government Response: Agreed. The Government agrees with the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian military court. The current process of review will be discontinued. The existing right of appeal from Courts Martial and Defence Force Magistrates (to be the Australian military court) to the DFDA Tribunal will be retained. Currently, the DFDAT may only hear appeals on conviction on points of law, and

may quash a conviction or substitute a conviction on an alternative offence. This will be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that: the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).

Government Response: Agreed. The Government will continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. Defence uses the Australian Standard for Whistleblower Protection Programs AS 8004-203, and the scheme is currently undergoing a comprehensive review by the Defence Inspector General. This review and its implementation will emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. The Government supports annual reporting of the operation of the scheme against documented performance standards.

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

Government Response: Agreed in part. The Government notes that Defence already reports statistics on reporting unacceptable behaviour in its annual report. The Government agrees that Defence will continue to include this data in the Defence annual report. The Government does not agree to report on potential under-reporting of unacceptable behaviour, as an exercise necessarily speculative in nature. Defence does, however, have in place a range of initiatives to manage and coordinate its complaints processing function to raise awareness and encourage reporting as appropriate.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

Government Response: Agreed. The Government will amend the Administrative Inquiries Manual to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of administrative inquiries. The Manual will provide improved guidance on the use of quick assessments.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

Government Response: Agreed. The Government will amend the Administrative Inquiries Manual to improve guidance to Commanders who are responsible for the selection of inquiry officers to carry out administrative inquiries, such as routine unit inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. This will improve independence and impartiality, as well as enhance the quality of inquiry outcomes.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers: Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry. A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report. The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation. The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.

Government Response: Agreed in part. The Government agrees to consider proposals to enhance the transparency and accountability in the appointment of investigating officers. The Government agrees that investigating officers be required to produce statements of independence and to make known any potential conflicts of interest. The Government does not support the proposal that conflict of interest reports be included in reports to the Commanding Officer, rather, the Government will direct Defence to amend the Administrative Inquiries Manual to require that investigating officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the appointing authority to any potential conflict of interest or objection to an investigating officer. Resolution of any conflict would then occur prior to the commencement of the investigation.

Recommendation 29

11.67 The committee makes the following recommendations—

a) The committee recommends that:

- the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
- the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
- the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
- the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
- all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
- the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;
- the CDF be required to give a written response to ADFARB findings/recommendations; if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
- the ADFARB be required to make an annual report to Parliament.

b) The committee recommends that this report

- contain information that will allow effective scrutiny of the performance of the ADFARB;

- provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
- comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.

c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:

- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
- where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.

d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.

e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:

- the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and
- although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.

f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:

- improving the training of investigating officers;
- maintaining a register of investigating officers, and
- developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.

g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:

- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
- the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.

h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Government Response: Not Agreed. The Government agrees there is a need to improve the complaints and redress of grievance management system, and proposes that the shortfalls in the existing system would best be met by streamlining the existing ADF complaints management and redress of grievance system and retaining independent internal and external review and oversight agencies. The committee's recommended ADF Administrative Review Board (ADFARB) would not support the relationship between command and discipline, would reduce contestability and introduce duplication.

The ADFARB concept proposed by the Senate Committee is based on the Canadian Forces Grievance Board (CFGB). The CFGB deals with only about 40 per cent of Canadian Defence Force grievances, is highly resource intensive and does not replace the Canadian internal complaints resolution body, or the Canadian Forces Ombudsman. Defence is concerned that the ADFARB concept would reduce contestability in the system by absorbing the ADF's only independent review authority, noting the proposal that the ADFARB take responsibility for and continue the

work of the IGADF. As proposed, the ADFARB would also duplicate the role of the Defence Force Ombudsman.

The Government does not agree to establish an ADFARB on the basis that it would be a costly exercise 19 that would not provide real benefits in terms of increasing perceived independence. The Government is also concerned that an ADFARB would remove the responsibility and accountability of commanders for the well being of ADF personnel in their command.

The Government proposes instead to reform and streamline the complaints and redress of grievance management system, in line with the recommendations of a joint Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. Implementation of these recommendations has commenced in line with a CDF Directive 2/2005. Changes to the system will improve the rigour, impartiality and timeliness of processing complaints.

The overarching principle guiding the redress of grievance system remains that complaints should be resolved at the lowest effective level and in the quickest possible time. Primary responsibility to resolve complaints remains with the unit commanders.

Defence's Complaint Resolution Agency (CRA) – an existing body which is established outside the ADF –will become the lead agency in the coordination of complaints and redresses of grievance.

In its expanded role, the CRA will have three major functions.

- The CRA will initially provide advice to commanding officers on the management of every application for redress of grievance and monitor the handling of those redress applications at the unit level. It will have an enhanced advisory and oversight function of every application.
- The CRA will have the authority to advise on appropriately trained and qualified investigating officers at this initial stage and, if necessary, will require an alternative investigating officer to that nominated by the commander.
- Where ADF personnel refer their complaint to the Service Chief or the Chief of the Defence Force following the decision of the commanding officer, the Complaint Resolution Agency, as in the present situation, will conduct an independent review of the matter and provide recommendations to the decision maker.

All complaints will be registered with the Complaint Resolution Agency within five days of initiation and it will be empowered to take over the management of all cases unresolved by commanders 90 days after lodgment. In all cases, the Agency will be the central point for monitoring

progress and resolution. A single register for tracking complaints across the ADF will be implemented.

Other improvements to the ROG system being implemented include improvements in training of commanding officers and investigating officers, consolidating Defence complaint mechanisms, and managing centrally the various complaint hotlines operating in Defence.

For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—the Inspector General of the ADF and the Defence Force Ombudsman.

The existing Inspector General of the ADF was established as recommended by Mr Burchett QC to deal exclusively with military justice matters. The IGADF was established to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system 20 independent of the ordinary chain of command and an avenue by which failures and flaws in the military justice system can be exposed and examined so that any cause of any injustice may be remedied.

Although it is not a general complaint handling agency like the CRA, it does provide an avenue for those with complaints about military justice, who are, for some reason, unable to go through their chain of command, to have their complaints investigated and remedied. The Government has drafted legislation to establish the Inspector General of the ADF as a statutory appointment in order to further strengthen its independence.

In addition to this review mechanism and completely external to the ADF is recourse to the Defence Force Ombudsman. This position will retain legislative authority to receive and review complaints and to initiate on its own motion investigations into ADF administration processes. The Defence Force Ombudsman has statutory power to investigate a matter, make findings and recommend a course of action to the appropriate decision maker and to table a report in Parliament if deemed necessary.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

Government Response: Agreed. The Government has taken action to clear the backlog of grievances, in line with recommendations from Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. This is scheduled to be completed by the end of 2005, with no requirement for additional funding or a task force.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

Government Response: Agreed. The Government will amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

Government Response: Agreed. The Government will amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

Government Response: Agreed in part. The Government notes that the substance of this recommendation was agreed to following the 1999 senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence (Inquiries) Regulation 33. The Government agrees that in cases where either the appointing authority, before the inquiry starts, or the President of a Board of Inquiry makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons will be entitled to appear before the Board and will have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Further, the Government agrees that where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation will be provided at

Commonwealth expense, in accordance with standing arrangements. The Government also agrees that the representatives of the estate of deceased persons, who have died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, will be entitled to be legally represented before the Board of Inquiry into that incident. Consistently, the Government agrees that where the representative of the estate of such persons chooses to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. It is noted that the identification of 'persons adversely affected' involves the application of the principles of natural justice; it does not automatically encompass every person who is, or may be, a witness or has some other interest in the inquiry.

Recommendation 34

12.120 The committee recommends that: all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry; the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary); the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle; the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.

Government Response: Not agreed. The Government agrees that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government will propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. CDF shall appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service. The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience will be the President. This form of inquiry will be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.

External independent legislative oversight by Comcare will continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process.

State and Territory Coroners will continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF is working towards completing a Memorandum of Understanding with State and 21 Territory Coroners. The Defence Force Ombudsman will continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF.

The Government does not support the concept of an ADFARB, as reflected in the response to recommendation 29, and so can not agree to refer notifiable incidents, including suicide, accidental death or serious injury to an ADFARB for investigation/inquiry.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

Government Response: Agreed in principle. The report of the Australian Law Reform Commission *Principled Regulation: Federal Civil and* 13 *Administrative Penalties in Federal Jurisdiction* is focused on commercial and corporate law matters, and not the employment of personnel. Any review of the military justice system would require a broader basis that allows examination of all aspects of the military justice system.

The Government agrees that in addition to ongoing internal monitoring and review, Defence will commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

Government Response: Agreed in principle. The Government agrees to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review will also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review will be undertaken outside the broad review

proposed at recommendation 35, and will be completed within the two-year implementation period.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

(d) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

(e) The workload and effectiveness of various bodies within the military justice system, such as but not limited to:

- Director of Military Prosecutions;
- Inspector General of the ADF;
- The Service Military Police Branches;
- RMJ/CJA;
- Head of Trial Counsel;
- Head of ADR.

Government Response: Agreed. The Government supports the need for transparency and parliamentary oversight of the military justice system and will provide, in the Defence annual report, reporting on the state of health of the military justice system. Reporting will include progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system. Defence will also amend the Defence (Inquiry) Regulations to provide for an annual report on the operation of the D(I)R, fulfilling a recommendation of the Burchett report. Defence will also report twice a year to the Senate committee, on progress of the reforms throughout the two year implementation process.

Recommendation 38

14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

Government Response: Agreed The Government agrees to commission an expert to examine whether the human rights of children are being respected. The Government also notes that Defence has already implemented significant policy initiatives under the Government's Cadet

Enhancement Program to address shortcomings in the care and control and rights of minors in the ADF Cadets, including:

- implementation of a behaviour policy, providing training and materials on the expected standards of behaviour, and including guidance and advice on the handling of sexual misconduct;
- development of a wellbeing program, specifically targeted at the mental health wellbeing of ADFC cadets;
- introduction of an ADFC cadet and adult cadet staff training enhancement program;
- a review of child protection policy and processes in line with State and Territory legislation;
- a review of screening processes for new staff; and
- production of a youth development guide for adult cadet staff.

Recommendation 39

14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Government Response: Agreed The Government agrees, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that will more than meet the Committee's recommendations on the human rights of minors.

Recommendation 40

14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.

Government Response: Agreed The Government agrees and notes that the Service Chiefs have already provided additional resources to the ADF Cadets to improve administrative support.

*The Government does not agree to the recommendations (1, 2, 3, 7, 8, and 9) that taken together propose the automatic referral of investigation and prosecution of criminal offences with a Service connection to civilian authorities.

The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the

military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.

The maintenance of effective discipline is indivisible from the function of command in ensuring the day-to-day preparedness of the ADF for war and the conduct of operations. Justices Brennan and Toohey of the High Court in *Re Tracey; ex parte Ryan* (1989) (and repeated by Justice McHugh in *Re Colonel Aird; ex parte Alpert* (2004)) said '*Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful authority and the enhancing of efficiency in the performance of service functions.'*

As a core function of command, military justice cannot be administered solely by civilian authorities. Recourse to the ordinary criminal courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the Defence Force. Further, the capacity to investigate and prosecute offences under the Defence Force Discipline Act 1982 is necessary to support ADF operations both within and outside Australia. The Government does not accept that the DFDA—or more broadly the system of military justice—is a "duplication" of the criminal system.

Importantly, jurisdiction under the DFDA for any offence may only be exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline—a purpose different to that served by the criminal law. Moreover, extensive guidelines for the exercise of DFDA jurisdiction and the satisfaction of this service connection test are set out in comprehensive Defence instructions. It is a core element of the DFDA that not all criminal activity is or should be dealt with by the military police.

The Government is also concerned that the civil code does not have the disciplinary provisions required to keep order and encourage discipline and cohesive teamwork, and may actively undermine the ability of commanding officers to address disciplinary issues through the more expeditious summary action 15 available under the DFDA. This particularly applies to those cases that may be considered insignificant in a civilian context—petty theft for instance—that may have serious implications for service discipline and morale, and may seriously undermine the authority of a commanding officer to maintain effective discipline. The proposed enhancements to the military justice system seek to provide a balance between military effectiveness and external oversight by ensuring that the system meets legal standards, conforms as far as possible to community expectations, and provides reassurance to the Parliament and the

community that ADF members' rights are being protected without compromising the ADF's ability to remain an effective fighting force. It is based on the premise of maintaining effective discipline and protecting individuals and their rights, administered to provide impartial, timely, fair and rigorous outcomes with transparency and accountability. Where Defence prosecution substantially serves the purpose of maintaining and enforcing Service discipline, offences in Australia will be dealt with under the DFDA.

Past challenges to the system of retention or referral of cases in the High Court have been unsuccessful and the current system and thresholds will be maintained, with determination decisions undertaken by the Director of Military Prosecutions. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

The Government is also of the view that outsourcing the criminal investigative function would complicate proposed efforts to address the problem of the capability of the military police. Military police will still be required to perform criminal investigative roles if, for instance, civilian authorities decline to investigate a matter, and subsequently referred it back to the military police.

The Government has accepted recommendations 5 and 6, to improve the quality of criminal investigations conducted by Service police, including through the establishment of an ADF Joint Investigation Unit.

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