FOREWORD

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The notion and practice of military law have expanded exponentially over the last 20 years. Previously, the role of a military lawyer was largely confined to discipline law and basic administrative law.

A brief glance at the contemporary topics covered in this edition shows how much has changed.

Legal Officers of the Australian Defence Force ('ADF') are now routinely deployed on operations domestically and internationally.

No matter what other areas may be topical, there is one which always remains at the essential core of military law. Military discipline law underpins the ADF at peace and in war, both in and outside Australia.

What is commonly referred to as 'military justice' in fact conflates two quite different parts of the system, to which very different considerations apply. One is the system of administrative law within the ADF, which covers complaints, review of command or administrative action and the conduct of administrative investigations, including Boards of Inquiry. It is that last which attracted most attention in the recent Senate report on the effectiveness of Australia's military justice system.[1] The second – also covered in the report – is the system of military discipline law. That concerns the charging of offences and hearings before service tribunals under the *Defence Force Discipline Act 1982* (Cth) ('*DFDA*').

There have been significant international developments in military discipline law in the last few years. Royal Navy courts martial in the United Kingdom have been found to be in breach of the fundamental right to be tried by a fair and impartial tribunal. Although the High Court of Australia has held (by majority) that the constitution of courts martial (and semble trials by Defence Force Magistrates) under the *DFDA* answers the requirement of independence of a service tribunal exercising disciplinary power, as the articles here show, that is not necessarily beyond challenge. But there are legislative measures which can be taken to guarantee the independence and constitutionality of service tribunals rather than devolving military judicial authority wholly or substantially to

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

civilian courts. A number of these have already been implemented and others are pending.

When seeking to draw lessons from experience elsewhere, it is essential to appreciate the differences (often not immediately obvious) between apparently comparable systems. Particular outcomes often turn on the differences. The position of Judge Advocate General ('JAG') is an example. In Australia, the JAG is a statutory appointment by the Governor-General. He or she must be (or have been) a Judge of a superior court. The JAG has certain reviewing and appointing functions under the *DFDA* and presents an annual report on it to the Parliament through the Minister. The JAG does not sit on military tribunals, nor give advice to the Department or the Minister. In the United Kingdom, the JAG is a Crown Court Judge who administers the court martial system and who does sit as a Judge advocate. In Canada, the JAG has no judicial function nor responsibility and is in fact the chief legal adviser to the Department of Defence and the government.

The decision of the European Court of Human Rights in *Grieves v United Kingdom*[2] did not turn simply upon the fact that the Judge Advocate was a serving uniformed naval officer. Other critical features were that, when not sitting as a Judge Advocate he carried out regular navy duties (and was subject to performance reports) and he was appointed (both in post and to particular courts martial) by the Chief Naval Judge Advocate who was chief legal adviser to the Royal Navy (including for the prosecution). By contrast, in Australia, the Chief Judge Advocate is a statutory appointment by the JAG and works exclusively within the Office of the JAG. Judge Advocates (and Defence Force Magistrates) are appointed to post by a Service Chief on the nomination of the JAG and to particular trials by the JAG (as are the President and members of the court martial). These are important differences and there are others.

This Thematic Edition on Australian Military Law is a timely and important contribution to an extremely important debate.

I congratulate the Editor and each of the authors for a timely and significant contribution to this important area of legal and military discourse. I look forward to the ongoing debate which it will hopefully stimulate.

2 *Grieves v United Kingdom* [GC] no. 57067/00, ECHR 2003-XII.