

THE CONSTITUTION AND MILITARY JUSTICE

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In the long history of warfare it has come to be regarded as a truism that any effective and successful military force must be well disciplined. That discipline is to be maintained and enforced by commanders at all levels. It is as necessary in small matters such as punctuality and cleanliness as it is in more important ones like the protection of the human rights of non-combatants.

A basic requirement of any disciplinary system is that members of armed services are made aware of the rules which are to govern and regulate their conduct. Under the British system, which was inherited by the Australian colonies, these rules were promulgated in a variety of ways including articles of war, legislation, general and unit specific orders and verbal commands. Usually, it was an offence to contravene a rule of conduct. Where an offence was committed, military authorities were able to impose prescribed punishments. Many offences were peculiar to the military (for example, failure to obey lawful orders, absence without leave and desertion). Others (such as theft from a comrade or drunkenness on duty), whilst they had civilian equivalents, had a particular significance in the military context. Still others (such as assault, murder and manslaughter) were not materially different in their elements or application in the military and civilian spheres.

From at least the 17th century military discipline in the British armed forces was enforced either directly by commanders or, in the case of more serious offences, by courts martial (at least in time of war).¹ British military discipline, enforced by courts martial, came to Australia at the time of the first settlement in 1788.² During the 19th century, detailed legislation was enacted in the United Kingdom providing for the discipline of the army and navy.³ This legislation had application to the Australian colonies and continued to operate (subject to some modification) even after the enactment of the *Defence Act* in 1903.⁴ In general terms, the *Army Act 1881* (Imp) and the *Naval Discipline Act 1866* (Imp) applied

1 See the historical summary contained in the judgment of Kirby J in *Hembury v Chief of the General Staff* (1998) 193 CLR 641, 666–7 and by Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 554–9.

2 Watkin Tench (Edited and Introduced by Tim Flannery), *1788: Comprising a Narrative of the Expedition to Botany Bay and a Complete Account of the Settlement at Port Jackson*, (1996).

3 *Naval Discipline Act 1866* (Imp) 29 & 30 Vict, c 109; *Army Act 1881* (Imp) 44 & 45 Vict, c 58.

4 For a summary of the relevant legislative history see *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 561–2.

in a modified form during peacetime but were given full effect in respect of Australian forces in wartime.⁵ From 1903 until 1985 each service (Navy, Army and later, Air Force) had its own disciplinary regime.

So it was, during the Second World War, that two Australian sailors who were serving on an Australian warship in the South Pacific came to be convicted by a court martial assembled under Australian law and sentenced to death under the *Naval Discipline Act* for the murder of a fellow Australian seaman.⁶ Following their conviction, warrants were issued committing them to the custody of the superintendent of the Long Bay Gaol. The lawfulness of their conviction and detention were called into question in habeas corpus proceedings issued in the High Court: *R v Bevan; Ex parte Elias and Gordon*⁷ ('Bevan'). One issue which arose in the proceeding was whether naval courts martial exercised the judicial power of the Commonwealth. The matter had not been argued by counsel but the Court felt compelled to rule upon the question for the purpose of deciding whether it had jurisdiction to entertain the proceedings. Justice Starke, having determined that such courts martial did exercise judicial power in the sense defined by Griffiths CJ in *Huddart Parker Company Pty Ltd v Moorehead*,⁸ continued:

But do they exercise the judicial power of the Commonwealth? If so the proceedings of such courts are unwarranted in point of law. The question depends upon the interpretation of the *Constitution* and whether such courts stand outside the judicial system established under the *Constitution*. The Parliament has power, subject to the *Constitution*, to make laws for the peace, order and good government of the Commonwealth with respect to 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. And by s 68 of the *Constitution* the command-in-chief of the naval and military forces of the Commonwealth is vested in the Governor General as the King's representative.

Under the *Constitution of the United States of America* the judicial power of the United States is vested in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish: cf the *Australian Constitution* s 71. And the judges hold office during good behaviour (art III, s1). Power is conferred upon Congress to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces (art I, s 8, cl 13, 14). The President is Commander-in-Chief of the army and navy of the United States (art II, s 2, cl 1). And the Fifth Amendment provides that no person shall be held to answer for capital or other infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, whereas the *Australian Constitution* (s 80) provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury but there is no exception in cases arising in the land or naval forces as in the American *Constitution*. But the frame of the two Constitutions and their provisions, though not identical, are not unlike. The Supreme Court of the United States has resolved

5 Ibid.

6 The trial left much to be desired. The captain of the ship prosecuted and told the Court that he would not have undertaken the prosecution unless he had been firmly convinced of the guilt of both of the accused. The prisoners' friend – a lowly paymaster-lieutenant who was later to become a Victorian County Court Judge and Naval Judge Advocate General – protested in vain.

7 (1942) 66 CLR 452.

8 (1909) 8 CLR 330, 357.

that courts martial established under the laws of the United States form no part of the judicial system of the United States and that their proceedings within the limits of their jurisdiction cannot be controlled or revised by civil courts. Thus in *Dynes v Hoover* Mr Justice Wayne, delivering the opinion of the Court, said – ‘These provisions’ (that is the provisions already mentioned) ‘show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3rd Article of the *Constitution* defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other’...

In my opinion, the same construction should be given to the constitutional power contained in s 51(vi) of the *Australian Constitution*. The scope of the defence power is extensive, as is suggested by the decisions of this Court (*Joseph v Colonial Treasurer* (NSW); *Farey v Burvett*), and though the power contained in s 51(vi) is subject to the *Constitution*, still the words ‘naval and military defence of the Commonwealth and the control of the forces to execute and maintain the laws of the Commonwealth,’ coupled with s 69 and the incidental power (s 51(xxxix)) indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise, and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative point of view.⁹

The reference to s 69 of the *Constitution* in his Honour’s judgment appears to be a misprint for s 68.

Justice McTiernan saw no reason to doubt that the legislation conferring judicial power on courts martial was a valid exercise of the powers vested in the Parliament by s 51(vi) and (xxxix).¹⁰ Justice Williams agreed. In a passage which was to be influential in later decisions his Honour said that:

As the establishment of courts martial is necessary to assist the Governor General, as Commander-in-Chief of the naval and military forces of the Commonwealth, to control the forces and thereby maintain discipline, I think it must follow that the Commonwealth Parliament, like Congress, can legislate for such courts, although constitutional questions could arise as to the extent of the jurisdiction in the case of ordinary criminal as opposed to offences against discipline and duty which could be conferred upon them, but, as it would usually be impossible to separate such offences, a generous view would have to be taken of such questions.¹¹

Justice Rich did not discuss this issue.

Three years later, in *R v Cox; Ex parte Smith*¹² (‘Cox’) Latham CJ, Dixon and Williams JJ held that courts martial could be empowered to hear and determine charges against former soldiers, who had been discharged from the forces, without offence to Chapter III of the *Constitution*.

There matters stood, in a constitutional sense, when the Parliamentary draftsmen embarked on the task of drafting what became the *Defence Force Discipline Act 1982* (Cth). The principal purpose of the legislation was to create a uniform system of military justice which was to apply to all elements of the Australian Defence Force. Part III of the Act creates a series of offences, most of

9 *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 467–8.

10 *Ibid* 479.

11 *Ibid* 481.

12 (1945) 71 CLR 1.

which are peculiarly military in nature. Some examples will suffice: aiding the enemy, mutiny, desertion, absence without leave, insubordinate behaviour, disobedience of a lawful command, assault on a guard, assault on an inferior, negligent performance of duty, malingering, low flying, looting and prejudicial behaviour. Some offences adapt civilian criminal offences to a military purpose. Again some examples will suffice: destruction of or damage to service property, unlawful possession of service property, possession of property suspected of having been unlawfully obtained and dealing in or possessing narcotic goods. In addition, s 61 of the Act picks up and makes applicable to service personnel the full panoply of the criminal law as it applies in the Jervis Bay Territory.¹³ A service member who acts or omits to act such as to commit (anywhere in the world) that which would constitute a criminal offence in the Jervis Bay Territory, is guilty of a service offence for the purposes of the *Defence Force Discipline Act 1982* (Cth). A very wide range of offences were thus created. There was a significant risk that the same act might render a service member liable to prosecution in both a service tribunal and a civil court for what could be both an offence under the Act and a civilian criminal offence. An obvious example was assault on a superior officer (an offence under s 25 of the Act) and common law assault under civilian law. The draftsman attempted to deal with the problem by providing that a civil court did not have jurisdiction to try a person who had been acquitted or convicted by a service tribunal of a service offence which was substantially the same as a civilian offence.¹⁴

The Act provided for a hierarchy of tribunals to hear and determine charges laid under the Act. In the first instance, charges were to be referred to subordinate authorities (officers) whose powers to impose punishments were relatively limited.¹⁵ If the subordinate authority was of the view that, if convicted, the person charged should be subject to a higher penalty, the matter would be referred to a convening authority who then had the option of sending the matter for trial before a Defence Force Magistrate (a legally qualified officer), a restricted court martial (at least three officers) or a general court martial (at least five officers).¹⁶ A judge advocate would provide courts martial with direction on legal matters.¹⁷

The *Defence Force Discipline Act 1982* (Cth) came into operation in 1985 and the first challenge to the constitutional validity of conferring judicial power on military tribunals came in *Re Tracey; Ex parte Ryan*¹⁸ ('*Re Tracey*'). Staff Sergeant Ryan had been charged with two counts of being absent without leave contrary to s 24(1) and one count of falsifying a service document contrary to s 55(1)(b) of the Act. The charges were referred to a Defence Force Magistrate for

13 Originally, the civil jurisdiction prescribed by the Act was that of the Australian Capital Territory. The later change to the Jervis Bay territory did not involve any material change to the issues discussed in this paper.

14 *Defence Force Discipline Act 1982* (Cth) s 190(5).

15 *Defence Force Discipline Act 1982* (Cth), pt VII, div 2.

16 *Ibid* s 114.

17 *Ibid* ss 117, 119(1).

18 (1989) 166 CLR 518.

trial. The defending officer made a preliminary objection that the Magistrate lacked jurisdiction to try the charges because he was not appointed consistently with the requirements of Chapter III of the *Constitution* and could not, therefore, exercise the judicial power of the Commonwealth. The Magistrate over-ruled the submission relying on the High Court's decisions in *Bevan* and *Cox*. Staff Sergeant Ryan then obtained an order nisi for a writ of prohibition in the High Court.

The Court accepted that a service tribunal which was trying offences under Part III of the Act had all the characteristics of a Court exercising judicial power.¹⁹ This was hardly surprising. Under the Act, an accused was to be arraigned.²⁰ In the absence of a plea of guilty, the prosecution was required to prove its case beyond reasonable doubt.²¹ The accused was entitled to be represented by a legal practitioner.²² Evidence was to be given on oath or affirmation.²³ The hearing was to be conducted in the presence of the accused.²⁴ The hearing was to be in public.²⁵ The service tribunal was bound to apply the rules of evidence in force from time to time in the Australian Capital Territory as if the tribunal was constituted as a court of that Territory and as if those proceedings were criminal proceedings in a court of that Territory.²⁶ What was in question was whether service tribunals were exercising judicial power under Chapter III of the *Constitution* or pursuant to power conferred by s 51(vi). *Bevan* and *Cox* had decided that the Parliament could confer judicial power on service tribunals pursuant to s 51(vi) and the majority of the Court in *Re Tracey* were not disposed to adopt a contrary view. The substantial question, for present purposes, was how far the Parliament could go, consistently with s 51(vi), in creating a disciplinary regime independently of Chapter III. In particular, the Court was concerned to consider whether it was open to the Parliament to create service offences by picking up the full range of civilian criminal offences under s 61 of the Act and empowering service tribunals to try charges against service members who were alleged to have committed such offences. Chief Justice Mason, Wilson and Dawson JJ accepted that s 51(vi) conferred a wide power on the Parliament. They held that:

[I]f offences against military law can extend no further than is thought necessary for the regularity and discipline of the defence forces ... this limitation would not preclude Parliament from making it an offence against military law for a defence member to engage in conduct which amounts to a civil offence. It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member ... the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces

19 Ibid 537, 573–4.

20 *Defence Force Discipline Act 1982* (Cth), ss 132(1)(a), 135(1)(a).

21 Ibid s 12.

22 Ibid s 137.

23 Ibid s 138.

24 Ibid s 139.

25 Ibid s 140.

26 Ibid s 146.

and the conduct of the members of those forces. In exercising that power, it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces. And Parliament's decision will prevail so long at any rate as the rule which it proscribes is sufficiently connected with the regulation of the forces and the good order and discipline of defence members.²⁷

In reaching this conclusion their Honours had regard to equivalent legislation in other countries which they found was:

based upon the premise that, as a matter of discipline, the proper administration of the 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. It is appropriate that such conduct should be punished in the interests not only of the community but of the defence force as well. There can be little doubt that in wartime or upon overseas service such considerations warrant the treatment of civil offences as service offences and it is open to the legislature to regard the position in peacetime as warranting similar treatment.²⁸

Their Honours were also mindful of the difficulties experienced in the United States following the Supreme Court's decision, in *O'Callahan v Parker*,²⁹ that the jurisdiction of a court martial to try a member of the armed forces depended upon the offence charged having a 'service connection'. In seeking to apply this test, United States military courts had handed down conflicting decisions and decisions turning on subtle distinctions. A military court might have jurisdiction if the offence was committed on a military base but not if it was committed a few feet outside the perimeters of the base. Drugs taken off base in off-duty hours might affect the later performance of military duties but service tribunals were divided on whether or not they had jurisdiction to deal with charges of illicit drug use. The uncertainty which had developed led the court in *Solorio v United States*³⁰ to hold that a military court had jurisdiction if the accused was a member of the armed forces at the time of the commission of the alleged offence.

Justices Brennan and Toohey were not prepared to accord as wide an operation to s 51(vi) as were Mason CJ, Wilson and Dawson JJ. Justices Brennan and Toohey were strongly influenced by constitutional history dating back to the *Magna Charta* which emphasised the primacy of the jurisdiction of civil courts over defence members and defence civilians. Their Honours said:

There are two sets of constitutional objectives to be reconciled. The first set of objectives, dictated by s 51(vi), consist of the defence of the Commonwealth and the several States and the control of the armed forces. To achieve these objectives, it is appropriate to repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members and defence civilians. The second set of objectives, dictated both by Chapter III and s 106 of the *Constitution* and by the constitutional history we have traced, consist of recognition of the pre-ordinate jurisdiction of the civil

27 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 545.

28 *Ibid* 543–4.

29 395 US 258 (1969).

30 483 US 435 (1987).

courts and the protection of civil rights which those courts assure alike to civilians and to defence members and defence civilians who are charged with criminal offences. To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline. These two sets of constitutional imperatives point to the limits of the valid operation of the *Discipline Act*. It may not impair civil jurisdiction but it may empower service tribunals to maintain or enforce discipline. *Therefore proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.*³¹

Their Honours were alert to the 'service connection' jurisprudence in the United States and the difficulties which it had caused for service tribunals. However, they did not consider that the test which they proposed was beyond the capacity of service tribunals to apply.³² Their Honours held that the Magistrate was able to deal with all three charges.

Justice Deane held that service tribunals could only be given jurisdiction under s 51(vi) to deal with what he described as 'exclusively disciplinary offences'. Applying this criterion, he held that the Magistrate was entitled to deal with the two charges of absence without leave but not the charge relating to falsification of a service document.³³

Justice Gaudron held that service tribunals did not have jurisdiction to deal with conduct engaged in by defence members in Australia where the offence was substantially the same as a civil offence.³⁴

The divergence of opinion meant that no ratio decidendi could be extracted from the reasons. Three members of the Court upheld the central elements of the new regime – the creation of all of the offences contained in the Act (including the civil criminal offences picked up through s 61) and the right of service tribunals to try them. Although Brennan and Toohey JJ agreed that the constitutional challenge should fail, their reasons left open the possibility that, in some future case, one of the 'adapted' offences created by the Act or an offence picked up through s 61, could not be tried by a service tribunal because their purpose test was not satisfied.

The Court also held that the provisions of ss 190(3) and (5) (which prevented civil courts from trying a service member who had asked a service tribunal to take into account an offence which had a civilian counterpart or who had been convicted or acquitted of such an offence by a service tribunal) were invalid because s 51(vi) of the *Constitution* did not give to Parliament the power to prohibit the exercise, by State courts, of the ordinary criminal jurisdiction vested in those courts by State law.³⁵ As a result, service members were technically at risk of double jeopardy. As a matter of practice this has not proved to be a problem, save in some rare instances when civil authorities have considered that

31 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 569–70 (emphasis added).

32 *Ibid* 571.

33 *Ibid* 591.

34 *Ibid* 599.

35 *Ibid* 548, 577–8.

penalties imposed by service tribunals have been manifestly inadequate and have launched prosecutions in civil courts.

These issues were again canvassed before the High Court two years later in *Re Nolan; Ex parte Young*³⁶ ('*Re Nolan*'). By this time Wilson J had retired and McHugh J had joined the Court. Staff Sergeant Young was charged before a Defence Force Magistrate with falsifying a service pay list so that it stated that he was entitled to receive more than his true entitlement contrary to s 55(1)(a) of the Act. This provision made it an offence for a defence member to falsify a service document with a view to gain. He was also charged, through s 61 of the Act, with the offence of using the falsified pay list with the intention of inducing an employee of the Commonwealth to accept it as genuine and to pay a larger amount than that to which he was properly entitled. This was an offence under s 135C(2) of the *Crimes Act 1900* (NSW) which applied in the Australian Capital Territory. The majority, Mason CJ, Brennan, Dawson and Toohey JJ, dismissed a challenge to the Magistrate's jurisdiction, consistently with their respective reasons in *Re Tracey*. Chief Justice Mason and Dawson J held that it was open to the Parliament to provide that civil offences could also be service offences if committed by service members and that charges could be dealt with by a service tribunal.³⁷ Justices Brennan and Toohey held that it could reasonably be said that the maintenance and enforcement of service discipline would be served by the Magistrate hearing and determining the charges.³⁸ Justices Deane, Gaudron and McHugh held that, as the service offences had civilian counterparts, it was not open to the Parliament to confer jurisdiction on the Magistrate to hear and determine the charges.³⁹

One further attempt was made to persuade the High Court to strike down the jurisdiction of service tribunals to deal with charges that were not purely disciplinary in character. This occurred in *Re Tyler; Ex parte Foley*⁴⁰ ('*Re Tyler*'). Wing Commander Foley was charged before a general court martial with dishonestly appropriating property of the Commonwealth contrary to s 47(1) of the Act. The charge arose out of an attempt by Wing Commander Foley to claim pay and allowances from the Commonwealth to which he was not entitled. The challenge to the court-martial's jurisdiction was dismissed. All members of the Court adhered to the views which they had expressed in *Re Nolan*. Justice McHugh considered that the reasoning of the majority in *Re Nolan* and *Re Tracey* was erroneous, but he maintained that the doctrine of *stare decisis* operated and that, because those two decisions were indistinguishable on the facts of the present case, the Court was bound to follow its earlier decisions.⁴¹

The result has been that, for over a decade now, service tribunals in Australia have applied Justices Brennan and Toohey's test in determining whether or not they have jurisdiction to try charges. This has not given rise to the type of

36 (1991) 172 CLR 460.

37 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 474–5.

38 *Ibid* 488–9.

39 *Ibid* 493, 498–9, 499.

40 (1994) 181 CLR 18.

41 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 37–40.

problem which beset military law in the United States before *Solorio v United States*. The main reason is that convening authorities have adopted a conservative approach when determining whether to refer charges to service tribunals. Where doubt exists, cases are referred to the appropriate Director of Public Prosecutions. Protocols have been developed under which consultation regularly occurs between military lawyers and DPP solicitors before any decisions are made about whether charges which have civilian counterparts should be dealt with in service tribunals or civil courts.

The conduct which led to the charges which were faced by the prosecutors in *Re Tracey*, *Re Nolan* and *Re Tyler* all occurred in or near metropolitan areas in Australia during peacetime. The Court was not called upon to rule on the extent to which the defence power might support the subjection of military personnel to the jurisdiction of service tribunals when the relevant conduct occurred in remote parts of Australia, during overseas deployment or when the service personnel were engaged in hostilities. Some members of the Court did, however, suggest that the Court may be more willing to countenance a wider jurisdiction for service tribunals in such circumstances. Reference has already been made to what was said by Mason CJ, Wilson and Dawson JJ on this point in *Re Tracey*. They were in no doubt that the proper administration of the defence force could involve service tribunals dealing with service members for service offences having civil counterparts when the conduct occurred 'in wartime or upon overseas service'.⁴² In the same case, Brennan and Toohey JJ said that, in applying their test, regard would need to be had to the environment in which the alleged offence occurred. They said:

In the application of this test, much depends on the facts of the case and the outcome may depend upon matters of impression and degree, especially on the needs of service discipline. In determining whether it is reasonable to regard the maintenance or enforcement of service discipline as a substantial purpose of bringing proceedings, it is important to consider whether the jurisdiction of a competent civil court can conveniently and appropriately be invoked to hear and determine a corresponding civil court offence. Thus, in a remote part of Australia where no civil court can conveniently be approached to entertain a prosecution for a civil offence, it may be necessary to proceed against a defence member for a corresponding service offence in order to maintain discipline in the relevant unit of the armed forces although there would be no authority to do so if the unit were stationed closer to a town. By the same token, the jurisdiction of service tribunals would expand greatly in time of war or when the relevant unit is serving outside Australia.⁴³

Justice Gaudron also expressed a readiness to adopt the less restrictive approach when defence members were deployed in remote parts of Australia or overseas.⁴⁴

In 2004 a case finally came before the High Court which called into question the jurisdiction of a service tribunal to deal with a soldier who was charged with

42 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 543–4.

43 *Ibid* 570.

44 *Ibid* 601.

misconduct during an overseas posting. *Re Colonel Aird; Ex parte Alpert*⁴⁵ involved an Australian soldier who was posted to the Butterworth base of the Royal Malaysian Air Force. His unit was providing protective security to the base. During this posting, the soldier took leave and went with other Australian service personnel to a resort in Thailand. While in Thailand, they were subject to immediate recall to duty. At the resort, the soldier met an English tourist. She subsequently complained to an Australian officer, who was also visiting Thailand at the time, that the soldier had raped her. Upon return to Butterworth, the officer reported the matter to his Commanding Officer and an enquiry was instituted. In the event the soldier was charged with rape⁴⁶ and the matter was referred to a Defence Force Magistrate for trial. By the time this occurred, the soldier had returned to Australia. The hearing took place in Brisbane. A preliminary application was made challenging the Magistrate's jurisdiction. It was contended on behalf of the accused that the proceedings could not reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. It was submitted that the soldier was on leave at the time in a country other than the one to which he was posted; that he was, in all relevant respects, indistinguishable from any other tourist at the resort; and that the conduct complained of would not have constituted an offence under Thai law. The Defence Force Magistrate rejected these submissions and held that he had jurisdiction to try the case. He relied on the fact that the soldier was known to the complainant as a member of the Australian Defence Force, that he was part of a group of Australian soldiers and that, although he was on leave, he was subject to immediate recall to duty.

The legal issues were complicated by a number of considerations. The first was that a considerable period of time had elapsed between the alleged rape and the commencement of the trial. During that time the accused soldier has returned to Australia and it had been possible to convene the trial in Brisbane. As a result, it could hardly be suggested that the immediate needs of military discipline and the absence of a convenient civil court warranted the exercise of jurisdiction by the service tribunal. The case also raised the question of whether or not Australian service personnel should be held to account for conduct which, if committed in Australia, would constitute a criminal offence but which would not be so treated in the country in which it occurred. Whilst it may have been advantageous to Private Alpert to claim that his conduct should be judged by reference to the law of the country in which it occurred, there may well be other situations in which Australian personnel would wish to be treated as being subject to Australian law in preference to the law of a country in which they are serving, especially where the laws of the foreign country limit defences which might be available under Australian law or provide for the imposition of punishments far more severe than would be the case in this country.

45 (2004) 209 ALR 311.

46 Strictly speaking the offence with which the soldier stands charged is the offence of engaging in sexual intercourse with another person without the consent of that other person contrary to s 54(1) of the *Crimes Act 1900* (ACT) which has application to the Jervis Bay territory. The offence there provided is rendered a service offence by s 61 of the *Defence Force Discipline Act 1982* (Cth).

The Magistrate's decision was challenged in the High Court. The case was considered by a Full Court after a justice had stated a special case that asked:

Insofar as Section 9 of the [*Defence Force Discipline Act*] purports to apply the provisions of that Act, including Section 61 ... so as to permit the trial by general court-martial under the Act of the prosecutor in respect of the alleged offence ... is it beyond the legislative power of the Commonwealth and, to that extent, invalid?

Section 9 gives extra-territorial effect to the *Defence Force Discipline Act* 1982 (Cth) in respect to service members. By majority (Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting) the question was answered 'no'. Despite some encouragement from some members of the Court during argument, the prosecutor did not invite the Court to re-open the question of whether service tribunals may exercise the judicial power of the Commonwealth.⁴⁷ Rather, argument concentrated on the question of whether s 51(vi) of the *Constitution* supported the imposition, by the Commonwealth, of an offence of sexual intercourse without consent on service personnel serving outside Australia. The prosecutor, not surprisingly, accepted the outcome of the earlier trilogy of cases and was, therefore, concerned to argue that, in the circumstances, the prosecution of the charge before a service tribunal could not reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. The majority rejected this contention.⁴⁸ Service discipline could, their Honours considered, be prejudicially affected by the presence of an alleged rapist in a unit. There was also a need to restrain uncontrolled violence by service personnel. The minority, on the other hand, considered that the circumstances of Private Alpert's alleged misconduct were not sufficiently service related to justify trial by service tribunal.⁴⁹

Although the question was not argued, Kirby J expressed agreement with the approach of Deane J that the constitutional doctrine of separation of powers meant that service tribunals could only be given jurisdiction under s 51(vi) to deal with 'exclusively disciplinary offences'. His Honour referred to what he saw as 'the need for this court to reinstate this simple rule of principle derived from the constitutional language and structure'. On this reasoning, s 61 of the *Defence Force Discipline Act* 1982 (Cth) would be invalid. He went on to predict that one day Justice Deane's view would come to be accepted unless the majority's decision 'puts the law on a mistaken track that proves irreversible'.⁵⁰

Justices Brennan's and Toohey's 'service connection' test has been retained as the test for determining the extent of the jurisdiction of service tribunals. It has now been applied to conduct occurring overseas whilst the service member concerned was on leave. Whether or not the Court will, at some time in the future, be prepared to entertain an argument that it should reinstate Justice Deane's 'simple rule of principle' remains to be seen. The issue may never arise

47 Transcript of Proceedings, *Re Aird & Ors; Ex parte Alpert* (High Court of Australia, Gleeson CJ, Gummow, McHugh, Kirby, Hayne, Callinan, Heydon JJ, 3 March 2004). The judicial power issue was raised at various points in the prosecutor's argument by Gleeson CJ, McHugh, Gummow and Kirby JJ.

48 *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311, 315, 322–3, 328, 349.

49 *Ibid* 335, 352–3.

50 *Ibid* 333–4.

if the Parliament acts on the recent recommendation of the Senate Foreign Affairs, Defence and Trade References Committee that the Act be amended to create a Permanent Military Court with jurisdiction to try offences under the Act currently prosecuted before courts-martial or Defence Force magistrates. The proposed military court would be created consistently with Chapter III of the *Constitution*. Its members would enjoy judicial tenure and, although they would, desirably, have some service experience, they would not be members of the Defence Force.⁵¹

For now the military discipline system, imposed by the *Defence Force Discipline Act 1982* (Cth), remains on a secure constitutional foundation provided that it is applied to conduct which can properly be regarded as ‘service connected’ whether or not the conduct occurs in Australia.

51 Report on the Effectiveness of Australia’s Military Justice System, June 2005, 101–2 (Recommendations 18 and 19). <http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/a04.pdf> At the time of writing this paper (June 2005) the report had not been considered by the Government although a response, following detailed analysis, had been promised.