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U.S. COURT OF APPEALS FOR THE ARMED FORCES

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**A NETTLE GRASPED LIGHTLY: THE INTRODUCTION OF THE
AUSTRALIAN MILITARY COURT**

"Constitutionality is a minimum standard. ... those responsible for organising and administering a military justice system must strive to offer a better system than that which cannot be constitutionally denied."

Chief Justice Lamer, *Report to the Canadian Minister of National Defence.*ⁱⁱ

Today I would like to talk to you about the recent Australian experience of military justice reform, in particular the imminent introduction of a permanent Australian Military Court. I have just offered you the observation made by Chief Justice Lamer in connection with the Canadian experience of military justice reform because I believe that it serves us in much the same way that a lodestone pointed the way for mariners of the past: it does not necessarily tell you exactly what your course is, or what your destination will be, but it does point you in the right direction.

In my opinion, a complication of the military justice system in Australia is that it does not possess any internal mechanism which would allow the system to incrementally change in order to remain aligned with community expectations and standards. Instead, as judicial and political winds change, the system has periodically

been subject to external scrutiny that has resulted in dramatic changes of course in order to "catch up" after years of stability. Chief Justice Lamer's observation that the system of military discipline to which we subject our servicemen and women should be the best possible that we can establish, is a decent and commendable standard to bear in mind whenever consideration is given to changing the course of the military justice system. I am pleased to say that in the past couple of years, reform of the Australian military justice system, particularly the establishment of a permanent military court (as opposed to *ad hoc* Service tribunals), has had considerable regard for this standard. While we have not achieved all that I might have hoped in our endeavours to bring the Australian military justice system into alignment with the modern expectations of justice held by the Australian people, I do believe that the already sound quality of justice delivered to our service personnel by the existing system will be lifted to a level at least heading towards best-practice as a result of the reforms to which I will speak this morning.

In order to understand the current changes to the Australian military justice system it is useful to understand what changes have occurred in the past. Many of you here might be familiar with the structure and history of military justice in Australia. For those of you who are not, I will offer a brief outline of the evolution of military justice in Australia before turning to a discussion of the *Defence Legislation Amendment Act of 2006*, the instrument which will bring into effect the Australian Military Court in October of this year.ⁱⁱⁱ

Until 1985 military justice in Australia was service specific, with the Royal Australian Navy, the Army, and the Royal Australian Air Force each operating their own discrete disciplinary regimes. The legislation underpinning these different regimes was fragmented and complex, and, although slightly modified and

modernised from time to time, continued to draw fundamentally on 19th century codes established for the regulation of the British Army and the Royal Navy.

It is uncontroversial that the military justice systems of common law nations have historically been subject to the greatest pressure for reform following periods of mass mobilisation. During the Second World War, Australia's defence forces, like those of the United States of America, relied overwhelmingly on citizen-soldiers who served only for the duration of conflict. The participation of these men and women in the defence forces widened general awareness and understanding of the military justice system of the time, especially its perceived limitations and deficiencies when compared to the civilian justice system. This in turn led to a push for change aimed at remedying perceived tyrannies and injustices and increasing the rights and protections of service personnel by aligning the military justice system more closely with civilian expectations of, and approaches to, criminal justice.

The consequence of this push in the United States of America was, of course, the introduction of the Uniform Code of Military Justice (UCMJ) in 1951. The same public pressure for change existed in Australia following World War II and although initially no less acute, it was effectively dispersed by the referral of the question of reform to a seemingly endless series of inquiries and boards. Piece-meal and service-specific reforms were effected from time to time, further blunting the urgency of substantial disciplinary reform. 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.

Public revulsion at high profile cases involving the perceived mistreatment of draftees re-energised the push for significant reform. The consequence of this was the

introduction of the *Defence Force Discipline Act* (DFDA) in 1982.^{iv} The DFDA unified and updated the disciplinary arrangements for the Australian Defence Force in ways very similar to the effect on your own armed forces of the UCMJ in 1951. The provisions of the DFDA commenced in 1985 and the arrangements which it put in place have endured substantially unaltered for twenty years.

The disciplinary offences established by the DFDA are applicable to all three services of the Australian Defence Force and they are quite wide-ranging.^v First, the DFDA includes offences not known to the criminal law, but which lie at the heart of military discipline such as desertion or absence without leave. The ambit of these offences is considerably widened by the existence of a general article (similar to Article 134 UCMJ) that prohibits conduct which is likely to prejudice the discipline of, or brings discredit upon, the Australian Defence Force. Secondly, the DFDA includes offences with directly parallel criminal equivalents such as theft or assault, but which are of pointed concern for the maintenance of good discipline when committed in a service environment. Once again, the ambit of these offences is wide due to a section which effectively introduces a suite of civilian criminal offences into the DFDA as disciplinary offences, in much the same way that Article 134 of the UCMJ does. Lastly, the DFDA includes some hybrid offences which in essence are known to the criminal law, but which contain additional specifically military elements such as, for example, assaulting a superior officer.

The service tribunals established by the DFDA to deal with these offences fit within what might be described as a bifurcated hierarchy. Those at the lower end of the hierarchy possess limited powers of punishment in respect of less serious offences and can deal only with defence members at the lower ranks, while those at the upper

end have the full range of DFDA punishments at their disposal, and can try any DFDA offence against any defence member.^{vi}

While all DFDA service tribunals are court-like insofar as rules of proof, evidence and procedure apply, upper level tribunals differ significantly from those at the lower level. The lower level tribunals, termed summary authorities, are administered by military personnel without formal legal training, while those appearing before or directing or sitting on the upper level tribunals are all legally trained. Typically a summary authority involves a commanding officer, usually at the rank of Lieutenant Colonel or equivalent, hearing a charge or charges against a member of his command. The accused at his or her own choice is represented either by him or herself or by another member of their unit, usually at senior non-commissioned officer rank. Likewise the prosecutor is also usually drawn from the unit and is of similar rank to the member defending the accused. Legal rules of evidence and procedure apply to the hearing and the commanding officer is left to decide guilt or innocence according to the criminal standard. The accused is able to seek legal advice from a legal officer^{vii} both before and after the hearing, and the proceedings are independently reviewed by a legal officer before being confirmed further up the chain of command by the relevant formation commander.

The higher level DFDA tribunals include trials by Defence Force magistrate and trials by court martial. A Defence Force magistrate's trial is presided over by a legal officer of around the rank of Colonel or equivalent appointed pursuant to the DFDA to sit as a Defence Force magistrate. A Defence Force magistrate has all the powers of a restricted court martial. He or she sits alone as both the decider of fact and law and has available to him or her all but the most severe of punishments allowable under the DFDA. Responsibility for matters of fact and law are, however,

split for DFDA courts martial. Matters of fact are decided by the court martial panel made up of three or five general service officers, depending on whether the trial is a restricted or general court martial. A Judge Advocate, a legal officer of around the rank of Colonel or equivalent appointed to the role pursuant to the DFDA,^{viii} and appointed to sit on the specific court martial, gives binding advice to the panel on matters of law. Both the prosecuting and defending officers for Defence Force magistrate's trials and courts martial are legal officers.

Notwithstanding the role of legal officers at the upper level DFDA tribunals as technical specialists, the disciplinary system established by the DFDA in 1985 was driven by commanders and the chain of command. The vast bulk of disciplinary matters were dealt with at unit level by commanding officers sitting as summary authorities.^{ix} In such circumstances the decision to initiate disciplinary proceedings against a defence member through the laying of a charge rested solely within the unit. All charges within the unit were either dealt with directly by the commanding officer through his or her own hearings, or indirectly through review of lower level intra-unit disciplinary hearings. The only way for a charge to find its way out of the unit and before a higher level tribunal, either a Defence Force magistrate or a court martial, was for the commanding officer to refer the matter to a convening authority.

A convening authority was usually a formation commander at around the rank of Brigadier or equivalent. Referral of a matter to a convening authority could occur in only three circumstances. First, if the commanding officer did not have jurisdiction to hear the charges due to the rank of the accused or the seriousness of the offence. Secondly, if the commanding officer had jurisdiction to hear the matter but thought it prudent to refer the matter up for reasons such as the complexity of the case. Thirdly, if the accused requested the matter to be dealt with by a Defence Force magistrate or

court martial having first been offered the election by the commanding officer. In only the first circumstance was the discretion of the commanding officer not decisive in a matter going before a court martial or defence force magistrate.

Once a matter came into the hands of a convening authority it became his or her responsibility to set in train all the legal and administrative requirements needed to bring the matter to hearing. This involved deciding on whether the charges referred up from the commanding officer were adequate, and if not the drafting and laying of new charges. It involved appointing a prosecuting officer and defending officer, as well as the Defence Force magistrate or Judge Advocate. It involved securing the attendance of prosecution and defence witnesses, as well as appointing the members of the panel in the case of courts martial. While all these decisions were made by the convening authority with the advice of a staff legal officer, they were all ultimately exercised at the convening authority's sole discretion.

In many respects the role of convening authorities in the DFDA system was very similar to the current role of convening authorities under the UCMJ. However, unlike the UCMJ system, the DFDA contained little provision to guide convening authorities in the exercise of their discretions, or formal restraint to constrain the improper exercise of discretions. For example the DFDA was silent on how a convening authority should decide on the appointment of officers to the panel of a court martial, whereas the UCMJ provides quite specific guidance to a convening authority in Article 25. Likewise, Article 37 of the UCMJ specifically forbids a convening authority from seeking to reprimand, censure or admonish any member of a court martial in connection with the discharge of their court martial duties. Similarly, the role of our convening authorities has attracted little judicial attention and so the body of precedent established by the U.S. Court of Appeals for the Armed

Forces constraining in particular ways the exercise of the discretion of the convening authority in recent years does not exist in Australia.^x Neither the DFDA nor interpretative precedent, offered much in the way of checks or balances to ensure that convening authorities exercised, or more importantly were seen to exercise, their discretions in a just and fair manner.

This then was the broad structure of Australian military justice as established by the *Defence Force Discipline Act* in the mid 1980s and which endured largely unaltered to the middle of the current decade. As you can see, command played a key role at all levels of this system in determining just how a disciplinary offence was to be dealt with. This was, within limits, a strength. The military justice system exists as a tool of command employed to produce a disciplined and operationally effective force. Commanders must, therefore, be able to exercise some control over the system. They must be able to determine whether the interests of their unit require that a matter be dealt with as a disciplinary offence or not. They know their own soldiers, sailors and airmen and are well placed to assess what punishment fits the offence and the circumstances of the offender. Yet, too intimate a relationship between the two can also be a weakness. Unchecked control with inadequate transparency, and inconsistency, can lead to perceptions of unfairness and oppression, thereby decreasing the confidence of service men and women in their chains of command.

As the term itself suggests, military justice requires not just the exercise of justice, but the exercise of justice in military environments for military purposes. This involves balancing the protection of the rights of defence members with the imperatives of attaining and maintaining operational effectiveness. The point at which the DFDA struck this balance became over time an increasingly sensitive pressure-point for change. While the legitimacy of the DFDA disciplinary system has

yet to be subject to a decisive blow, it has, rather like the ocean working on a precipitous cliff-face, been worn down by a succession of waves. These waves, in turn, have emanated from two distinct sources, the courts and the parliament, and have brought about the change which the Australian military justice system is currently experiencing.

Since their introduction, the legitimacy of DFDA service tribunals and their exercise of power have been repeatedly challenged before the High Court of Australia, our supreme federal court. These challenges have generally taken one of two approaches when attacking our system of service tribunals. The first has been to deny the legitimacy of the tribunals themselves by arguing that the power they exercise is a power denied to them by the Australian constitution. This argument was first run before the High Court in 1989 and has, indeed, been run again as recently as February of this year.^{xi} Chapter III of our constitution (much like Article III of the Constitution of the United States of America ("the American constitution")) states that "the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates".^{xii} Australian courts martial and Defence Force magistrates' trials look a bit like courts. They try service offences according to the same rules of evidence and proof employed in federal courts. They impose punishments that can range up to imprisonment in a civilian gaol. The argument mounted against them is that by doing these things they are in fact purporting to exercise the judicial power of the Commonwealth, while not actually being a court created by the Parliament in accordance with the Constitution. By so doing, it is argued, their exercise of power is unconstitutional.

The High Court has generally rejected this argument by accepting that service tribunals are not exercising the judicial power of the Commonwealth, but are in fact exercising power pursuant to the Commonwealth's power under section 51 of the Constitution to make laws with respect to the "naval and military defence of the Commonwealth" – commonly referred to as the Defence power – insofar as they are concerned with the enforcement and maintenance of service discipline.^{xiii} Like the power granted to Congress in Section 8 of Article 1 of the American constitution, our Federal Parliament is granted the power to make laws connected with defence of the Commonwealth, although notably the American constitution goes further by granting Congress additional specific power to "make rules for the Government and Regulation of the land and naval forces", suggesting a much clearer contemplation of the need to establish a military justice system. Consequently, the court-like trappings of service tribunals have been held to constitute the exercise of judicial-like power, but they have not been regarded as impinging on the Chapter III judicial power of the Commonwealth, as they are in the service of ends which lie outside the scope of Chapter III of the Constitution. Rather they have been seen as creatures of the legislature in a way similar, although more limited, to your concept of Article I tribunals (or, as they are described, "legislative courts").

The second line of attack on the DFDA system of service tribunals mounted in the courts has been to accept that they are able to exercise power pursuant to the Defence power of the Commonwealth, but to challenge the cut-off point of this power. The concern here has been with jurisdiction. Since 1985 there have been four matters decided by the High Court where this was an issue, with a fifth currently before the court pending decision shortly.^{xiv} In each of these cases, notwithstanding dissenting opinions and various refinements of reasoning, the centre of gravity has

tended to lie with a *service nexus* test. Such a test has been variously formulated, but in essence the High Court has accepted that service tribunals have jurisdiction to deal only with offences that substantially serve the purpose of maintaining or enforcing service discipline.

What might substantially serve the purpose of maintaining or enforcing service discipline is very context dependant. In time of war, or while our defence force is on operations, especially when overseas, the ambit of offences to which an Australian service member might be liable has been described as necessarily larger than the ambit of offences to which they would be subject to while they were off duty at home in Australia. For example, the rape of a civilian by a soldier in Australia while he was on extended leave away from the barracks would likely be beyond the reach of our service tribunals, but the same offence committed against a civilian overseas while on operations in a disturbed or dislocated society would very likely be triable in a service tribunal. As can be seen, in Australia the test for determining jurisdiction is far more limited than the status test adopted by your Supreme Court in the case of *Solorio v United States*^{xv}. Indeed, the service nexus test in Australia considers many of the same factors and elements articulated by your Supreme Court in *Relford v Commandant, U.S. Disciplinary Barracks*^{xvi}. Of course, the aim of those seeking to challenge the jurisdiction of our service tribunals is to try to limit as much as possible the scope of offences encompassed by the *service nexus* test.

Appeals brought before the High Court of Australia challenging the exercise of the judicial power of the Commonwealth and the jurisdiction of service tribunals have not touched on the fairness and impartiality issues raised in Canada and the United Kingdom by *Findlay v the United Kingdom*^{xvii}, *Grievs v the United Kingdom*,^{xviii} and *R v Genereux*.^{xix} These cases, of course, held that systems of

military trials dependant on the chain of command for the exercise of critical trial discretions are fundamentally unfair and contrary to the human right to trial by an impartial tribunal. Although these decisions turned on locally compelling rights instruments such as the guarantee to independent and fair trial contained in the Canadian Constitution, or the subjection of the United Kingdom to the requirement of the European Convention on Human Rights that trial be by independent and impartial tribunal, and although no Australian rights legislation makes demands of such specificity or thoroughness, there is a substantial possibility that at least some members of our High Court might see such obligations as applying to our own jurisdiction, and the military justice system in particular.

While courts of review in the United States have accepted a doctrine of "military deference" in which the resolution of conflict between the constitutional rights of individual service personnel and asserted military purpose has been adjudged to best lie with Congress, in Australia, the High Court has been inclined to give no such deference.

The concern in Australia was that, given the repeated High Court challenges to the DFDA system, sooner or later fairness and impartiality would be raised as an appeal point. In this regard the central role of the convening authority, in deciding on the charge, the time and place of the trial, the identity of the accused's defending officer and the prosecuting officer, in making witnesses available for the prosecution and the defence, and in deciding on and appointing the judicial officer and the military panel, if one was needed, was a weak point in the system. Informed observers in Australia believed that while the DFDA military justice system might scrape by further challenges to its constitutionality or jurisdiction, it was only a matter of time before the partiality and lack of independence caused by the central role of the

chain of command would cause the system to come to judicial grief. It might have been less worrying if we were starting from a position of strength, but a significant minority of the High Court has been unconvinced as to the constitutional validity of service tribunals, and the "fair and impartial" argument may have been sufficient to turn a significant minority into a majority.

The pressure for reform exerted by the courts has been subtle, as it has been the possibility of successful challenge rather than its actuality that has acted as a driver. Much less subtle has been the pressure from the legislature and the executive to reform the DFDA system. Within the last ten years there have been no less than four large-scale inquiries which have turned at least part of their attention to the functioning of the DFDA system of military justice, the most recent of these having handed down its findings in June 2005, with previous reports having been published in 1997, 1999, and 2001.^{xx} These inquiries have either been conducted by bi-partisan committees drawn from our federal parliament, or by independent inquiry officers appointed pursuant to the authority of the executive arm of government.

In this regard the Australian experience of military justice reform has again been quite different from that of the United States of America. I understand that the most recent report proposing change to the UCMJ was completed independently from government by the Cox Commission in 2001. While drawing a spirited defence against reform from some uniformed lawyers, the report did not spur the United States government into any re-examination of the case for change. The military justice system of the Australian Defence Force has, in contrast, been subject to repeated government or government sponsored inquisition in recent years. None of the reports generated by these inquiries have been particularly kind to the Australian Defence

Force. Indeed, they have led to considerable adverse publicity in the Australian media each time they have been released.

One of the principal reasons for this is that when examining the justice system of the Australian Defence Force these reports have included not only the DFDA disciplinary system, but also the separate administrative law system of inquiries and sanctions. The most egregious and publicly sensitive cases documented by these reports of the justice system failing Australian service personnel have generally been administrative in character, involving alleged or perceived failures to deal with the grievances of service personnel adequately. Despite this, the disciplinary system has been caught up in the general cry for military justice change. Nevertheless, the recommendations advanced by these reports have mostly been thoughtful. Like the *obiter dicta* of dissenting High Court justices, they have pointed out aspects of the military justice system which are less than ideal. However, unlike the measured words of High Court justices uttered in a forum some distance from the front page of the morning newspaper, the findings and recommendations of these inquiries have attracted considerable public attention and therefore placed considerable pressure on the executive to reform the military justice system.

The most substantial reform to the DFDA military justice system arising out of these inquiries to be fully implemented to date has been the abolition of convening authorities in June of last year. While the abolition was a sudden event, the lead up to it was not. Over several years the institutions necessary to replace the convening authority, especially the Director of Military Prosecutions, were developed because of delays in getting legislation enacted.^{xxi} As noted earlier in this paper, convening authorities played a central role in the exercise of many important pre-trial discretions in connection with Defence Force magistrates' trials and courts martial, with none of

the codified constraints or guidance which operate on convening authorities under the UCMJ. The great concern was not that senior officers as convening authorities were actually using their position to improperly influence the outcomes of service tribunals, (although there were very rare instances of this), nor that they were exercising their discretions inconsistently, (although, once again, there were instances of this). Rather, it was the matter of perceptions of impartiality and fairness, not just of the public at large, but more particularly of servicemen and women and their faith in the integrity of the military justice system and their commanders.

There was also the feeling that the system had become dated and out of kilter with its counterparts in Canada and the United Kingdom. We were no longer able to say of the system that although it was different from that provided by the civil courts, all of our common law allies also did it this way. Rather, both Canada and the United Kingdom had gone a long way to matching the standards and expectations of their civil systems. It was believed that it was time to do the same thing in Australia.

The discretions previously exercised by convening authorities under the old DFDA system have for almost twelve months now been separated and transferred to independent or semi-independent decision makers.

The prosecutorial discretions of the convening authority are now exercised by the Director of Military Prosecutions ("the DMP"), an independent statutory appointment at the legal officer rank of Brigadier or equivalent, outside the chain of command, and with her own office, staff and budget. Units still possess authority to initiate and lay charges, but those matters which commanding officers wish to have dealt with by higher service tribunals are now referred to the DMP for decision on whether to proceed, and if so, the form of the charges and the appropriate tribunal. The DMP also selects the prosecuting officer from the staff of her own office.

However, the DMP also possesses the power to initiate disciplinary proceedings herself, having also been authorised to lay charges against service personnel directly.

The administrative discretions of the convening authority are now exercised by the Registrar of Military Justice ("the RMJ"), an independent statutory appointment at the rank of legal officer Colonel or equivalent, outside the chain of command, and with his own staff and budget contained within my office, the office of the Judge Advocate General. If the DMP decides that a matter should be tried by court martial or Defence Force magistrate, the charges are referred from the DMP to the RMJ with a binding request that the matter be set down for hearing. The RMJ appoints the Judge Advocate or Defence Force magistrate, nominated by me, the Judge Advocate General, who will hear the matter, and decides on the date, time and location of the trial. If the matter is a court martial, it is also the responsibility of the RMJ to appoint the court martial panel. The RMJ currently does this by approaching the relevant service officer career management agency and requesting that a number of officers at specific ranks be nominated for court martial duty. Without knowing the identity of the accused or the nature of the charges, the relevant agency produces a list of officers who are releasable from duty without prejudice to operational interests. The RMJ then uses this list to randomly appoint the number of panel members required by the court martial in question.

The defence counsel responsibilities of the convening authority are now exercised by the Director of Defence Counsel Services ("the DDCS"). While being a legal officer at the rank of Colonel or equivalent, the DDCS, unlike the DMP and the RMJ, is not a statutory appointment. It is the responsibility of the DDCS to ensure that any accused who wishes to be represented by a defending officer is provided with a service lawyer.

The primary intent of these changes was to eliminate the suggestion that the chain of command is able to influence the outcomes of trials through the improper exercise of the discretions formerly held by convening authorities, however a secondary intent was to simplify the process and to improve the consistency of trial decision making by removing decision making from the plethora of convening authorities previously in existence across the Australian Defence Force and placing it in the hands of three central figures. In making these changes it was clear that the balance between military interests and the rights of service personnel would shift from the former to the latter. In some respects this was perfectly desirable, but it was also recognised that the chain of command needed still to be able to use the military justice system as a tool to produce a disciplined and operationally effective defence force. This was preserved to a degree, despite the abolition of convening authorities, by allowing commanding officers to retain the discretion to initiate disciplinary proceedings, as well as by the creation of what are called "superior authorities". "Superior authorities" are effectively convening authorities by another name with their teeth having been drawn. Their role is to advise the DMP of the service interest in trying a particular charge in a particular venue against a service member. In this way the DMP, a legal officer with no substantial experience of command, is able to take into account command interest when exercising prosecutorial discretions without being bound by it.

The abolition of convening authorities and their replacement by independent trial decision makers by our military justice system last year was largely the consequence of the recommendations made by the 1997, 1999 and 2001 reports and Judge Advocate General reports to Parliament.^{xxii} As I noted earlier the most recent report into the effectiveness of our military justice system was released in June

2005.^{xxiii} While it has consistently been my belief, and that of many of my colleagues, that the DFDA was a sound disciplinary system that simply needed modification of its structures to be brought into alignment with contemporary expectations, there were still many, particularly in parliament, who felt that the same complaints about the fairness and equity of the military justice system were being made again and again, and that the Australian Defence Force, the Department of Defence and the executive arm of the Australian government were unwilling to address them.

This was the background against which further remit to examine the effectiveness of the Australian military justice system was again handed by the Senate to the Foreign Affairs, Defence and Trade References Committee, for inquiry and report in 2003. The inquiry ran for just under two years, holding eleven public hearings and seven in-camera hearings, and receiving 71 public submissions and 63 confidential submissions. I was amongst the many invited to make submissions to the committee alongside other senior service legal officers, both permanent and reserve, civilian professional legal bodies, and any individual who felt they had an interest in the system.^{xxiv} In June 2005 the committee's 312 page report, containing 29 separate recommendations, was published.

Having already been on the receiving end of three quite uncompromising assessments of its military justice system already, the Australian Defence Force expected the 2005 report to be more of the same. In some measure it was, but the harshness of the rhetoric this time around was of a greater order of magnitude than that seen in previous reports. For example, the report's authors sympathetically quoted submissions made to it such as:

"The military justice system in its current form is an anachronism. It is 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 ... There is no longer a requirement for the public purse to bear the cost of maintaining a separate but parallel criminal law process";^{xxv}

or

"Our family's psychological and emotional abuse suffered at the hands of the military justice system has been likened to repeated bashings with a baseball bat ... Our journey is a horrific example of the appalling state of the military justice system ... [it is] a system in total disarray."^{xxvi}

Passages such as this darkly hinted that the authors of the report thought that military justice was something that the modern military simply did not need, or would be better off contracting out to civilian agencies (in much the same way as catering and accommodation is nowadays dealt with), if it could not be trusted to handling it efficiently itself.

The government responded promptly to these concerns and assigned the committee's recommendations a degree of legislative priority not enjoyed by the recommendations of previous inquiries. The recommendations themselves concentrated substantially on the administrative law processes that form part of military justice. Those that focussed specifically on DFDA practices and processes coalesced around two issues: the reform of service investigative processes and agencies and the reform of the service disciplinary tribunals themselves. In connection with the latter it was the perceived lack of independence of the current system of DFDA trials by Defence Force magistrate and courts martial that most concerned the committee. In order to remedy these defects the committee recommended that:^{xxvii}

- 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;

- The Permanent Military Court be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality with judges to be appointed by the Governor-General in Council with tenure until retirement age;
- 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; and
- The bench of the Permanent Military Court should include judges whose experience combines both civilian and military practice;

In addition to these recommendations concerning the structure of the Permanent Military Court, the committee also recommended that any Defence member charged with a service offence be given the right to elect trial by the Permanent Military Court rather than a summary authority if they so chose and that a right of appeal be established from summary authorities to the Permanent Military Court.

The overall effect of the suggested reforms would be to abandon the system of *ad hoc* tribunals deriving their power from Parliament's ability to make laws in connection with the defence of the Commonwealth, presided over by legal officers subject in some degree to the chain of command, in favour of fully constitutionally compliant independent courts entirely outside the purview of the executive and the Australian Defence Force chain of command, presided over by individuals with all the protections of judicial independence. Furthermore, the control exercised by the chain of command over the military discipline process would be eroded yet further by giving service men and women charged with an offence the technical freedom to decide which tribunal they would prefer to have try the matter.

The move to replace courts martial and trials by Defence Force magistrate by a Permanent Military Court was bold. Previous attempts at reform had been restricted to the connection with the chain of command embodied by the convening authority. As noted, on the recommendation of previous inquiries, the role of the convening authority was effectively abolished in the middle of 2006 with the convening authorities' functions being divided between the DMP, the RMJ and the DDCS. Yet all this reform left the higher DFDA tribunals as still essentially service creatures, reliant for their legitimacy on the exercise of the Defence power condoned with fluctuating enthusiasm in the High Court challenges mentioned earlier. The committee recommended that this approach be abandoned and that a Permanent Military Court should be established sitting outside the Defence power, drawing its authority from its status as a constitutionally valid Chapter III federal court. This would be akin to the government of the United States changing UCMJ courts martial from Article I to Article III tribunals. For many years the constitutional validity of DFDA service tribunals had been a constant nettle to the Australian Defence Force. The Senate Committee's report in 2005 clearly proposed that this nettle should now be firmly grasped and the issue settled once and for all.

The government's response, published in October 2005, certainly grasped the nettle, but not nearly as firmly as the committee would have liked.^{xxviii} The government agreed that it would establish a permanent military court (to be known as the Australian Military Court), and that it would take measures to guarantee it greater independence than those supporting the current system of *ad hoc* tribunals. However the government did not agree to alter the character of the court so as to place it within the bounds of the exercise of judicial power of the Commonwealth in accordance with Chapter III of the Constitution. This was simply a step too far.

Rather, the government's vision for the Australian Military Court was to establish the court pursuant to the same authority, the defence power and concomitant defence legislation, which legitimated the already existing system of courts martial and Defence Force magistrates' trials. Judicial independence was to be guaranteed by the appointment of military judges by the Minister of Defence, a representative of the executive branch of government, to five year fixed terms with a possible renewal for a further five years. While serving a period of appointment military judges were not to be eligible for promotion. The government saw the court as being made up of a chief military judge, supplemented by two further permanent military judges, and a further part-time panel of reserves. The military judges were to have a level of professional qualifications and experience similar to those required for appointment to civilian judicial office. While the government stressed that a military judge should have a balance of experience in civilian legal and military practice, qualified military legal practitioners were not to be excluded simply on the basis that they did not have any civilian legal experience.

The government was adamant that these measures alone would be sufficient to guarantee the independence and impartiality of the court and that it would not be necessary to go outside the Defence power and provide the court with the full extent of independence guarantees so as to make the court compliant with the requirements of Chapter III of the Constitution. Although on one hand, the committee stressed that it wanted those sitting on a Chapter III compliant military court to have service and judicial experience, the service career of any such judge would clearly have to be behind him or her in order not to offend principles of impartiality. The government, on the other hand, emphasised that those sitting on service tribunals must not only have service knowledge in order to justly judge and sentence in connection with

service offences, but that they must also be available to go with the court into operational theatres as members of the Australian Defence Force to hear matters as they occurred while on deployment overseas.

The other sting associated with making the court compliant with Chapter III of the Constitution involved Chapter III's guarantees to trial by jury, similar to the guarantee offered by section 2, Article III of the American constitution. Although superficially looking like a jury, a court martial panel (or military jury as it was proposed to be called) is a quite different beast. In terms of its smaller size, sufficiency of majority verdict, and constrained selection pool, the military jury fell short of the common law jury requirements implicit in section 80, Chapter III.^{xxix} The government did not want to abandon these features of the Australian Military Court as they were intimately connected to service interests, particularly the ability of the court to sit in overseas operational theatres, the bringing of service knowledge to bear on the court's deliberations, and mitigating the diversion of personnel resources away from operational priorities.

In this regard, the committee saw the Australian Military Court as sitting outside the Australian Defence Force and best served by essentially civilian judges, albeit with past service experience to draw upon, together with something very close to a common law jury; whereas the government saw the judges of the court as serving military officers first, with judicial expertise as a secondary characteristic, a military jury very close to the old courts martial panel, and the court itself, while possessing more independence than current higher level service tribunals, still firmly located within the bounds of the Australian Defence Force. The nettle was at least being grasped, but not as firmly as many of the proponents for change would have liked.

The time given for completing the implementation of the agreed reforms was the end of 2007. The deadline for the establishment of the Australian Military Court in particular was October 2007. The legislation containing the Australian Military Court provisions as envisioned by the government was introduced into our federal parliament in September last year.^{xxx} The passage of the *Defence Legislation Amendment Bill 2006* through the lower house was smooth, but things soon became unstuck when the Bill entered the Senate and was reviewed by the Senate Committee whose recommendations had been the prime mover for the reform. This review was, effectively, the first opportunity for the committee formally to offer its view as to the adequacy of the government's response to its recommendations. The committee sought written submissions from invited parties, before holding a meeting on 9 October 2006. I was once again asked as the Australian Defence Force Judge Advocate General to make written submissions and to appear before the committee.^{xxxi}

The concerns which I articulated before the committee were substantially those which I had earlier raised before the committee when it was conducting its inquiry in the first instance. While the High Court has never absolutely rejected the Defence power as a basis for service tribunals, it has always seemed to offer it only qualified endorsement. While it may not have been possible to establish a military court under Chapter III, nonetheless, in my view, the more closely the arrangements for the Australian Military Court could be made to align with those prevailing in Chapter III courts, then the less risk the court ran of being successfully challenged and struck down judicially. The model of the court presented by the *Defence Legislation Amendment Bill of 2006* fell some way short of that.

My first concern was that the Australian Military Court was to be established as a tribunal, beholden to the executive and without the status and independence of a court exercising judicial power. The DFDA would grant this tribunal power to try the most serious disciplinary offences, such as sexual assault or murder, committed by Australian servicemen and servicewomen while on operations overseas. To have such offences dealt with by a body described as a tribunal and possessing circumscribed independence seemed to me to be incongruous.

Of greater concern was the move to establish tenure for terms of five years for military judges, renewable in exceptional circumstances for a further term of five years. Appointment was terminal, with military judges being barred from continuing their service careers at the conclusion of their terms. I viewed the shortness of the proposed term as inconsistent with principles of judicial independence. I also viewed the shortness of the proposed term as inconsistent with the service interest in developing a cadre of experienced military judges. To terminate the career of a judge five years into an appointment would, in my view, be to cut that career short just as the point that judge is performing at his or her optimum. Finally, the terminal nature of the appointment would discourage many talented, younger service legal officers from seeking appointment until they had reached the later stages of their careers, and, of course, the concept of a renewable term for the judges at the behest of the executive was completely inconsistent with their independence. For all these reasons, I did not view five year, terminal appointments as a suitable way for establishing the tenure of the prospective bench of the Australian Military Court.

My preferred model would have been for the Australian Military Court to be established with military judges provided with tenure until retirement, even if that retirement would be set at a comparatively young age. In this regard my view has

always been not that we should establish a military justice system that satisfies the bare minimum of requirements. Rather, as I said at the outset today, I agree with Chief Justice Lamer when he said we have an obligation to our service men and women to establish the best possible military justice system that we can for them.

The Bill attracted adverse comment from other quarters and the government removed it from the Senate to reconsider its provisions. It was slightly altered to take into account the matters raised by the committee and reintroduced to the lower house in November 2006. It passed smoothly through both houses this time, becoming law on 11 December 2006.^{xxxii} While the final shape of the court did not resemble all that I might have hoped that it would, it was an advance on what was being proposed two months earlier. The court is to be a court of record (although I think this needs to be reconsidered). The settled term for the tenure of the judges will be ten years, with appointment and termination by the Governor General. Unfortunately, this effectively amounts to removal by the executive and is, in my view, inconsistent with full independence. The appointment will ordinarily be terminal, but there will be scope for a military judge to be further temporarily appointed in an acting capacity after retirement. At the five year mark a military judge will automatically be promoted to the next highest rank. These measures are an advance on our current system of courts martial and trials by Defence Force magistrate. They create a service tribunal with greater stature and independence and which is more fully insulated from command influence, but I remain of the view that the nettle of change should have been grasped more firmly. Observations made by one of our High Court Justices during submissions in connection with a current challenge to the constitutionality of our present military justice system bear this out, and I will return to them.

Other notable features of the Australian Military Court as it will come into existence in October this year is that its military judges will have the ability to sit alone or with a military jury depending on the seriousness of the offence and the wishes of the accused. Military juries will generally be constituted by six members at the officer or senior warrant officer rank, although the most serious offences will be tried before juries of twelve officers or senior warrant officers. Selection and appointment of these juries will be by a uniformed Registrar of Military Justice, appointed outside the chain of command. If a jury is unable to offer a unanimous decision after eight hours of deliberation, decision is to be by five-sixths majority. Given the size and operational tempo of our Defence force I believe that it will be difficult in practice to obtain the numbers of officers and senior warrant officers required to sit as jury members, especially seeing that the Registrar is currently encountering difficulties panelling courts martial that only require three.

It is planned that the Australian Military Court will start hearing its first matters in October this year. Many of those involved in the administration and exercise of military justice in Australia feel a great sense of relief that the some of the uncertainty generated by repeated government inquiries and constitutional challenge might be behind us with the implementation of reform to modernise the system. However, recent remarks by Justice Kirby of the High Court of Australia may suggest otherwise.

A case involving the constitutionality of the pre-Australian Military Court justice system is currently before the High Court.^{xxxiii} The challenge is on the familiar basis that the exercise of power by a service tribunal is unlawful as it is an exercise of the judicial power of the Commonwealth by a body outside the ambit of Chapter III.

During submissions counsel drew the court's attention in passing to the legislation that will establish the Australian Military Court.

While most of the justices hearing the matter refused to comment, Justice Kirby did not react positively. His view was that a body that looked like a court and acted like a court, even purporting to refer to itself by that name, and to be constituted by a judge and jury, but established and operating within the control of the executive arm of government was a very disturbing development. He quite clearly felt that tight control should be exercised over the establishment of tribunals outside Chapter III of our Constitution and regarded with suspicion moves to establish in Australia a widened category of non-Chapter III tribunals which would parallel judicially accepted legislative courts in the United States. Separation of the judicial and executive arms of government clearly played on Justice Kirby's mind. The decision has yet to be handed down. Whether the issue played on the minds of the other justices will be a strong indicator as to whether the Australian Military Court will be subject to future repeated constitutional challenge, as were its predecessors. Unfortunately, I rather think that it will. What is somewhat ironic about this situation is that Justice Kirby has seized upon the very attributes of the new Australian Military Court which are designed to align our new superior service tribunal more closely with the structures and protections of the Chapter III courts.

As part of the debate about the Uniform Code of Military Justice in 1948 General Dwight D. Eisenhower observed that one unassailable certainty about the Armed Services was that : "it was never set up to insure justice".^{xxxiv} Rather, he argued, the function of the military was to defend the nation, and in so doing must violate the very concepts of rights and justice for which the nation stood. Certainly operational effectiveness is the goal of an armed force, and, in turn, discipline, backed

by a military justice system, is a key component of operational effectiveness. However, I do not believe that a military justice system must altogether abrogate justice, and the values of the wider society served by the military, in the purported interests of command. Justice, in terms of aligning the military justice system more closely with the expectations of society, increases the faith of service men and women in the chain of command and the forces in which they serve. This can only improve operational effectiveness. Of course, the discipline system must remain a tool of command – the delicate question is just where the balance is drawn between the rights of the individual and the needs of command. The Australian Defence Force has now shifted that balance closer to the former than the latter. I am confident that our Navy, Army and Air Force will be all the stronger for it.

ⁱ. I wish to record my appreciation for the work of my Staff Officer, Major Lachlan Mead, in the preparation of this paper.

ⁱⁱ. The First Independent Review by the Right Honourable Antonio Lamer P.C, C.C, C.D., of the Provisions and Operation of Bill C-25, *An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts*, as Required Under s.96 of Statutes of Canada 1998, c.35, Submitted to the Minister of National Defence, September 3, 2003, p. 21 available at http://www.dnd.ca/site/Reports/review/index_e.asp as at 24 April 2007.

ⁱⁱⁱ. For a more extensive introduction to the history of military justice in Australia see Wing Commander Frank B. Healy, "The Military Justice System in Australia" (2002) 52 *The Air Force Law Review* 93.

^{iv}. *The Defence Force Discipline Act 1982* (Cth). Available at <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401462?OpenDocument> as at 24 April 2007.

^v. See Part III of the DFDA.

^{vi}. For a discussion of the operation of the DFDA prior to the abolition of convening authorities and introduction of the Australian Military Court see Wing Commander Frank B. Healy, *loc cit*.

^{vii} In the ADF, a legal officer is a fully-qualified lawyer, equivalent to a staff Judge Advocate (or "JAG" officer) in the United States Armed Forces.

^{viii}. Qualified legal officers are appointed to the Judge Advocates Panel by the Chief of the Defence Force or a Service Chief, on the nomination of the JAG. Appointments of Defence Force Magistrates are then made from that Panel by the JAG to the DFM Panel. From those panels they are appointed to individual trials as required.

^{ix}. Statistical breakdown of offences and tribunals by service are included in my annual reports to Parliament available at <http://www.defence.gov.au/jag/reports.htm> as at 24 April 2007.

^x. For example *United States v Wiesen* 56 M.J. 172 (2001) and *United States v James* 61 M.J. 132 (2005).

^{xi}. See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 and *White v Director of Military Prosecutions & Anor* [2007] HCA Trans 26 available at <http://www.austlii.edu.au/au/other/hca/transcripts/toc-W.html> as at 24 April 2007.

^{xii}. *Commonwealth of Australia Constitution Act* available at http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/ as at 24 April 2007.

^{xiii}. This view has been accepted by the High Court in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; & Ors* (1994) 181 CLR 18.

- ^{xiv}. *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460, *Re Tyler; & Ors* (1994) 181 CLR 18 and *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308. Decision in *White v Director of Military Prosecutions & Anor* [2007] has yet to be handed down.
- ^{xv} *Solorio v United States* 483 U.S. 435 (1987)
- ^{xvi} *Relford v Commandant, U.S. Disciplinary Barracks* 401 U.S. 355 (1971)
- ^{xvii}. *Findlay v United Kingdom* 24 Eur. H.R. Rep 221 (1997).
- ^{xviii}. *Grievs v United Kingdom* [2003] ECHR 683.
- ^{xix}. *R v Genereux* (1992) 88 DLR 110.
- ^{xx}. The Honourable Justice A.R. Abadee, *A study into the Judicial System Under the Defence Force Discipline Act* (1997); The Joint Standing Committee for Foreign Affairs, Defence and Trade, *Inquiry into Military Justice Procedures* (1999) available at <http://www.aph.gov.au/house/committee/jfadt/military/reptindx.htm> as at 24 April 2007; The Joint Standing Committee for Foreign Affairs, Defence and Trade, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* (2001) available at http://www.aph.gov.au/house/committee/jfadt/DOD_Rept/MJindex.htm as at 24 April 2007, The Honourable J.C.S. Burchett, QC, *Report of an Inquiry into Military Justice in the Australian Defence Force* (2001), The Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (2005) available at http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/index.htm as at 24 April 2007. The Abadee and Burchett reports were internal to the Department of Defence and not publicly released. Summaries of their findings and recommendations are, however, contained in the 2005 Senate report.
- ^{xxi}. The establishment of the DMP, RMJ and DDCS before the abolition of convening authorities is discussed in my most recent published report to Parliament, *Defence Force Discipline Act 1982, Report for the Period 1 January to 31 December 2005*, pp 15-17 and 22 available at <http://www.defence.gov.au/jag/reports.htm> as at 24 April 2007.
- ^{xxii}. *Supra* at vi and xv.
- ^{xxiii}. The Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (2005) available at http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/index.htm as at 24 April 2007.
- ^{xxiv}. A copy of my submission to the committee is contained in my 2003 report to Parliament, *Defence Force Discipline Act 1982, Report for the Period 1 January to 31 December 2003*, Annex O available at <http://www.defence.gov.au/jag/reports.htm> as at 24 April 2007.
- ^{xxv}. The Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (2005), p 85 available at http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/index.htm as at 24 April 2007.
- ^{xxvi}. *Ibid*, p 61 available at http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/index.htm as at 24 April 2007.
- ^{xxvii}. See recommendations 18,19,20 and 21 of the committee, *Ibid*, pp 101-102 available at http://www.aph.gov.au/Senate/committee/fadt_ctte/miljustice/report/index.htm as at 24 April 2007.
- ^{xxviii}. Department of Defence, *Response to the Senate Foreign Affairs, Defence and Trade Committee 'Report on the Effectiveness of Australia's Military Justice System* (2005) available at http://www.defence.gov.au/mjs/docs/MJI_GOVERNMENT_RESPONSE_4oct052.pdf as at 24 April 2007.
- ^{xxix}. *Commonwealth of Australia Constitution Act* available at http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/ as at 24 April 2007. Of course, so long as a military jury would consist of serving military officers, it could never equate to a civilian jury. The common law has always recognised that courts martial are an exception to trials where there can be a right to a jury of that type.
- ^{xxx}. A copy of the Bill as initially introduced is available at <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200616564?OpenDocument> as at 24 April 2007.
- ^{xxxi}. Hansard for the meeting of the Senate Committee on 9 October 2006 is available at <http://www.aph.gov.au/hansard/senate/commtee/S9803.pdf> as at 24 April 2007.
- ^{xxxii}. A copy of the Act is available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/2872FBAF289F83C7CA257242000CEBB1?OpenDocument> as at 24 April 2007
- ^{xxxiii}. *White v Director of Military Prosecutions & Anor* [2007] HCATrans 26 available at <http://www.austlii.edu.au/au/other/hca/transcripts/toc-W.html> as at 24 April 2007.

^{xxxiv}. Cited by Major Christopher W. Behan in “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 at 291.