

THE CIVILIANISATION OF AUSTRALIAN MILITARY LAW

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I INTRODUCTION

The relationship between military and civilian law has long been an uneasy one. According to orthodox legal doctrine, however, that should not be the case. There is longstanding and powerful authority for the principle that military law is subject to civilian law.¹ One consequence of this principle is that the civilian government decides the extent, if at all, to which the military may be subject to different laws or even separate legal systems. On this view, the boundaries of military law are set by the civilian government and those boundaries are ultimately policed by the government itself. The civilian courts assist in this ‘policing’ or ‘boarder control’ function of military by exercise of their authority to declare and interpret the law.²

But the history of military justice suggests that the relationship between military and civilian law is much more complex. Military commanders have long

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1 The precise origins of this authority are an obscure mixture of history and politics. Defence was originally one of the prerogatives held by the Crown, but it was illegal for the monarch to maintain a standing army during peacetime. That rule was confirmed by art 9 of the *Bill of Rights 1689* (Eng), which provided that the monarch could only raise an army during peacetime with the consent of parliament. That provision was but one example of the subjection of royal power and prerogative to parliamentary authority as a result of the Glorious Revolution (the army itself arose from the so-called ‘New Model Army’ that was formed by Oliver Cromwell to fight the revolution). The parliamentary authority over the armed forces has never since been seriously questioned in England or Australia, though it was modified by the *Mutiny Act 1689* (Eng). That Act eased some restrictions over the King in light of the imminent threat posed by Scottish rebels led by James I. The combined effect of both Acts enabled the monarch to retain nominal control of the forces, but this was clearly subject to the substantive control of parliament. These historical influences are often cited in modern cases to explain the importance of the ultimate command exercised by parliament over the armed forces. See, eg, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 572-3 (Brennan and Toohey JJ).

2 The exercise of that judicial function can take one of two main forms. The first is constitutional in nature, by which the High Court exercises its original jurisdiction to determine any constitutional questions arising from the military legal system. In recent times, the questions of this nature have concerned the extent to which the federal parliament can invest military disciplinary authorities with the power to hear and determine conduct that might also fall within the jurisdiction of civilian courts exercising criminal jurisdiction. The second judicial function that civilian courts may exercise over military law is the normal appellate/review functions by which courts may consider applications for appeal or review arising from military law proceedings.

maintained that the armed forces require considerable autonomy from the civilian legal system in order to maintain effective command and control over service members. According to this view, military law and military life may be undermined by external forces such as civilian law. Elements of the civilian legal system of this nature include scrutiny by civilian courts of military disciplinary and other decisions made within the armed forces,³ or the involvement in military justice of legal officers who are subject to the professional regulatory regimes that normally apply to legal practitioners.⁴ Those who argue in favour of a highly autonomous military justice system do not suggest that the military should become a law unto itself. They instead argue that that recourse to the civilian courts and civilian processes of law by service members has the potential to undermine military culture and fragment the command structure and should, therefore, be restricted.

The extent to which the law governing the armed forces should be separated from the influence of civilian legal principles and institutions has been a key issue in the evolution of modern military forces. The increasing influence of civilian legal principles and institutions, usually described as 'civilianisation', continues to provoke a strong response from military commanders. The civilianisation of military law has long been a central issue of American military scholarship, but has received considerably less attention in other western nations such as Australia.

This article examines the notion of civilianisation and how it affects Australian military law. The article is mainly concerned with military disciplinary because this area of military life has been a key focus of parliamentary and judicial attention in Australia. The first sections of the article trace the arguments that can be made for and against the development of a special or separate body of legal doctrine for the military. The next sections examine several features of the military justice system and consider whether, and to what extent, they may have enhanced the civilianisation of Australian military law. The final section of this article examines the comprehensive review of the military justice system recently undertaken by the Senate Committee for Foreign Affairs, Defence and Trade References and whether the recommendations of that review might, if enacted, affect the civilianisation of Australian military justice.⁵

II WHAT IS CIVILIANISATION?

Civilianisation means the incorporation of civilian values into military life. Any attempt to move beyond that apparently simple definition requires many statements by way of qualification, but for present purposes it is useful to rehearse the key issues that surround civilianisation. The first is that the principle

3 Scrutiny of this nature may take the form of either supervisory judicial review or appellate review.

4 The subjection of military legal officers to legal professional regulatory regimes is discussed below.

5 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The effectiveness of Australia's military justice system* (2005) ('*The Senate Report into Military Justice*').

of civilianisation presumes that the armed forces are clearly subject to civilian control. While there are many nations in which the armed forces may exert considerable control over government, it is fair to suggest that this is not the case in most western nations at present. But the absence of overt military influence over civilian government does not itself explain how, or even if, the civilian government controls the military.⁶ Some American scholars, for example, have argued that continued references to the civilian control of the military are rhetorical in part because no coherent definition or body of principles to explain the hallmarks of civilian control of the military has ever really emerged.⁷ It is possible that the absence of a settled body of doctrine reflects a wider lack of knowledge about the societal relationship between civilians and the military in modern society, but research into this issue remains in its infancy.⁸

The most widely accepted explanation of civilian control over the military is two-fold. It firstly provides that 'the ends of government policy are ... set by civilians; the military is limited to decision about means'; and, secondly, element provides that the civilian government determines where 'the line between ends and means (and hence between civilian and military responsibility) is to be drawn'.⁹

Civilisation is an example of civilian control of the military. It is the incorporation of the norms of civilian society into the military and can occur in any aspect of military life. The civilisation of military law refers to the incorporation of the institutions and norms of the civilian legal system into

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- 6 In *Mocicka v Chief of Army* [2003] ADFDAT 1 [13] the tribunal commented that '[I]n a democratic society governed by the rule of law the authority of the armed forces should be based on community respect rather than fear'. This statement suggests that the relationship between the civilian government and the military is one of respect rather subordination.
 - 7 An influential exponent of this view was Samuel Herman, *The Soldier and the State* (1957). A recent analysis is Peter Feaver, 'The Civil-Military Problematique: Huntington, Janowitz and the Question of Civilian Control' (1996) 23 *Armed Forces and Society* 149. Feaver observes (at 149) that 'the civil-military challenge is to reconcile a military strong enough to do anything the civilians ask them with a military subordinate enough to do only what civilians authorize them to do.'
 - 8 This issue is the basis of the American research project known as the 'Gap Project'. The Gap Project involves military scholars from several leading universities, who surveyed influential and rising leaders within military and civilian life. Participants were questioned at great length on issues relevant to the possible gap between civilian and military attitudes to many cultural issues, such as religion, morality, economic policy, political and social values, foreign policy and so on. The aim was to determine what, if any, 'gap' in attitudes and values might exist between the two groups. A collection of studies arising from the Gap Project and a full copy of the detailed questionnaire used in the study are published in Peter Feaver & Richard Kohn (eds) *Soldiers and Civilians: The Civil-Military Gap and American National Security* (2001).
 - 9 See Kenneth Kemp & Charles Hudlin, 'Civil Supremacy Over the Military: Its Nature and Limits' (Fall, 1992) *Armed Forces and Society* 2, 8-9. See also *Greer v Spock* 424 US 828, 845-6 where Powell J explained that '[C]ommand of the armed forces placed in the political head of state, elected by the people, assures civilian control of the military.' Some commentators offer a more subtle explanation of civilian control. See, eg, Charles Dunlap, 'Welcome to the Junta: The Erosion of Civilian Control of the US Military' (1994) 29 *Wakeforest Law Review* 314, 343-4. Dunlap argues that the notion of civilian control over the military is offended even when civilian authorities voluntarily cede authority to the military if that authority enables the military to exert an influence that endangers civil liberties or the democratic process. Although Dunlap argued for this view over a decade ago, it has assumed a new relevance in the so-called war on terror.

military law. The incorporation of civilian law institutions usually occurs when a civilian statute or regulatory regime is extended to the military. Examples of this nature include the application of freedom of information ('FOI') and anti-discrimination legislation to the defence forces,¹⁰ and the introduction of a right to complain to an independent Ombudsman about unfair or unjust administrative action.

The incorporation of civilian legal norms is a much more subtle process that occurs either through the exposure of military personnel to civilian legal culture or the introduction of civilian lawyers into the military justice system. It is easy to underestimate the impact that civilian legal culture can have on closed environments such as the military. Lawyers carry and transmit a system of professional values that are fiercely independent. This independence is antithetical to the command model of military decision-making, which does not countenance disagreement or dissent. The other important effect of civilian legal norms is that they tend to overwhelm the values of the system into which they are introduced and thereby effect cultural change from within.¹¹

Much of the debate surrounding civilianisation reveals considerable disagreement about its evolution. Some commentators suggest that civilianisation involves the voluntary incorporation of civilian values into military law by military authorities.¹² Others, particularly, those who are members of the military, refer to civilianisation in a pejorative manner, suggesting that it usually occurs against the objection of military officials or, at best, with their begrudging acquiescence or barely concealed resistance.¹³ There is similar disagreement about the trend of civilianisation. Some commentators argue that the civilianisation of military law has continued unabated for the last hundred years,¹⁴ while others argue that the evolution of military law is more cyclical and

10 The application of anti-discrimination legislation to the defence forces was examined by the High Court in *X v Commonwealth* (1999) 200 CLR 177. In that case a soldier who was discharged because he had tested HIV positive challenged his discharge under the *Disability Discrimination Act 1992* (Cth). The challenge was rejected by a majority of the High Court, which accepted the argument of military commanders that a soldier who was HIV positive might be unable to perform the inherent requirements of a soldier's employment according to s 15(4)(a) of the Act. That section essentially provides that different treatment is not unlawful discrimination if it is related to deciding and enforcing the inherent requirements of employment. It is worth noting that the High Court applied the normal tests governing discrimination in civilian employment to the *X* case, though it took account of the nature of a soldier's tasks.

11 For illustrations of this argument on the influence of lawyers in prison discipline and arbitration, see respectively Martin Loughlin, 'The Underside of the Law: Judicial Review and the Prison Disciplinary System' (1993) 46(2) *Current Legal Problems* 52 and Penny Brooker, 'The Juridification of Alternative Dispute Resolution' (1998) 28 *Anglo-American Law Review* 1.

12 See, eg, G R Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 *Modern Law Review* 36, 38.

13 One leading American commentator as referred to civilianisation as 'the "C word," the mere utterance of which still makes the occasional senior military lawyer see red': Eugene Fidell, 'The Culture Change in Military Law' in Eugene Fidell & Dwight Sullivan, *Evolving Military Justice* (2002) 163, 163.

14 See eg, Gerry Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 *Modern Law Review* 36, arguing that the civilianisation of English military law accelerated after World War II; Edward Sherman 'The Civilianization of Military Law' (1970) 22 *Maine Law Review* 3, 8-59, arguing that American military law has witnessed continued civilianisation from the beginning of the 20th century to the era of the Vietnam war.

that there have been clear periods in which civilianisation has slowed or even reversed.¹⁵

III IS MILITARY LAW SPECIAL?

A Difference in Law

The notion of difference can be important in law. It is often invoked as a reason that some activities or professions should not be subject to one or more of the normal principles of law. Arguments based on difference usually have two strands. The first strand is the suggestion that the qualities of an activity or profession are such to render it clearly different to others upon which the law has evolved. This strand makes a subtle appeal to the incremental nature of common law reasoning by suggesting that some of the fundamental tools of the common law, particularly the use of analogies to extend legal doctrine to new or novel areas, may not be appropriate. The second strand of any appeal to difference is usually the assertion that the application of normal legal principles to the area of difference would impede the proper functioning of that area. On this view, difference warrants different treatment.

The notion of difference seems especially apt for areas that appear separate and distinct from mainstream society. Prisons are one such example. For a long time prison officials argued that the courts should not exercise supervisory jurisdiction over the administrative decisions of prison officials because prisons could not function effectively if their managers were subject to external control. Such arguments implied that prisons were sufficiently different that the principles of judicial review developed in wider society might cause chaos if extended to them.¹⁶ That argument was attractive in part because prisons and prisoners were removed from mainstream society. Difference seems more obvious, and perhaps easier to accept, when it is accompanied by a level of separation.

The arguments of prison officials were ultimately rejected by the courts, but they provide a salutary reminder of the willingness of the courts to consider and sometimes accede to the notion of difference. More particularly, the reasons invoked by prison officials are strikingly similar to those of military officials. The reasons provided by prison officials included: that the urgent or difficult

15 See, eg, Diane Mazur, 'Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law' (2002) 77 *Indiana Law Journal* 701, arguing that the body of doctrine developed by the American Supreme Court under Rehnquist CJ has enabled the American military to essentially become both a partisan conservative force and one that is increasingly isolated from civilian life. See also Jonathon Turley, 'The Pocket Military Republic' (2002-3) 97 *Northwestern Law Review* 1, 133, who concludes his detailed study of the evolution of American military law by declaring that 'the civilian system's close proximity has inevitably changed the latter. The gravitational force of the Madisonian system has shaped military governance, but core differences still predominate. It is remarkable that this system of governance with millions of "citizens" has escaped serious congressional scrutiny'.

16 The law during the time this reasoning prevailed is explained in Matthew Groves, 'Proceedings for Prison Disciplinary Offences' (1998) 24 *Monash Law Review* 338, 349-51.

nature of many of the administrative decisions of prison managers were unsuited to review by the courts; that the internal disciplinary code of prison disciplinary offences provided a tailored system of justice that would be undermined if matters were handed to external authorities;¹⁷ the maintenance of control and security were integral to prison life and would be undermined by any form of external review;¹⁸ lastly, and perhaps most importantly, that only prison officials had the expertise necessary to oversee administrative and disciplinary decision-making within prisons.¹⁹ Such arguments implied that prisons possessed a separate system of law – an internal authority – that would be hampered by the introduction of external influences. These arguments were ultimately rejected when the courts accepted that their supervisory jurisdiction over prisons was a ‘beneficial and necessary jurisdiction’ that should not be circumscribed for the essentially pragmatic reasons provided by prison officials.²⁰

The extent to which the court will examine the decision of prison officials has increased sharply in recent years with the advent of the principle of legality. The principle of legality describes the more intense rights sensitive approach to judicial review that is evolving in many Commonwealth nations. In effect, the principle draws together many traditional common law principles and interpretive presumptions, to support a more intense standard of review.²¹ That standard increases in accordance to the perceived intrusion of decision-making upon basic rights.²² The rights that may be protected by this more intense approach to judicial review include the right of access to the courts,²³ the right of access to an independent lawyer,²⁴ the maintenance of legal privilege²⁵ and, in some circumstances, the right of access to the media.²⁶

17 Similar reasoning was adopted in respect of the discipline of firemen in *Ex parte Fry* [1954] 2 All ER 118. In that case the court declined to issue relief to a fireman who complained of irregularities in disciplinary proceedings because it feared that judicial intervention might weaken the internal disciplinary system for firemen. The court was particularly influenced by the quasi-military character of the fire brigade (as evidence through its command and discipline and structure). This apparent analogy between civilian bodies and the military was strongly criticised by Sir William Wade: ‘Discipline and Fireman Fry’ (1954) 17 *Modern Law Review* 375.

18 A widely cited statement of this principle came from the *Becker v Home Office* [1972] 2 All ER 676, 680 where Lord Denning MR suggested that ‘if the courts were to entertain actions by disgruntled prisoners, the governor’s life would become intolerable.’

19 *Binse v Williams* [1998] 1 VR 381, which deals with the decision of a prison governor to place an unmanageable prisoner in shackles.

20 *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58, 155 (Lord Bridge, with whom the other Lords concurred). These sentiments have been approved in Australia: *Holden v SA* (1992) 62 A Crim R 308, 317-8 (Legoe J); *McEvoy v Lobban* [1990] 2 Qd R 235, 242 (Thomas J); *Herald & Weekly Times Ltd v Correctional Services Commissioner* (2001) 18 VAR 316, 330 (Eames J).

21 The foundations of the principle are discussed in Dyzenhaus D, Hunt M & Taggart M, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalism’ (2001) 1 *Oxford University Commonwealth Law Journal* 5.

22 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

23 *Raymond v Honey* [1982] 1 AC 1.

24 *R v Secretary of State for the Home Department; Ex parte Leech* [1993] 4 All ER 539.

25 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (‘Daly’).

26 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

The principle of legality is an important development for several reasons. First, the principle involves the rejection of the idea that some areas of decision-making can be isolated from the mainstream principles of law.²⁷ On this view, arguments of difference will not survive the principle of legality. It is worth noting that most of these principles evolved in prison related cases. That suggests that the courts do not accept that the existence of a separate disciplinary code provides a sufficient reason for the courts to refrain from exercising their supervisory jurisdiction in an appropriate case. Another important aspect of the prison related cases is that the courts clearly no longer accept the arguments offered by prison officials about the maintenance of discipline and control without question. Courts will instead examine rules or decisions to determine themselves whether the rule or decision is an appropriate means of maintaining control.²⁸ In addition, recent decisions have suggested those in a vulnerable position can expect particular protection.²⁹ This possibility suggests that the structures of command and control may invite, rather than discourage, scrutiny by the courts. Reasoning of this nature has important implications for the military justice system because of the particularly important role played by notions of command and control in military life.

B Differing Approaches to the Special Status of the Military

The suggestion that military law and life is different in a material sense may have a profound impact on service members because it implies that service members do not, or should not, enjoy the normal civil rights of other citizens. Military commanders have long invoked arguments similar to those used by prison officials to justify both the maintenance of a separate military legal system and the exclusion of many elements of civilian law. Although the suggestion that the military is different is often made in general or rhetorical terms, several separate arguments underpin the notion that the military is different for reasons that should be recognised in law. First, the military performs a special function and may have to do so in a special manner. The defence of the land may require the deliberate killing of others. This grave duty might require people to act against normal human instinct. Members of the armed forces might never be called on to perform these grave tasks, but the potential they might need to do so is always present.³⁰

A second and logically related point arises from the role of the chain of command as a tool to prepare and maintain the armed forces.³¹ The nature of military command can require service members to either accept orders that would

27 David Dyzenhaus, 'Baker: The Unity of Public Law' in David Dyzenhaus (ed), *The Unity of Public Law* (2004) 1, 2.

28 *Daly* [2001] 2 AC 532.

29 This was another feature of the *Daly* case: *Daly* [2001] 2 AC 532.

30 See, eg, *Greer v Spock* 424 US 828, 838 (1976) where the American Supreme Court acknowledged that it was 'the primary business of the armies and navies to fight or be ready to fight wars'.

31 Courts have repeatedly accepted that the need to maintain command and discipline is an integral aspect of this separate and specialized character of military life: *Parker v Levy* 417 US 733, 759 (1974).

be unacceptable or even unlawful by civilians in comparable positions,³² or to accept orders that would serve no purpose in civilian life.³³ Command is essentially authority, the strength of which is diminished when subject to external constraints or influence.³⁴ The most extreme version of these arguments can be deployed against *any* encroachment of civilian law into military life.³⁵ Such an argument was famously made by General Sherman to a Committee of the American House of Representatives. General Sherman argued that:

An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values and defeats the object of its existence.³⁶

The Senate report was mindful of such sentiments when it acknowledged ‘that any interference – even parliamentary scrutiny – with the means of administering command through the military justice system is of great concern to the military’.³⁷

Civilians usually view the command function as one that comes to the fore during combat, or other extreme situations, when service members might have to obey orders they neither understand nor like, but military personnel take a more holistic view of the command function.³⁸ Military personnel argue that the chain of command and the broader cohesion between individual service members that the military hierarchy promotes may be vital to combat but they are forged in peacetime. According to this view, judicial deference to military command decisions is equally important to decisions taken during peacetime or combat because one depends on the other.³⁹

32 See, eg, *Russell Vance v Chief of Air Force* (2004) 154 ACTR 12 where the Supreme Court of the ACT accepted that defence legal officers (DLOs) might, unlike their civilian counterparts, be obliged to breach privilege when ordered to do so by an appropriately qualified superior officer. That possibility proved a significant obstacle to a claim of legal privilege by the DLOs.

33 See, eg, the defence disciplinary offences that have no counterpart in civilian life, such as failing to comply with directions or orders: *Defence Force Discipline Act 1982* (Cth) ss 28-9.

34 Military authorities sometimes recognise this possibility. One example is *Defence Force Discipline Rules 1985* (Cth) r 33 which requires that members of a court martial vote in reverse order of seniority (ie the most junior votes first). The rule acknowledges that junior officers are liable to be influenced by the beliefs, or perceived beliefs, of senior counterparts. The history of such provisions is explained in *Hembury v Chief of General Staff* (1998) 193 CLR 641, 652 (McHugh J).

35 Though few would support the total separation of military and civilian life. Even those who support a highly autonomous defence legal system would, for example, likely accept that such a system should be subject to the jurisdiction of a civilian court invested with jurisdiction to settle constitutional questions such as those which challenge the constitutional validity of military disciplinary bodies. Another example might be the need for a right of appeal to civilian courts to determine possible choice of law disputes between civilian and military courts. It is possible, however, that many military commanders would see no real problem in granting jurisdiction to military courts to determine such conflicts.

36 General William Tecumseh Sherman, *Hearings on H.R. 2498 Before the Subcommittee of the House Committee on Armed Services* (81st Congress, 1949) at 789 (reprinted in *Index of Legislative History – Uniform Code of Military Justice* (Hein, 2000)).

37 *The Senate Report into Military Justice*, above n 5, [109].

38 See, eg, the subtle point made by McHugh J on the effect of status and authority in the military: *Hembury v Chief of General Staff* (1998) 193 CLR 641, 652.

39 The connection of these issues to judicial attitudes is examined in Sam Nunn, ‘The Fundamental Principles of the Supreme Court’s Jurisprudence in Military Cases’ (1994) 29 *Wakeforest Law Review* 557.

A third reason that the military is argued to be different finds expression in the deference that courts often accord to the decisions of military officials. In many instances courts justify their deference to the military officials on the basis that they lack the personal or institutional competence to query the decision of military officials.⁴⁰ When courts accord such deference they usually draw attention to the apparently unique nature of the military environment.⁴¹ It is interesting that Warren CJ, who was a staunch advocate of the strengthening of the constitutional rights of American citizens, accepted that military life provided the single significant exception to those views. ‘The most obvious reason’ for strong judicial deference to military officials, he explained, was that ‘courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have’.⁴²

A fourth, more subtle argument, arises from the character of military culture. The separation of much of military life from any civilian counterpart, and the distinct nature of many military tasks, each require and enable the development of a separate culture.⁴³ The law is an important part of that culture because it can foster the imperatives of military life. The law can, for example, assist the command structure by the creation of offences prohibiting disobedience, insubordination and conduct that may affect the good order of the military. It can also foster the command structure and other aspects of military culture by demonstrating deference to the views of military officials when considering the complaints from service members about such issues.⁴⁴

For a long time arguments about the different character of military life seemed a natural reflection of the social and political position of the armed forces. For a long part of English history, and in the early years of the American republic, members of the armed forces were viewed with intense suspicion by the civilian population.⁴⁵ During these times, soldiers were often shunned by mainstream society and the military vocation viewed with disdain. It was, therefore,

40 In recent times the willingness of courts to reach such conclusions may be affected by the fact that most judges are now unlikely to have experienced any form of military service. See, eg, *Bromet v Oddie* [2003] FCAFC 213 [51] where Madgwick J commented ‘[I]n modern times it is unusual for judges to have had any significant military experience or even to be steeped in military history or lore. They should therefore tread carefully.’

41 Judicial deference of this form in American jurisprudence is criticised in Jonathon Turley, ‘The Military Pocket Republic’ (2002) 97 *Northwestern Law Review* 1, 47-54.

42 Earl Warren, ‘The Bill of Rights and the Military’ (1962) 37 *New York University Law Review* 181, 187.

43 On the development of internal cultures, see Edgar Schein, ‘Organisational Culture’ (1990) 45 *American Psychologist* 111. Schein believes that ‘culture’ is ‘what a group learns over a period of time as that group solves its problems of survival in an external environment and its problem of internal integration’. See also his *Organizational Culture and Leadership* (3rd ed, 2004). Although Schein devised a general typology of organisational cultures, when applied to the military it suggests that military culture is shaped by the existence of the military as a separate environment within the wider external civilian environment.

44 There is circularity within this reasoning because the courts can of course acquire knowledge of military life by undertaking greater scrutiny of it.

45 The classic work on the role of the military in English history remains Charles Clode, *Military Forces of the Crown* (1861). Political attitudes to the military in early American history are explained in Jonathon Turley, ‘The Military Pocket Republic’ (2002) 97 *Northwestern Law Review* 1, 15-24.

unsurprising, that these almost parallel societies had very little contact. When contact occurred, the courts were quick to stress their disinterest in military life.⁴⁶

English courts long accepted that they possessed a nominal jurisdiction over military issues, but made it plain that this jurisdiction would be exercised in only the most exceptional case.⁴⁷ They refused to intervene when courts martial proceedings had plainly been conducted without observance to procedural requirements if soldiers had any other means to appeal the punishment imposed by erroneously conducted proceedings.⁴⁸ In some instances, the courts simply denied their jurisdiction to consider matters of military law and procedure.⁴⁹

Many American scholars have argued that their Supreme Court maintained a similar doctrine of non-interference with military affairs to that applied by English courts.⁵⁰ This doctrine of non-interference prevailed in the early part of American history, but has since been replaced by a more sophisticated doctrine of deference by the Supreme Court of America to constitutional and judicial review of military law issues. This doctrine of deference implies that the court retains the jurisdiction to intervene in appropriate cases, or even to discard entirely its deferential approach in favour of a more interventionist approach, though the jurisprudence of the Supreme Court over the last 50 years suggests that such changes are extremely unlikely. The court has, for example, accepted that armed forces are 'by necessity a specialized society separate from civilian society'.⁵¹ The court explained that

military law ... is a jurisprudence which exists separate and apart from the law which governs in or federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it ...⁵²

This statement obscures the true character of the Supreme Court's military law jurisprudence. There is no doubt that the court has not played as active a role in military life as it has in civilian life, but that lesser role reflects a conscious doctrinal choice on the part of the court. More particularly, the suggestion that the court has played no part in the evolution of military reflects the ongoing decision of the court to decline such a role. A clear illustration is the series of cases in which the Supreme Court has accepted that aspects of civilian life, such

46 There is the further reason that England did not maintain a standing army for many centuries, but instead convened one when circumstances required. It has been suggested that the non-permanent nature of the army and, therefore, its courts martial, partly explain the paucity of material on judicial attitudes to the military in much of English legal history. See the historical analysis of English military authority in Gordon Hook, 'The Evolution of New Zealand Military Tribunals' [2003] *New Zealand Armed Forces Law Review* 36.

47 The leading modern case was *Re Mansergh* (1858) 26 JP 22. In that case it was held that the courts would only intervene when a military tribunal had clearly exceeded its jurisdiction and done so in a manner that affected the rights of a service member to life or liberty. See also *Dawkins v Lord Paulet* (1869) 5 QB 96.

48 See, eg, *Marks v Frogley* [1898] 1 QB 888.

49 *R v Secretary of State for War; Ex parte Martyn* [1949] 1 All ER 242. See also *R v OC Depot Battalion, RASC Colchester; Ex parte Elliot* [1949] 1 All ER 373.

50 See, eg, John O'Connor, 'The Origins and Application of the Military Deference Doctrine' (2001) 35 *Georgia Law Review* 101165-97.

51 *United States; ex rel Toth v Quarles* 350 US 11, 17 (1950).

52 *Burns v Wilson* 346 US 137, 140 (1953).

as basic rights and liberties, may be curtailed in their application to military personnel by reason of the separate and distinct nature of military life.⁵³ The extent of that reasoning was illustrated in the leading case of *Parker v Levy*.⁵⁴ Levy was an army doctor convicted of various disciplinary offences arising from anti-war statements he made to new recruits. Levy questioned America's involvement in the war and suggested that the recruits should not help the war effort. The statements were made when the Vietnam War was the single most divisive issue in American society and, had they been made by a civilian, would certainly have been protected by the constitutionally entrenched right of free speech. Levy argued that the same rights extended to a service member. The Supreme Court conceded that 'members of the military community enjoy many of the same rights and bear many of the burdens as do members of the civilian community' but cautioned that 'within the military there is simply not the same autonomy as there is in the larger civilian community'.⁵⁵ The court continued:

In the armed forces, some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent changes, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.⁵⁶

The extent to which constitutional protections can be applied to, or withheld from, service members is a complex and contested issue in American law, but it remains clear that military personnel can be denied the full enjoyment of their constitutional rights by reason of their service status.⁵⁷ Military personnel cannot, for example, circulate petitions or distribute publications without permission from superior officers.⁵⁸ They cannot bring claims against the armed forces under the federal tort claims legislation that allows all other Americans to litigate

53 See, eg, *Goldman v Weinberger* 475 US 503, 507 (1986) where the Supreme Court accepted that significant deference should be accorded to military commanders for the exercise of their professional or vocational judgement, even if that judgement infringed on the constitutional rights of other service members.

54 417 US 733 (1974).

55 *Parker v Levy* 417 US 733, 751 (1974).

56 *Parker v Levy* 417 US 733, 751 (1974).

57 See Earl Martin, 'Separating United States Service Members From the Bill of Rights' (2004) 54 *Syracuse Law Review* 599; Diane Mazur, 'Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law' (2002) 77 *Indiana Law Journal* 701; James Hirschhorn, 'The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights' (1984) 62 *North Carolina Law Review* 177.

58 On the circulation of petitions, see *Brown v Glines* 444 US 348 (1980) *Secretary of Navy v Huff* 444 US 453 (1980). On the circulation of publications, see *Greer v Spock* 424 US 828 (1974).

against the federal government and its officials.⁵⁹ This rule prevents military personnel from suing military professionals such as doctors and mental health professionals for malpractice.⁶⁰ Military personnel may also be prevented suing fellow service members for allegedly discriminatory treatment on racial grounds experienced during military service.⁶¹

The approach of the Supreme Court to the enjoyment of constitutional rights by members of the armed forces reveals an obvious paradox. The court has on the one hand accepted that military life is sufficiently different to civilian life that the constitutional rights of services members should sometimes be curtailed. On the other hand, it has delivered a series of decisions that encourage and continue a significant level of separation between military and civilian life.

C Reasons Against Difference

While there are many reasons why military life may be regarded as separate and distinct from civilian life, many other considerations point in the opposite direction. Some reflect a steady movement of civilian law concepts into military law, which has occurred over many centuries, while others reflect more recent trends. The suggestion that distinctions between military and civilian life should be narrowed found favour in English law during the 18th century in a series of cases which established that soldiers were subject to normal rights and obligations of any other citizen except to the extent the law expressly provided otherwise. Most of the cases that gave rise to this proposition involved civil riots. The courts were called to consider the politically contentious issue of the lawfulness of the use of military forces to suppress riots. The courts held that soldiers were in fact obliged to intervene because they were subject to the general common law duty incumbent on citizens to act to suppress a riot.⁶² By the start of the 19th century, the more general rule that could be distilled from these cases was that:

the law acknowledges no distinction ... between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject.⁶³

59 *Feres v United States* 340 US 135 (1950). That principle was invoked to deny a remedy in damages to a soldier who was dosed (secretly and without his knowledge) with LSD as part of army studies on the effect of the drug: *United States v Stanley* 483 US 669 (1987).

60 The rule is examined in Jonathon Turley, 'Pax Militaris: The *Feres* Doctrine and the Retention of Sovereign Immunity in the Military System of Governance' (2003) 71 *George Washington Law Review* 1.

61 *Chappell v Wallace* 462 US 296 (1983).

62 Lord Mansfield CJ was a strong proponent of this principle: *R v Kennett* (1781) 5 Car & P 282; *Burdett v Abbott* (1812) 4 Taunt, 401. See also S Skinner, 'Citizens in Uniform: Public Defence, Reasonableness and Human Rights' [2000] *Public Law* 266, 273-5.

63 *R v Pinney* (1832) 5 Car & P 258, 258 (Lord Tindal CJ).

Halsbury's explains this rule to mean that:

a person does not, by enlisting in or entering the armed forces, thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land.⁶⁴

On this view, a service member can expect to receive the normal rights and privileges granted by the law unless there is express provision to the contrary. It should be noted that, while the High Court of Australia has not directly engaged this concept, the general approach of the court to military justice provides some evidence of sympathy with the civilian soldier doctrine. In *Groves v Commonwealth*,⁶⁵ for example, a majority of the High Court held that 'military law has a quite restricted range of operation and is seen as an additional, rather than a replacement, set of rights and duties'.⁶⁶ This reasoning suggests that those subject to military law acquire further rights and obligations while retaining, at least as far as is possible, those of civilian law.

The idea of the 'citizen soldier' is a double edged sword. It suggests that members of the armed forces should expect to enjoy the normal rights of other civilians, but that expectation carries the burden of subjection to the normal obligations of civilians.⁶⁷ The citizen soldier doctrine clearly stands in opposition to any suggestion that military life and law is different, but it does not prevent the creation of differences. It simply requires that the starting point is that any rights or remedies enjoyed by normal citizens are enjoyed by service members unless the law clearly suggests otherwise.⁶⁸

The decision of the Privy Council in *Attorney-General for England and Wales v R*⁶⁹ indicates that some exceptions to the enjoyment of the normal rights by service members may arise at common law. In that case a former member of the Special Air Service ('SAS') sought equitable relief against the army. The soldier had signed an agreement not to publish information about his service activities. Commanders of the unit introduced such agreements after several members of the SAS battalion published accounts of their exploits in the first Gulf War. These accounts caused considerable concern among remaining members of the unit who felt the authors were either unfairly attempting to blame a deceased soldier or

64 LexisNexis, *Halsbury's Laws of England*, vol 2(2) (2003, 4th ed reissue) Armed Forces, 'Chapter 1 – The Legal Position of the Armed Forces' [3], citing *Burdett v Abbott* (1812) 4 Taunt 401, 449-50 (Lord Mansfield CJ). The classic modern exposition was made in *Holden v Evans* (1919) 35 TLR 642, 643-4 (McCardie J).

65 (1985) 157 CLR 309.

66 *Groves v Commonwealth* (1985) 157 CLR 309, 315 (Mason CJ, Wilson, Brennan, Dawson and Toohey JJ). See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 and *Re Tyler; Ex parte Foley* (1993) 181 CLR 18, 35 where Gaudron J stressed that service members were neither immune from the operation of the general law nor deprived of its protection. Such reasoning echoes the citizen soldier doctrine.

67 A notorious example of this was the action reported in the English journal *The Lawyer* (24 February 1998) where the English Ministry of Defence issued a writ for several million pounds against the estate of a pilot who was killed in a mid-air collision. The cause of action essentially sought to hold the pilot liable according to the principles traditionally applied in civilian law workplaces.

68 The historical and political basis of the doctrine is explained in Stephen Skinner, 'Citizens in Uniform: Public Defence, Reasonableness and Human Rights' [2000] *Public Law* 266.

69 [2004] 2 NZLR 577.

'talking up' their own role.⁷⁰ Soldiers who wished to continue with the SAS had to sign the agreement. Those who did not would be returned to their previous unit. R signed the agreement but eventually wished to publish an account of his time in the SAS. R defended an attempt by government authorities to restrain publication of his book on the basis that he was coerced into signing the agreement and that he had provided no consideration so any agreement of a contractual nature was void.

The suggestions that a soldier might enter a contract in the normal sense with military authorities, or that command activities might form of the basis of a plea of duress or unconscionable conduct, were novel. The first implies that agreements between soldiers and their superiors should be governed by normal contract or perhaps workplace laws. The second implies that the command authority and decision-making of military authorities – which necessarily favours commanders – should be adjudged according to equitable doctrines such as unconscionability or undue influence to which an imbalance of power is antithetical. Each clearly has the potential to undermine command authority; particularly the second, because it attempts to use the unequal nature of the command relationship – the necessary disparity in power between superior and subordinate – as a basis for a legal remedy.

The Privy Council rejected the pleas of duress and undue influence largely because they were not supported by the evidence.⁷¹ The facts suggested that R clearly understood the agreement and was equally clear about the obligations it entailed. In addition, the benefit obtained in the form of not being returned to his original unit provided sufficient forbearance to amount to consideration for the purposes of contract law.⁷² This reasoning invites several comments. First, the dismissal by the Privy Council of the claim was largely by reason of the facts at hand. The Privy Council did not discount the possibility that a serviced member could, in an appropriate case, invoke civil law concepts such as undue influence or unconscionable conduct which are based on unfairness and unequal power between the parties. What an appropriate case might be remains to be seen. Secondly, the case was decided within the relatively narrow confines of equitable doctrines. The court did not consider the more far reaching doctrines that have underpinned the expansion of public law in recent years, such as the principle of legality which was mentioned above.

70 The decision to institute confidentiality agreements appears to have been caused in part by a survey among SAS members that revealed that almost all supported their introduction. That curious example of industrial democracy in a military setting provoked surprisingly little comment from the various courts that considered R's claim.

71 A point made more difficult because R, having invoked these civilian law principles, was subject to the additional civilian law requirement that he prove the facts supporting each element of the claim.

72 *Attorney-General for England and Wales v R* [2004] 2 NZLR 577, 584-5. The decision of the Court of Appeal of New Zealand was quite similar: [2002] 2 NZLR 91. That decision is examined in P Twist, 'Limits to the Supreme Government, Command and Disposition of the Armed Forces: *Attorney-General for England and Wales v R*' [2002] *New Zealand Armed Forces Law Review* 43.

IV SOURCES OF CIVILIANISATION

Civilianisation is the result of many different influences in military law rather than a single decisive one. It is not easy to measure the precise influence that particular changes have had on the military, or the combined effect of several changes, but a survey of different areas can reveal common points about the evolution of civilian influence. This section examines several such areas and considers whether they may enhance or frustrate the civilianisation of Australian military law.

A The Constitutional Influence

The possibility of successful constitutional challenge in military disciplinary proceedings remains ever present while the disciplinary system is in its current form. It is beyond the scope of this paper to explain those constitutional issues in detail or to consider the likely outcome of a frontal attack on the structure of the present system, which appears almost inevitable in the near future.⁷³ But an explanation of some of the key points of the constitutional uncertainty is useful for present purposes because they highlight an important point of uncertainty about the extent to which the system of military justice should conform to the requirements of civilian justice.

Many key elements of the military justice system are not controversial in a constitutional sense.⁷⁴ Such elements include the variable nature of the defence power, which is at its greatest during times of war and armed conflict but contracts considerably during peacetime.⁷⁵ Another well settled proposition is that the defence power can support the creation of a separate system or code of discipline for the armed forces.⁷⁶ It is also clear that the resolution of disputes arising from that code can be resolved by the exercise of the judicial power and, importantly, this judicial power emanates from the defence power itself.

73 There was, in fact, a sense of exasperation in some members of the High Court that the applicant did not directly challenge the constitutional validity of the disciplinary scheme. See, eg, *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [81]-[84] (Kirby J).

74 In this paper I refer to the 'defence' power which is s 51(vi) of the *Constitution*, but it is clear that the additional power for defence related issues may be drawn from the power to maintain internal security (the wording 51(vi) includes 'the control of the forces to execute and maintain the laws of the Commonwealth') and external relations with other nations (s 51(xxix)). The extent to which the second limb of s 51(vi) can support the question of military discipline was expressly doubted in *Re Tracey; Ex parte Ryan* (1989) 166 LCR 518, 564 (Mason CJ, Wilson and Dawson JJ). Although Gummow J has since endorsed this view, he has also accepted that the defence power can support the recourse to force to control internal threats: *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [60]-[61]. In my view it is difficult, and perhaps undesirable, to separate authority to exercise the defence power from the authority to control the defence forces. Each complements the other. The extent to which the foreign affairs power can support the creation of military tribunals outside the requirements of Chapter III has also been questioned: see *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [27] (McHugh J), [82] (Kirby J).

75 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 195-6, 197-8 (Dixon J), 206-7 (McTiernan J), 268 (Fullager J). See also the authorities cited by McHugh J in *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [27] and G Sawyer, 'Defence Power of the commonwealth in Time of Peace' (1954) 6 *Res Judicatae* 214.

76 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 541 (Mason CJ, Wilson & Dawson JJ); *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [8] (Gleeson CJ).

Accordingly, bodies established to hear and resolve defence force disciplinary matters need not conform to the requirements of Chapter III of the *Constitution*.⁷⁷

There is, however, an apparently simple point of dispute which underpins a point of constitutional and social importance about the appropriate boundary between military and civilian law. This dispute surrounds the extent to which the defence power may authorise the determination of offences by military bodies that do not conform to Chapter III. How, and how closely, must those offences be connected to the defence power? Some military offences are purely disciplinary in nature in the sense that they possess no civilian counter part, such as desertion,⁷⁸ disobeying an order⁷⁹ or engaging in conduct that is likely to prejudice the discipline of, or bring discredit on, the defence force.⁸⁰ Other military offences are hybrid in the sense that they could constitute an offence under either civilian or military law such as assault.⁸¹ Some hybrid offences, such as assaulting a superior or subordinate officer,⁸² acquire a special significance when they occur within the armed forces, and for that reason may be regarded as within the armed forces. This latter form of offences is best described as hybrid in view of the judicial acceptance that it is perhaps impossible to draw a 'clear and satisfactory line between offences committed by defence members which are of a military character and those which are not'.⁸³

That difficulty goes to the heart of the constitutional dilemma. To what extent does the defence power authorise the creation of service tribunals that do not conform to the requirements of Chapter III? Does the power enable services tribunals to be invested with power to determine only offences of a disciplinary nature or does it extend to hybrid offences? At the constitutional level, this question is one of constitutional reconciliation because it requires the defence power, and its inherent authority to create and enforce a disciplinary code, to be reconciled with the more general requirements of Chapter III.⁸⁴ Any expansion

77 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 540-1 (Mason CJ, Wilson and Dawson JJ). See also *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23 where Dixon J explained that the exception of defence tribunals to Chapter III was 'not real. To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.' The constitutional accommodation of military courts in American law, which also incorporates a constitutionally based requirement of the separation of powers, is similar. See [Anon] 'Military Justice and Article III' (1990) 103 *Harvard Law Review* 1909. In the most significant constitutional challenge since that article was published, the Supreme Court affirmed that military courts are not required to be affixed with the features of court that exercise judicial power according to Article III of the *Constitution: Weiss v United States* 510 US 163 (1994). It has been suggested that the dearth of recent constitutional challenges to the composure of military courts is evidence that judicial deference to military judicial power is well established: John O'Connor 'The Origins and Application of the Military Deference Doctrine' (2001) 35 *Georgia Law Review* 101.

78 *Defence Force Discipline Act 1982* (Cth) s 22.

79 *Defence Force Discipline Act 1982* (Cth) s 27.

80 *Defence Force Discipline Act 1982* (Cth) s 60. The offence is discussed in Matthew Groves, 'The use of criminal law principles in military law' (1997) 23 *Monash Law Review* 456, 473-7.

81 *Defence Force Discipline Act 1982* (Cth) s 33(a).

82 *Defence Force Discipline Act 1982* (Cth) ss 25, 34 respectively.

83 See, eg, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 544 (Mason CJ, Wilson and Dawson JJ).

84 The characterisation of this as a task of reconciliation was adopted by Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 569-70.

on one factor requires a contraction on the other, hence the task of reconciliation. At another level, the question requires an intuitive judgment about the appropriate border between civilian and military authority, the preparedness of military authorities to accede to the exercise of civilian authority over military personnel, and the preparedness of the civilian judiciary to understand and accept that some judicial authority can, and perhaps even should, be exercised without conformity to the requirements of Chapter III.

Some judges have accepted that the issue can be decided by whether the relevant offence has a sufficient 'service connection', which requires that an offence should bear a relationship to the service environment. An offence need only be relevant to the maintenance of the discipline and good order of the services.⁸⁵ Adherents to this view essentially believe that the defence power can authorise military tribunals to determine what I have described as purely disciplinary offences but almost certainly not hybrid offences.⁸⁶ Other judges have accepted that the scope of the defence power should be decided by reference to the 'service status' of the defendant, which enables a military tribunal to exercise jurisdiction by reason of the defendant's status as a service member.⁸⁷ Adherents to this view believe that military tribunals can determine both disciplinary and hybrid offences.

Several comments can be made about the differences between and consequences of the 'service connection' and 'service status' tests. First, neither view has gained clear support among the High Court. It is not even clear that the court would adopt this classification if it was to finally resolve the constitutional uncertainties surrounding military tribunals. Secondly, the apparent problems would dissolve if military tribunals were created in conformity to Chapter III of the *Constitution*. Such changes would, however, require significant reforms to the military justice system. Thirdly, judges who accept the service connection view often disagree about the application of that test. In other words, they disagree about what may or may not constitute a service connection.⁸⁸

85 See, eg, *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 545 (Mason CJ, Wilson and Dawson JJ). Most members of the court accepted this principle in *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311 [91]-[100] (Kirby J), [158] (Callinan and Heydon JJ).

86 In its strictest form, this view would enable military tribunals that do not conform to Chapter III to only determine military offences of an 'exclusively disciplinary character.' This view was favoured by McHugh J in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 499 and *Re Tyler; Ex parte Foley* (1993) 181 CLR 18, 39. Deane J appeared to favour a similarly strict view in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 585-6. Despite the apparent strictness of the view, it raises the difficult question of what is meant by 'exclusively'. No doubt military and civilian views on this point could differ greatly.

87 This view now prevails in the United States: *Solorio v United States* 483 US 435 (1987).

88 Such a disagreement led to the sharp division in *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311. McHugh J favoured the service connection view and held that the offence in question had such a connection. The offence was an alleged rape committed by a service member who was on an overseas posting but on leave in another foreign country, away from his unit and wearing civilian clothes. McHugh J found the service connection test satisfied largely because the defendant was overseas only by reason of his service, remained liable to recall at any time and subject to some restrictions even while on leave. Callinan and Heydon JJ agreed with McHugh J on his adoption of the service connection but did not accept that it was met in this case. In my view, there is much force in their Honours reasoning. It could even be argued that the relatively slender basis upon which McHugh J found the service connection test to be satisfied made it difficult to distinguish from the service status test.

The outcome of this constitutional uncertainty about the defence disciplinary scheme will greatly affect the scope of the defence force discipline. If the current disciplinary scheme finally ran aground on constitutional principles, the reasoning of the High Court would exercise enormous influence on subsequent reforms to the military disciplinary. The adoption by a clear majority of either the service connection or status test would greatly affect the scope of the military disciplinary scheme. Many American commentators have suggested that the adoption by the Supreme Court of that nation of the service status test has been an important element of the high level of deference and autonomy that court has granted to the military.⁸⁹ The same applies to Australia. A decisive adoption of one test or the other, whether by constitutional doctrine or legislative reform, would determine the extent to which military offences were determined by adjudicative bodies that operated within the armed forces of the civilian courts.

B The Introduction of A Single Military Disciplinary Statute

The introduction of the *Defence Force Disciplinary Act 1982* (Cth) ('the *Discipline Act*') ushered a new era in Australian military law. It removed many features of Australian military law that had been inherited from England, such as the use of different disciplinary codes for each branch of the services. The English military law system was also significantly altered by successive Australian governments. Those alterations had, according to the Minister at the introduction of the *Discipline Act*, lead to a military disciplinary system that was 'a Serbian bog of archaisms. Oddities and inconsistencies abound'.⁹⁰ In *Re Tracey; Ex parte Ryan*⁹¹ Brennan and Toohey JJ explained that the *Discipline Act* provided:

the first occasion in this country when provisions for common application to the naval, military and air forces of the Commonwealth have been enacted to define services offences, criminal liability, punishments, apprehension and investigation and to confer jurisdiction on service tribunals organised in a common system. The *Discipline Act* swept aside a complex of Commonwealth Acts and regulations and Imperial Acts and regulations which had theretofore applied naval, military and air force law to the navy, the army and the air force.⁹²

The *Discipline Act* introduced a uniform approach to military discipline and also a general scheme for the investigation and administration of military disciplinary offences.⁹³ The *Discipline Act* also proved an important conduit for

89 See, eg, John O'Connor, 'The Origins of the Military Deference Doctrine' (2001) 35 *Georgia Law Review* 161, 273-7.

90 Commonwealth, 127 *Parliamentary Debates*, House of Representatives, 29 April 1982, 2083 (J Killen). Some of the complex background to the *Discipline Act* is explained in the Minister's speech. The Act arose largely from a working party that reported to Parliament about the consolidation and modernisation of military law nine years earlier.

91 (1989) 166 CLR 518.

92 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 550.

93 For this reason, the *Discipline Act* bears many similarities to the American Uniform Code of Military Justice. Although that Code is an executive order issued by the President, it serves the same basic function of introducing a single military code to cover all forms of military service.

the influx of principles of the civilian criminal law. The Defence Force Disciplinary Appeal Tribunal has explained that the *Discipline Act*:

appears to equate service offence with criminal offences tried in the civil courts. Thus, the jurisprudence of criminal law in its application to trials in civil courts may now have more relevance in the considerations of service offences when offences were considered within the jurisprudence applicable to military law.⁹⁴

There are many decisions of both the Defence Force Disciplinary Appeal Tribunal⁹⁵ and the Full Court of the Federal Court⁹⁶ that illustrate the increasing relevance of civilian law jurisprudence to the determination of military offences.

Another important feature of the *Discipline Act* was the application to service members of the external criminal law. This occurs by operation of s 61 of the *Discipline Act*, which essentially extends the ACT *Criminal Code* to service members.⁹⁷ This section confirms that service members remain amenable to the general criminal law. It is also clear that this arrangement has extraterritorial operation. Accordingly, service members may be amenable to civilian criminal law whilst overseas.⁹⁸

The *Discipline Act* not only made military disciplinary law much easier to understand and administer, it also made the law much easier to amend. That possibility has proved to be important to the subsequent history of the Act. The most important amendment was the introduction of legislation to ensure compliance of the *Discipline Act* with the *Criminal Code Act 1995* (Cth).⁹⁹ The application of common law principles of criminal responsibility has been replaced with the principles of the *Criminal Code*.¹⁰⁰ Although the Code was significantly altered in its application to the armed forces,¹⁰¹ those amendments were devised on the assumption that military legislation should conform to the

94 *Victor v Chief of Naval Staff* (1992) 115 ALR 716, 727.

95 See, eg, *Kasprzyck v Chief of Army* (2001) 124 A Crim R 217 where the tribunal drew upon civilian law principles governing property offences to determine property offences included in the *Discipline Act*. See also *Mocicka v Chief of Army* [2003] ADFDAT 1 [14] where the tribunal used principles of civilian criminal law to determine the meaning of 'likely' for a charge under s 60 of the *Discipline Act*, which creates an offence for 'conduct likely to bring discredit on the Defence Force.'

96 See, eg, *Hoffman v Chief of Army* (2004) 137 FCR 520 where the court determined a complex textual conflict between separate provisions of the *Discipline Act* by reference to orthodox civilian law principles of construction.

97 Section 61 of the *Discipline Act* provides that a service member is guilty of an offence if he or she does or omits to do an act in the Jervis Bay Territory, which if done or omitted to be done, would be a 'territory offence.' A 'territory offence' is defined by s 3 as one that is punishable under the *Crimes Act 1900* (ACT).

98 *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311. It should be noted that while there was considerable disagreement in earlier High Court decisions on the disciplinary scheme, there was clear agreement in the court that the Commonwealth had wide power to subject service members to military discipline: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 544 (Mason CJ, Wilson and Dawson JJ), 570 (Brennan and Toohey JJ), 585 (Deane J), 601 (Gaudron J).

99 The amending statute was the *Defence Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

100 This reform was affected by amendment of s 10 of the *Discipline Act*.

101 The most common variation from the *Criminal Code* was the preservation of strict liability for many military offences. The *Criminal Code* requires that an offence of strict liability must be expressly specified as such.

same principles of civilian law unless there was good reason for the contrary.¹⁰² That assumption implies that the content of military law should, where possible, be the same as civilian law and that any differences between must be justified.

When the Judge Advocate General subsequently reported on the effect of amendments, he referred to them as a process of harmonisation between the *Criminal Code* and the *Discipline Act*. He also drew attention to the need for ‘intensive’ and ‘ongoing’ training for those defence personnel who administered the *Discipline Act*.¹⁰³ This assessment of the implementation of the *Criminal Code* suggests that the process is one that will draw many aspects of civilian and military law closer and that personnel responsible for the implementation of military law will need to increasingly draw from civilian law principles.

C The Role of the DFDAT

The role of the Defence Force Discipline Appeals Tribunal (‘DFDAT’) has complimented the introduction of a single comprehensive scheme of criminal liability for service members by the *Discipline Act* because there is now a single appellate body to administer a single system of military criminal law. Justice McHugh commented that ‘[F]or all practical purposes, the Tribunal is a court of criminal appeal. Its members are serving judges’.¹⁰⁴ While it is not possible to undertake a detailed analysis of the jurisprudence of the Tribunal, his Honour was clearly correct in the sense that the decisions of the Tribunal appear very similar to those of a specialised court of criminal appeal. Many of the appeals determined by the tribunal deal with principles of criminal liability, statutory interpretation, and the like, which commonly arise in civilian courts of criminal appeal. Even a cursory survey of a range of Tribunal decisions, which span issues such as the application of the rule against bias to conduct in a disciplinary hearing,¹⁰⁵ accrued rights and liabilities under criminal legislation,¹⁰⁶ the principles governing property offences,¹⁰⁷ or application for extensions of time to lodge appeals,¹⁰⁸ reveals that the reasoning of the Tribunal bears an obvious similarity to that of a court of criminal appeal.

102 A point reinforced in the second reading speech of the minister has introduced the Bill. The minister explained that the application of the *Criminal Code* to defence legislation occurred as part of a more general review that required all federal agencies to review legislation for which they were responsible, with a view to harmonising those statutes with the Code. That approach suggests that the Department of Defence was prima facie regarded like any other agency: Commonwealth, 242 *Parliamentary Debates*, House of Representatives, 29 August 2001, 30466 (Hon B Scott).

103 Judge Advocate General, *Defence Force Discipline Act 1982 – Report for the period 1 January to 31 December 2001* (2002) 4-5.

104 *Hembury v Chief of General Staff* (1998) 193 CLR 641, 649.

105 *Hogan v Chief of Army* [1999] ADFDAT 1. Here the tribunal applied the test for judicial bias that applied in civilian courts.

106 *Rogers v Chief of Army* [2004] ADFDAT 1, where a complex question of statutory interpretation on this issue was determined by reference to civilian law authorities.

107 *Coleman v Chief of Army* [2003] ADFDAT 2, where the tribunal determined the requirements of ‘property belonging to another’ by reference to normal civilian tests.

108 *Ferdinands v Chief of Army* [2002] ADFDAT 3, involving an appeal against refusal of application to lodge appeal out of time, the matter was determined according to High Court authority applicable to civilian law appeals.

It should be noted that the Federal Court is granted appellate jurisdiction over decisions of the Tribunal, but this jurisdiction is limited to questions of law only.¹⁰⁹ The nature of this jurisdiction limits the function of the Federal Court to the determination of the question of law that was involved in the decision of the Tribunal. The structure of the right of appeal is such that the Federal Court exercises original rather than appellate jurisdiction over Tribunal.¹¹⁰ It has been suggested that the apparently limited appellate role of the Federal Court means that it cannot draw from comparable and useful jurisprudence from courts of criminal appeal.¹¹¹ In my view, that apparent limitation has little practical consequence because the Tribunal itself functions as a quasi court of criminal appeal and, therefore, introduces the jurisprudence of those courts into defence disciplinary matters.

D Judicial Review

Judicial review of administrative action provides an important form of control over administrative decision-making. The empirical studies of judicial review suggest that the relatively small number of decisions subject to judicial review belies the full effect of those applications. More particularly, it is clear that the normative effect of the apparently small number of applications for judicial review has a much greater effect on decision-making agencies than may appear to the outside eye.¹¹² In other words, judicial review – or even the potential for judicial review – changes the behaviour of decision-makers. To a large extent, however, the defence forces have been immunised from these processes.

The primary vehicle for judicial review of administrative action at the federal level is the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'). The significant procedural advantages of the *ADJR Act* include a right to a statement of reasons, a statutory codification of the grounds of review and simplification of the technical common law remedies into streamlined statutory remedies. Importantly, decisions taken under the *Discipline Act* are expressly excluded from the scope of the Act.¹¹³ Other military decisions are amenable to review under the *ADJR Act*, but are expressly exempt from the statutory right to provide reasons that normally attaches to decisions that are amenable to review

109 *Defence Force Discipline Appeals Act 1955* (Cth) s 52(1). But once that limited jurisdiction is enlivened, the court can make such order as it thinks appropriate: s 52(4).

110 *Hembury v Chief of General Staff* (1998) 193 CLR 641, 653 (Gummow and Callinan JJ). Their Honours pointed out that the jurisdiction of the court is such that it exercises original jurisdiction under this right of 'appeal'.

111 *Hembury v Chief of General Staff* (1998) 193 CLR 641, 673-4 (Hayne J).

112 See Geneva Richardson & Maurice Sunkin, 'Judicial Review: Questions of Impact' [1996] *Public Law* 79; Geneva Richardson & David Machin, 'Judicial Review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal' [2000] *Public Law* 494; Robyn Creyke & John McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163. See also the papers collected in Simon Halliday (ed) *Judicial Review and Bureaucratic Impact* (2004).

113 *ADJR Act*, sch 1(o). That exclusion does not extend to decisions of the DFDAT, but an express exclusion of that body from the scope of the *ADJR Act* is not required. The definition in s 3 of the *ADJR Act* of a 'decision to which this Act applies' is a 'decision' which is 'made under an enactment' and is 'of an administrative character'. The DFDAT exercises judicial rather than administrative power and, therefore, its decisions do not fall within the scope of the basic definitional requirements of s 3.

under the Act. Such decisions include those made ‘in connection with, or made in the course of, redress of grievances or redress of wrongs’ of service members, or ‘decisions in connection with personnel management (including recruitment, training, promotion and organisation)’ of service members.¹¹⁴

This exclusion does not disturb judicial review by way of s 39B of the *Judiciary Act 1903* (Cth), which replicates the original jurisdiction of the High Court.¹¹⁵ Accordingly, decisions under the *Discipline Act* cannot be the subject of statutory judicial review and its associated advantages, such as the right to obtain a statement of reasons,¹¹⁶ but they remain amenable to judicial review according to common law principles.¹¹⁷

The net effect of this exclusion of some military decisions from either the entire *ADJR Act* or its obligation to provide reasons for decisions, while the alternate avenue of judicial review under the *Judiciary Act 1903* (Cth) remains available, is that military decisions are amenable to a patchwork structure of judicial review.¹¹⁸ Proceedings under the *Discipline Act* may be immune from statutory judicial review but decisions with a disciplinary element that are not taken directly under the *Discipline Act*, such as administrative inquiries related to possibility disciplinary issue,¹¹⁹ or the actions and decisions of an investigating officer appointed by legislation other than the *Discipline Act* are amenable to statutory judicial review. The ability to seek statutory judicial review of such decisions allows for indirect or collateral challenge of many decisions with a disciplinary element.¹²⁰ The applications of judicial review of such decisions indicate that courts apply the normal principles governing judicial review and often examine the conduct of military decision-makers in considerable detail.¹²¹

Decisions that are not excluded from the *ADJR Act* are also subject to judicial review according to the normal principles of civilian law. Accordingly, there have applications for judicial review of a decision to terminate the enlistment of a

114 *ADJR Act*, sch 2(a), (b).

115 The jurisdiction of the Federal court is explained in Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 24-6, 33-5.

116 That right is granted by s 13 of the *ADJR Act* and extends only to decisions that are amenable to review under the Act. There is no equivalent exemption under freedom of information legislation. Exemption under that regime is granted only to documents of the Defence Intelligence Organisation and the Defence Signals Directorate: *Freedom of Information Act 1982* (Cth) sch 2.

117 There are limitations to the jurisdiction of the Federal Court under s 39B in criminal proceedings that are commenced in a State or Territory court, but these do not normally apply to military decisions. On the difficulty of proceeding with an application for judicial review of a defence related decision without the benefit of a statement of reasons, see *Martinek v Evans* [2002] FCA 1584.

118 It is not intended to suggest that review by way of s39B of the *Judiciary Act 1903* (Cth) should not be available. If that avenue were abolished, service members aggrieved by disciplinary and administrative decisions would have no alternative but to seek a remedy in the original jurisdiction of the High Court in s75(v) of the *Constitution*. It would obviously be undesirable to curtail the judicial rights of service members so as to exclude all options except that of constitutional judicial review because the High Court should not be burdened with unexceptional applications.

119 *X v McDermott* (1994) 51 FCR 1.

120 *C v T* (1995) 58 FCR 1.

121 See, eg, *C v T* (1995) 58 FCR 1 where the court carefully scrutinised the manner in which an inquiring officer questioned witnesses.

service member on the grounds that the decision was unfair and unreasonable,¹²² and of a decision to transfer a service member on the ground that the decision failed to take account of the effect of the transfer of the service member's family and financial commitments.¹²³ While each of these cases failed, the decision-maker was required to justify his or her conduct to exacting external scrutiny.¹²⁴

It is difficult to measure the precise extent of the applications for judicial review of military decisions, though it is clear that the *potential* to commence an application for judicial review can itself have an immediate and lasting effect. The *Senate Report into Military Justice* gave one such example in which an officer faced with disciplinary proceedings endured a lengthy and fragmented pre-trial procedure. Although eight pre-trial proceedings were conducted over several months the investigation lacked crucial detail and the central allegation against the officer was not clearly made. The case was terminated when the officer threatened to seek judicial review in the Federal Court on the grounds of delay and lack of evidence.¹²⁵ This case provides a clear example of the influence of even the threat of recourse to civilian legal principles.

E Inquiries and Reviews

The role of external reviews is an important measure of civilian influence. More particularly, the response by military forces to external reviews provides evidence of the extent to which external scrutiny can have a direct and timely effect the operation of the armed forces. The narrative account provided by the *Senate Report into Military Justice* of several earlier inquiries into various aspects of the defence forces, and the often disappointing outcomes arising from these inquiries, suggest that the defence forces are quite resistant to the effect of reviews and inquiries.

An inquiry in 1998 by the federal Ombudsman into how the defence force responded to serious incidents and offences concluded that the procedures for administrative and disciplinary investigations were seriously deficient and required significant reform. The Ombudsman was particularly critical of the apparent lack of appropriate professional standards in the conduct, monitoring and review of investigations.¹²⁶ Two contradictory points can be made about this report. First, the Ombudsman's investigation began after the Chief of the Defence Force requested the Ombudsman investigate a particular incident. This

122 *Stuart v Chief of Army* [2003] FCA 1291.

123 *Paterson v Chief of Army (No 2)* [2001] FCA 196.

124 There are even instances in which the defence force itself might seek to use the *ADJR Act* in an attempt to overturn an unfavourable administrative decision. *X v Commonwealth* (1999) 200 CLR 177 is an example. That was a disability discrimination case that ultimately reached the High Court. Early in the proceedings, the defence forces sought judicial review under the *ADJR Act* of the decision of the Human Rights and Equal Opportunity Commissioner who had upheld the initial complaint by X which alleged he had been subject to discriminatory treatment by the defence forces: *The Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76. If that application had succeeded, the complex subsequent High Court proceedings would almost certainly not have occurred.

125 *The Senate Report into Military Justice*, above n 5, [38].

126 Commonwealth Ombudsman, *Own Motion Investigation into how the Australian Defence Force Responds to Allegations of Serious Incidents and Offences* (1998), ch 5.

request indicates an understanding of, and acceptance by, military command of the value of external scrutiny. Secondly, many of the problems identified by the Ombudsman were found to still exist by the *Senate Report into Military Justice*, which was completed seven years later.

A subsequent investigation of the defence disciplinary system the following year by the Joint Standing Committee on Foreign Defence and Trade shared many of the same concerns. The report of that Committee expressed particular concern about the absence of procedural fairness granted to service members during disciplinary investigations. The report was especially concerned about the secretive nature of many investigations and the lack of appropriate training and professional standards for staff who administered the disciplinary system.¹²⁷ One notable aspect of this report was that it proceeded on the assumption that the requirements of procedural fairness, as the doctrine of natural justice is now often labelled, should extend to service members.¹²⁸ A subsequent investigation by the same committee into allegations of brutality within a particular unit revealed similar problems about the secretive nature of investigations and the poor standard of training and oversight for investigative staff. An important feature of this report was the recommendation that the training of military investigators should include greater experience in the work of comparable civilian bodies in order to improve the quality of their work.¹²⁹

A subsequent related inquiry which was commissioned by the Chief of the Defence Force confirmed that systemic flaws existed within procedures for disciplinary investigations.¹³⁰ The report repeated earlier concerns about undue delays, frequent examples of the exercise of undue or improper influence by commanders during the investigation of disciplinary processes, and a general failure to observe the requirements of procedural fairness during disciplinary investigations.

The *Senate Report into Military Justice* acknowledged that military authorities had often sought to respond to the problems raised by earlier reports but concluded that the response was often inadequate. The Senate Report explained:

repeated inquiries and reports indicate that the same problems continue to arise. Despite almost constant scrutiny, ADF personnel continue to suffer under a system that is seemingly incapable of effectively addressing its own weaknesses.¹³¹

127 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice Procedures in the Australian Defence Forces* (Report 89, 1999).

128 The report did suggest that the exact requirements of the doctrine should take account of the character of the military environment, but this is simply an illustration of the variable content of the doctrine of procedural fairness.

129 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Rough Justice? Investigation into Allegations of Brutality in the Army's Parachute Battalion* (Report 99, 2001) 61.

130 Australian Government Department of Defence, JCS Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force* ('the Burchett Report') (2001).

131 *The Senate Report into Military Justice*, above n 5, 3.23.

V THE SENATE REPORT

The *Senate Report into Military Justice* identified significant flaws in the military justice system and made sweeping recommendations to correct those flaws. The full extent of both the perceived problems and their suggested solutions cannot be easily summarised, but several key themes emerge from the report. The report made adverse findings about individual investigations and prosecutions conducted in the military justice system, and its overall structure.¹³² A key element of the many comprehensive recommendations for reform was the argument that the military justice system should become less military in character. More particularly, it was recommended that civilian courts and law enforcement should assume responsibility for much more of the conduct of defence force members that is currently prosecuted within the military justice system.¹³³ An important related element of the report was that it ultimately rejected much of the evidence given by defence officials who argued that control of military justice system should remain firmly within the military. The rejection of such evidence by the report provides a subtle example of the assertion of civilian authority over the military.

The shape of any reforms based on the *Senate Report into Military Justice* lies in the hands of the government, but it is useful to comment on the potential consequences that some of the major recommendations would have for Australian military law. Those comments are subject to two important cautions. The first is that the tabling of the report does not necessarily mean that its recommendations will be enacted in full or even in part. The recent history of the administration of the defence forces has witnessed regular reviews and inquiries, coupled with a continued reluctance of governments to give effect to many of the recommendations that have arisen from those reviews and inquiries.¹³⁴ The second caution is that the Senate Report was clearly mindful of the difficulties in previous inquiries and reports into the defence forces. The report indicated that the Senate Committee on Foreign Affairs, Defence and Trade References had requested the ADF to submit annual reports on the implementation and effectiveness of reforms to military justice in light of the Senate Report and any other initiatives. The Committee has also requested that the ADF report annually

132 The *Senate Report into Military Justice* echoed concerns expressed by the report of a recent joint inquiry conducted by the Department of Defence and the Office of the Commonwealth Ombudsman: Commonwealth Ombudsman, *Review of Australian Defence Force Redress of Grievance Systems 2004 – A joint report by the Department of Defence and the office of the commonwealth Ombudsman* (January 2005). That report suggested that the military grievance system was overly complex, piecemeal in nature, often inefficient, and that many of these problems were exacerbated by wider problems in the military justice system.

133 The report also recommended fundamental changes to the structure and operation of the administrative mechanisms to receive and investigate grievance from service members. *The Senate Report into Military Justice* (2005), above n 5, chs 6, 7, 10, 13 and recommendations 24-5, 29, 30, 35

134 The Minister for Defence has not, at the time of writing this paper, issued a press release in response to the *Senate Report into Military Justice*. In an interview given shortly after the Senate report was tabled, the minister indicated his apparent sympathy to the view of the Chief of the Defence Force whom the minister suggested did not support radical change to the military justice system. See the transcript at <<http://www.minister.defence.gov.au/HillTranscripttpl.cfm?CurrentId=4929>> at 24 June 2005.

on the workload and effectiveness of the key decision-makers within the military justice system.¹³⁵ This aspect of the report indicates that the Committee intends to monitor the implementation of its recommendations, which may itself increase the likelihood that implementation occurs, and that the Committee intends to enhance its supervisory function over the military justice system. While the outcome of increased parliamentary scrutiny cannot be predicted, evidence from other jurisdictions suggests that parliamentary committees that make a determined effort to improve their oversight of defence matters can develop considerable expertise and thereby increase their ability to influence the military.¹³⁶

A The Adjudication of Offences and Chapter III of the Constitution

A key recommendation of the *Senate Report into Military Justice* was that a Permanent Military Court be established to hear and determine military offences and that this should conform to the requirements of Chapter III of the *Constitution*.¹³⁷ This recommendation would preserve the separate military legal system, but introduce a greater adherence to the institutional qualities of civilian judicial power. The possible increased influence of civilian justice was reinforced by additional recommendations that appointees to the court should possess several years experience in the civilian courts.¹³⁸

Changes of this nature would almost certainly dispel many of the constitutional problems surrounding the defence disciplinary scheme, but they would also require many other institutional reforms. The Defence Force Disciplinary Appeal Tribunal would have to be reviewed, perhaps even abolished. It would be inappropriate, and probably also unconstitutional, for the Tribunal to exercise any appellate jurisdiction over the proposed military court. If the exercise of defence judicial power were to be constituted according to the principles applicable to Chapter III, it would be anomalous that the supervision of those bodies was not also conducted according to normal principles that govern inferior courts. If so, the Federal Court would be granted the right of appeal that is normally vested in a court of criminal appeal. Changes of this nature would amplify the oversight function of the Federal Court by widening its appellate function over military justice so that it occupied the position of a quasi-court of criminal appeal, which is currently occupied by the Tribunal.

One important consequence of the creation of a military court is that it would inevitably give rise to a judicial culture within the military justice system in the

135 *The Senate Report into Military Justice*, above n 5, l. The Judge Advocate General was not included in the list of bodies to provide an annual report to the Senate Committee because he has done so for many years.

136 On the English experience, see Bruce George & J David Morgan, 'Parliamentary Scrutiny of Defence' (1999) 5 *Journal of Legislative Studies* 1.

137 *The Senate Report into Military Justice*, above n 5, (recommendations 18-9).

138 *Ibid.* (recommendations 20-1). The report did not specify whether the experience required would be experience of working within the civilian legal system or simply that practitioners be admitted as legal practitioners for a period of years. The latter does not necessarily require any direct experience within the civilian courts.

sense that members of the court would be freed from the chain of command, take the oath of judicial office and act with the institutional neutrality required of judicial officers. An important related point is that the judicial culture cannot easily be adopted in part – it must be adopted in full or not at all. That point was well illustrated by the recent review of Canadian military law which recommended that military judges, who were appointed to fixed renewable terms, should be appointed to a specialist military court according to the normal terms of judicial appointment. The report recommended that military judges be granted many of the protections accorded to civilian judges, such as protected conditions and statutory immunity from civil action when acting in their judicial capacity. It also recommended that military judges be granted many of the sentencing powers exercised by civilian judges, such as the power to impose suspended sentences.¹³⁹ The common theme in all of these recommendations is the suggestion that military judges should look and act increasingly like civilian judges.¹⁴⁰

B Independence from the ADF¹⁴¹

The *Senate Report into Military Justice* recommended that officers responsible for the conduct and determination of disciplinary offences should be granted institutional independence from the defence force. In one sense these recommendations are a natural extension of the suggestion that the adjudicative bodies should be constituted in accordance with Chapter III of the *Constitution* because there seems little purpose to constitute decision-making bodies in accordance with orthodox constitutional rules without also granting those bodies the same institutional independence granted to other judicial bodies. But the suggestion that institutional independence should be granted to prosecuting authorities moves a step further. The recommendation to create an independent Director of Military Prosecutions with responsibility for advocacy, advice and prosecutorial functions would remove operational control of prosecution decisions from military forces.¹⁴² One important question about these changes is the extent to which an independent military prosecutor might be influenced by his or her civilian counterparts. The history of independent civilian prosecutorial

139 *The First Independent Review by the Right Honourable Antonio Lamer PC, CC, CD 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 section 96 of the Statutes of Canada 1998, c.35* [(2003) 17-31, (hereafter '*The Lamer Report*'). The recommendations to replace fixed term appointments with appointments to the age or retirement, as is the standard practice for judicial officers, contrasts American practice. American military judges are appointed to renewable terms and subject to regular performance assessments. The latter practice has attracted considerable criticisms on the basis that it comprises the independence of military judges. See, eg, Fredric Lederer & Barbara Hundley, 'Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice' (1994) 3 *William and Mary Bill of Rights Journal* 629.

140 *The Lamer Report* can be contrasted with the review of the American Uniform Code of Military Justice that was conducted on the 50th anniversary of the code: Hon Walter Cox III, *Report of the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice* (2001). The Cox Commission was much more procedural in its focus. A summary of its report is located on the website of the National Institute of Military Justice: <<http://www.nimj.org>> at 17 September 2005.

141 *The Senate Report into Military Justice*, above n 5, li.

142 *The Senate Report into Military Justice*, above n 5, (recommendations 10-11).

authorities suggests that they act with great independence and often take decisions that are unpopular with the government of the day. It is difficult to predict whether an independent military prosecutor would adopt the same vigorous independence.

C Military Disciplinary Law in More Limited Circumstances

It was explained above that there is an overlap between civilian criminal law and military disciplinary offences because many military offences, such as assaulting a superior officer, are 'hybrid' offences in the sense that they can constitute an offence under military or civilian law but acquire a special significance when committed in a military environment. The *Senate Report into Military Justice* did not recommend the abolition of hybrid offences, but its recommendations that responsibility for the investigation and prosecution of criminal conduct be vested in civilian authorities foreshadows a much narrower role for military law. The report anticipated that civilian authorities might decline to pursue many matters and suggested that such cases should be referred back to military authorities, but it recommended that military authorities should only pursue such matters when they could 'reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline'.¹⁴³

These changes would restrict significantly the scope of the military disciplinary system and allow for a corresponding increase in the reach of civilian authority over the military.¹⁴⁴ Several comments can be made about the potential effect of that increased reach of civilian authority. First, civilian authorities would exercise initial control over the investigation of hybrid offences and determine whether, and how, to investigate and prosecute such offences. While military authorities would retain the right to pursue some matters, this would only occur if civilian authorities declined to do so and, even then, when a 'service connection' could be established. Secondly, the *Senate Report into Military Justice* gave no indication how the requirement that an offence could 'reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline' was to be determined. While military authorities would clearly take account of service issues, that requirement might not be easy to satisfy. The *Senate Report into Military Justice* suggestion that offences be pursued by military authorities only if they *substantially* maintained or enforced discipline introduces a threshold or preliminary requirement that must be satisfied before an offence should be pursued. Another difficult issue is the extent to which military authorities should take account of the reasons why civilian authorities declined to pursue a matter. If they decided that a matter was too trivial or that the prospects of a conviction were not sufficiently strong to warrant a prosecution, would military authorities need to explain their decision to adopt a different view? Should military authorities take account or use the evidence obtained by civilian authorities? While it is difficult to predict the outcome of

143 *The Senate Report into Military Justice*, above n 5, recommendation 4.

144 These changes would, if enacted, amount to the adoption of the view advocated by some members of the High Court that the defence disciplinary scheme should extend only to disciplinary offences.

these problems, it is likely they point to a greater influence of civilian standards for the investigation and prosecution of offences on military justice. That, in turn, would influence the conduct of military investigations.

D An Independent Directorate of Defence Counsel Services

The *Senate Report into Military Justice* suggested that other aspects of the military legal apparatus be granted greater institutional independence from the ADF. It recommended that all permanent military legal officers be required to hold current lawyers' practicing certificates and that a Director of Defence Counsel Services be established.¹⁴⁵

The recommendation to establish a Director of Defence Counsel Services would provide institutional support to enhance the independence by Defence Legal Officers ('DLOs') by creating a high profile office that would serve as a focus, perhaps in a protective sense, for DLOs who acted on behalf of service members. The Senate Report was mindful that the Canadian model from which it drew this recommendation was widely perceived to be independent of the chain of military command.¹⁴⁶

The recommendation that legal officers hold current practicing certificates was clearly designed to overcome the problems identified in the recent case of *Vance v Chief of Air Force*.¹⁴⁷ In that case the Supreme Court of the ACT held that DLOs did not possess a sufficient level of professional independence required to support a claim of legal privilege for much of their work.¹⁴⁸ This finding was influenced by several factors, all of which suggested that DLOs acted primarily as military, rather than legal, officers. First, DLOs operated within a hierarchical regime of command which limited their independence to that allowed by superior officers. This problem was highlighted by evidence which suggested that the defence forces had not fostered a culture of independence for legal advisers but instead accepted that DLOs were amenable to superior orders concerning their legal work.¹⁴⁹ Secondly, DLOs were not normally subject to continuing legal education and other mechanisms designed to foster ethical standards, and there

145 *The Senate Report into Military Justice*, above n 5, (recommendations 16 and 17 respectively).

146 *Ibid.*, 74-6. It should be noted that a recent review of the Canadian scheme recommended reforms to strengthen the independence of the Director of Defence Counsel Services, to grant the Director the same level of security and independence enjoyed by the head military prosecutor: *The Lamer Report* (2003), above n 139, 14-16.

147 (2004) 154 ACTR 12. Vance was involved in a long running claim for damages for what he alleged was a wrongful decision to discharge him on medical grounds. The ADF resisted Vance's motion for discovery with a claim of legal privilege. Vance claimed that DLOs were not sufficiently independent to claim legal privilege and, therefore, could not resist discovery on this ground.

148 The position in Canada seems similar. The *Lamer Report* (2003), above n 139, 62-3 noted that defence counsel acted as advisers rather than legal counsel in the traditional sense. The report recommended that confidentiality between defence counsel and their client be strengthened but concluded that the introduction of solicitor/client privilege would be inappropriate in a military setting.

149 Crispin J was influenced by evidence in the case at hand, in which a DLO was ordered to deliver confidential files. He also recited evidence by a government minister, who was a former DLO, that DLOs could be commanded to act against their legal training. In addition, a senior member of the defence force did not clearly deny the possibility that DLOs could be ordered to act contrary to legal professional ethical rules: *Vance v Chief of Air Force* (2004) 154 ACTR 12, [60].

was no clear mechanism by which professional ethical standards could be applied to DLOs.¹⁵⁰

It should be noted that the decision of Crispin J was set aside after the Senate was tabled.¹⁵¹ The ACT Court of Appeal held that Crispin J had erred when he applied the common law test governing legal privilege rather than requirements for legal privilege established in the *Evidence Act 1995* (Cth). The Court of Appeal conceded that DLOs did not hold practising certificates but concluded that this issue was not decisive to the statutory requirements for legal privilege.¹⁵² The more important issue, according to the Court of Appeal, was whether the document was confidential in the sense that it was prepared 'in circumstances that the person who prepared it was under an express or implied obligation not to disclose its contents ...'¹⁵³ In my view, the connection drawn by the Court of Appeal between circumstances that give rise to an obligation of confidence and the existence of legal privilege does not sit easily with legal practice in the armed forces. It is entirely possible that a DLO might provide advice in circumstances that would prima facie impose an obligation of confidence, but that obligation could be overridden by superior orders directing the DLO to disclose advice that would otherwise be confidential.

A requirement that DLOs hold current practicing certificates would provide an important foothold for civilian values within the defence force. The superficial reason is that legal professional regulatory requirements such as continuing legal and ethical education and the obligation to observe professional ethical standards introduce external norms. But a deeper reason is the persuasive nature of legal culture. Many legal ethical values highlight the independent position of lawyers and their overriding duty protect and pursue the interests of clients and to obey and uphold the law.¹⁵⁴

The role of other lawyers in fostering these values is crucial. When lawyers are faced with ethical and other professional problems, they are encouraged to seek the advice of other lawyers. This approach immerses lawyers in legal culture and its values and makes them more able to resist what are perceived as external values or pressures, such as superior orders.¹⁵⁵ Such practices may arguably imperil the chain of command because they invite DLOs to question the chain of

150 *Vance v Chief of Air Force* (2004) 154 ACTR 12, [63] where Crispin J noted that DLOs almost certainly could not be subject to legal professional discipline for any order to act against legal ethical guidelines. He also noted that, even if a DLO was sanctioned, he or she did not require a practising certificate to continue work in the defence force.

151 *Commonwealth of Australia & Chief of Air Force v Vance* [2005] ACTCA 35.

152 The main point of difference appeared to be that Crispin J held that privilege could only be established when the lawyer held a practising certificate. The Court of Appeal rejected this absolute approach: *ibid* [22].

153 *Ibid* [24].

154 The literature on these issues is vast. A useful explanation of the duties of lawyers is given in Gino Dal Pont, *Lawyers' Professional Responsibility* (2nd ed, 2001).

155 *The Senate Report into Military Justice* (2005), above n 5, seemed aware of this possibility when it suggested that the 'exposure' of DLOs civilian processes during secondments to civilian prosecuting bodies would broaden their professional skills, [4.37]. It is difficult to imagine that DLOs could absorb civilian professional skills but not their accompanying ethical context.

command and also subject DLOs to a divided loyalty – between the client and chain of command – which is antithetical to military life.

VI CONCLUDING OBSERVATIONS

The days in which the military and civilian legal systems operated separately from each other have long since ended. Most would agree that civilian and military law should contain many common features, but there is likely to be disagreement on the extent to which the two should be harmonised by way of civilianisation. Much of that disagreement depends upon the perspective from which civilianisation is viewed. If one accepts that the military life is sufficiently different as to warrant a system of governance that is distinctly separate and different from much of civilian life, the civilianisation of military law represents an undesirable, even detrimental, encroachment of external values into military life. But if one does not accept that the character of military life is such to justify significant differences with civilian life, the civilianisation of military law represents a natural and desirable evolution of military law and the broader culture within which it operates. According to this view, military and civilian law should not differ unless there is clear and compelling reason.

It is difficult to accept one view entirely at the expense of the other because the arguments for and against the different character of military life are usually finely balanced. Australian courts have clearly not adopted the high level of deference which the Supreme Court of America has extended to the decision of military officials. The continued uncertainty that surrounds the constitutional validity of the Australian military disciplinary system concerns the relatively narrow question of the extent to which disciplinary offences may validly extend to service members. When the High Court finally resolves the constitutional questions surrounding military disciplinary scheme it is, in my view, likely to support the ‘service connection’ test. The decisive adoption of that test would arguably narrow the scope of military disciplinary and, by implication, the military legal system as a whole, because it would restrict the extent to which service members were subject to military disciplinary offences. But this would depend very much on the manner in which the test was applied. The adoption of the service connection test would compliment other changes in military justice system such as the adoption of the principles of *Criminal Code Act 1995* (Cth) and the assumption by the Defence Force Discipline Appeal Tribunal of the role of a quasi-court of criminal appeal.

The extent to which the recommendations of the Senate Report might change the military justice system is difficult to determine. Resistance to change is a recurring feature of military law and there is a reasonable possibility that any attempt to implement the *Senate Report into Military Justice* would meet significant institutional resistance. At the same time, however, it must be conceded that the publication of the report may provide an impetus for change. The report is well argued and makes a strong case for reform. In addition, its final recommendations were not subject to any division according to political or

other lines. The central recommendations of the Senate would, if enacted, greatly increase the civilian influence over the military justice. The combined impact of those recommendations would be far greater than their individual elements might suggest, but whether wider changes will be embraced by the legislature remains to be seen.