THE DEFENCE FORCE DISCIPLINE ACT; DISCIPLINARY DREAM OR ADMINISTRATIVE NIGHTMARE

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Presented to the AIAL, 4 March 1992, Canberra, and first published in AIAL Newsletter No 10 1991.

The general subject of this paper is the *Defence Force Discipline Act 1982*, proclaimed in mid 1985, and its impact on formal disciplinary measures. I intend to make a number of introductory remarks about military discipline in its social context, as that subject is at the root of concerns over formal disciplinary provisions, and to then explain some of the provisions of the Act. That should create a context for discussion of several High Court cases and the possibilities for management of the disciplinary system that flow from them. The particular cases are: *Re Tracey; Ex parte Ryan* (1989) 63 ALJR 250; *McWaters v Day* (1989) CLR 289; *Re Nolan; Ex parte Young* (1989) 172 CLR 460

It is important to look to social context and to the substance of the subject of discipline. There is no doubt that a matrix of factors including technology, social environment, and political and economic forces, impact on the military organization and influences internal and external perceptions of its role, structure, place in society and its needs as a professional organization. This has been no more evident in our history than in the present day. It is not necessary, and perhaps not even possible, to place the influence of such factors in any order of precedence or to delineate any particular time or period as more important than another. However, for my part I see the conclusion of our involvement in the socially divisive Vietnam war as a convenient point at which to mark the commencement of a period of quite dramatic change for the Defence Force. Australian troop withdrawal from Vietnam ended a period of over 30 years during which some element of our forces had always been deployed on active service. I do not disregard the recent deployment to the Gulf war of our ships or our involvement in multinational or United Nations peacekeeping operations but I draw a distinction between them and the combat operations conducted throughout World War II, Korea, Borneo, Malaya and Vietnam. From the Vietnam era which saw a Task Force of about 8000 personnel (at the height of our involvement) employed on 12 month tours of duty, the percentage of personnel in the forces with combat/active service experience has declined to miniscule proportions. For the last 20 years our forces have been employed in what would once have been termed garrison duties, well removed from the active service which provides a part of the *raison d'etre* for discipline.

At about the time of the withdrawal from Vietnam I recall, in general terms, a Fabian Society paper published by Mr Barnard, Minister for Defence in the Whitlam government, wherein he referred to a certain tension between the military and Labor governments but prophesied the removal of the last vestiges of the military caste structure and the convergence of civilian and military styles of management and civilian and military skills. It seems to me that he paid insufficient regard to the strength of self supporting military conservatism (not always a bad thing) but in many ways his views were remarkably prophetic. Perhaps the first significant step in the process he envisaged was the defence reorganization based on the Tange Report, which saw the development of a defence bureaucracy combining the civil and military elements of the Defence

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Department, and which laid the basis for command of the Defence Force by the Chief of the Defence Force (CDF) and the joint administration of the Defence Force by the Secretary of the Department and the CDF. In more recent times, and continuing at the moment, we see the natural development of that process in the Defence Regional Support Review which combines core departmental and single service functions in single Defence Centres in each State.

During the same period we have seen the development of a relatively low profile Armed Forces Federation which, in traditional terms, cuts across the relationship between leaders at all levels and the troops. That event perhaps refocussed and even to some extent revitalized the position of traditional defence lobby groups such as the RSL, but at the same time drew a distinction between the military forces of yesteryear and the defence forces of the modern era. That distinction waxes and wanes: the emotive Sydney march of Vietnam veterans evokes memories of 'our boys' and their service to country, at least for the older generation, while the very existence of a Defence Force Remuneration Tribunal seems to represent the industrial focus of the present force. The Dibb Report refocussed strategy and led to reassessments of role and functions. The Wrigley Report raised the possibility of an almost European style defence - perhaps along the lines of the Swedish total defence model. The Force Structure Review has led to quite dramatic changes in manning and the first intake of the Ready Reserve (one year full time, four years part-time) is now in training.

In all these activities there is constant pressure on resources, and underlying that factor, as always, is the question of cost. New ways must be found to extend the capacity of resources limited by cost to reduce the cost. There is constant examination of 'contracting out', and greater reliance on existing infrastructure, and competing questions of whether the contractor will be there when the bullets fly or whether the infrastructure can cope in a variety of circumstances. Whatever the merit of the arguments the inexorable fact is that there is a discernible convergence of military and civilian management to achieve the defence aim. It is likely that this will increase. There is and will be increasing interchange of skills, work practices and management styles. Issues of equal opportunity employment, privacy, occupational health and safety, and conditions of employment are becoming matters of 'common' parlance between civilians and servicepersons. That is not to say that they have never been issues for the military, but in yesteryear they were raised in an entirely military context.

So where has this convergence left the warrior class, which despite all remains a focal point of the defence aim. At this point we move to the other end of the continuum and look to the impact of this evolution on our military force. It is trite that we are all products of our environment.

It is a traditional and basic tenet that discipline in all its forms is at the heart of the effective fighting force. Discipline is an essential element of combat power, that is the total means of destructive force that a military organization can bring to bear on an opponent. The most modern military technology in the hands of an undisciplined force will not guarantee the decisive application of combat power. So what is discipline?

Our British heritage seems to have promoted two general concerns on the subject. First, parliamentary control of the military beast to ensure the protection of the public and its institutions and secondly, promotion of the efficiency and effectiveness of the force. Unlike many third world countries where militarism continues as a reaction to weakness in civil institutions our history has firmly established control of the military by government: accordingly I put to one side the historical concern to maintain discipline for the protection of the public and concentrate on the concern to promote efficiency and effectiveness. There is much mythology about Australian military discipline from the two world wars and we tend naturally to cling to the heroic aspects: 'mateship' is a central theme, along with disregard for

rules and regulations. There is nothing wrong in this, but a clinical examination of the subject raises a myriad of factors which reveals the naivete of reliance on the heroic aspects.

The Army Handbook on Leadership, mirrored I am certain in publications in our sister Services, introduces the subject by stating that the existence of discipline ensures a readiness to obey willingly and to take appropriate and intelligent action. It proposes that discipline training is mental and moral training towards voluntary and swift compliance with a code of behaviour, and that the crux of the issue of discipline is the conscience of the person who conforms. Discipline is a matter of suasion rather than force, and the imposed discipline of recruit training becomes, with sound leadership, intelligent self discipline which will sustain persons in adversity, promote intelligent obedience, promote respect among peers subordinates and superiors, and promote cohesion among individuals - the whole leading to the capacity to apply combat power effectively. The regimentation of persons, a popular perception of military discipline, is far too simplistic a manner of description of this process.

The process places a heavy burden on leadership, but an equally serious obligation on individuals to conform to standards that will promote the effectiveness of the group.

At times the leadership will fail, or individuals will resist the process. A range of measures are available to continue efforts at persuasion, preventative measures such as fault checking, counselling, or formal warnings but where these measures fail, there exists the formal disciplinary system. But even in the final resort to punishment, essential aspects of discipline must be applied. Deputy Judge Advocate Robert Carey CB writing on military law and discipline in 1877 in London had this to say:

> 'Discipline and efficiency can only be secured by a careful study of individual character, by attention to the most minute details of all that concerns the health, comfort or necessities of soldiers, by impartiality, by experience, and by a determination to enforce obedience to all the rules and regulations of the service. To a certain extent this can only be attained by punishment, and at times by severity. It is however not only necessary to know what punishment can be legally awarded but also to discriminate and to decide what punishment ought to be awarded, when punishment can be dispensed with, or when it must be resorted to, and when the object desired to be attained will be best secured by a slight or severe award.'

In a more succinct statement of some these issues, writing nearly one hundred years later in the American *Criminal Law Review*, General William C. Westmoreland said:

> A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

At first glance it seems that these lessons of history were considered in the development of the *Defence Force Discipline Act 1982* and that policy framers and the drafter took note of the 'convergence' theory articulated by Mr Barnard.

The Discipline Act had its genesis in the 1946 Reed Committee Report to the Minister for the Army upon the trial and punishment of offences against military law. The Report found overwhelming evidence that the form of military law was unsatisfactory and confusing and recommended that all offences, punishments and all matters relating to the trial and punishment of offences against military law should be in a separate code incorporating provisions that are applicable in both peace and war. In 1949 an interdepartmental committee was set up to review Defence legislation, including disciplinary legislation. During the next ten years numerous separate Service disciplinary

Bills were prepared for presentation to Parliament, 11 in all I believe, but none were enacted. In this period and in the ensuing decade, considerable reliance was placed on the Reports of the Select Committees for the British House of Commons but then in 1965, on a Navy initiative, a decision was taken to prepare a 'uniform disciplinary code' for the three Services. Over the next seven or so years a Working Party under the chairmanship of a representative of the Attorney-General's Department developed comprehensive proposals against a backdrop of public disinterest, inherent military conservatism and competing Service positions. In 1973 the Working Party received new impetus with the receipt of Ministerial Directives as to matters to be incorporated in the disciplinary code. Included were:

(a) right to representation by counsel;

(b) right to legal advice;

(c) right to have a transcript of proceedings;

(d) suspension of sentences;

(e) inclusion of sentencing criteria;

(f) incorporation of rights under the Human Rights Bill;

(g) the need to keep Service encroachment on personal liberty and rights closely equated to the ordinary civil law.

A report and draft legislation was presented to the Minister in late 1973 and tabled in 1974. Armed with the resulting comments, the Working Party presented a second draft in 1975. In the late 1970's the Defence Minister in a new government indicated that he was concerned about needless technicalities, and excessively generous provisions relating to legal representation. He took the view that simple disciplinary transgressions should be dealt with summarily and that there should be limited scope to involve legal procedure. A compromise was settled upon and the Defence Force Discipline Bill was enacted in 1982. An interesting side issue at the time was the contemplation of the Criminal Investigations Bill. It was envisaged that the Bill would shortly be enacted but to ensure the modernity of the Discipline Act, many of the comprehensive investigatory provisions were incorporated. It is history that agreement could not be reached on the Investigations Bill and it lapsed - but many provisions were included in the Discipline Act.

The result of this 30 odd year gestation was not a 'code' of service discipline, despite the existence of several effective State codes of criminal law, nor is the legislation entirely uniform for the three Services, the latter requirement having foundered on the rock of naval requirements for summary discipline. The legislation has been described as:

> ... new and contemporary legislation, capable of meeting the perceived needs of the Defence Force over coming decades, subjecting all Australian Defence Force personnel to one readily identified and cohesive body of law which will provide for what it is realistic to call common offences and evidentiary rules, common requirements as to the composition of courts martial and the procedures observed therein, a common system of review of all trials, and so far as is feasible to adopt them, common forms of administrative practices for handling disciplinary matters throughout the 3 Services.

Without more the development of homogenous Australian legislation for the three Services was a significant advance. For the rest the Discipline Act has been described as 'evolutionary' rather than 'revolutionary'. The proponents of the Bill contended that the change was not change for the sake of change, and that the driving motives were not those of reforming zealots. The intentions had been to:

> replace the existing systems [which were complex] with a sound new system which will match the perceived national, political, social

and juridical aspirations of the day, and of ... tomorrow.

It is not inappropriate to note that this global intention made no specific mention of 'military' aspirations. A generous interpretation would indicate that military needs are naturally incorporated in the scope of such a broad aim and that it marked a milestone in the convergence of military and civilian practices. A less generous approach, perhaps in danger of being described as a traditional military approach, is that insufficient account was taken of peculiarly military needs and circumstances and that the result was not so much a convergence as a subordination of traditional military requirements to civilian processes.

At this point a thumb nail sketch of the Act at time of proclamation is necessary and instructive. You will forgive me if, where it is necessary, I employ Army terms as descriptors that will apply in equivalent circumstances in the other two Services.

Broadly speaking there are three levels in the hierarchy of disciplinary tribunals: the summary level, the courts martial level, and the courts martial appeal level.

The explanatory notes indicate sub-levels in those levels of tribunals. In order to place their respective functions in perspectice, I provide you with the following figures:

Number of trials in 1990

Navy

Subordinate Summary Authorities	2139
Commanding Officers	1132
Superior Summary Authorities	Nil
Defence Force Magistrate	8
Restricted Court Martial	3
General Court Martial	2

Army

Subordinate Summary Authorities	2092
Commanding Officers	1388
Superior Summary Authorities	1
Defence Force Magistrate	53
Restricted Court Martial	19
General Court Martial	2

Air Force

Subordinate Summary Authorities	335
Commanding Officers	140
Superior Summary Authorities	1
Defence Force Magistrate	3
Restricted Court Martial	1
General Court Martial	1

When the figures from the three Services are combined they give figures of, at the summary level 7228 trials, and at the court martial level, 92 trials. In 1990 three appeals from court martial proceedings were conducted.

The broad figures from the three Services also reveal that there are different policies at play in the approach to disciplinary questions, in some cases driven by different circumstances, but I disregard that matter for the purpose of this paper. They indicate that an overwhelming majority of offences are dealt with at a sub unit or unit level. I am also able to inform you that the vast majority of these offences relate to minor disciplinary infractions (a fact borne out by the Independent Review of Defence Force Discipline - of which more later) and that over 90 per cent of such trials involve guilty pleas.

It is clear that the Commanding Officer is at the centre of summary proceedings. A subordinate summary authority exercises his jurisdiction in respect of offences notified to him/her by the Commanding Officer. It is open to the Commanding Officer to refer matters to a Superior Summary Authority but it is clear that such a procedure has fallen into disuse. A Superior Summary Authority may also be a Convening Authority charged with the responsibility of Convening Courts Martial in respect of matters referred to him by a Commanding Officer - this is one of a number of factors which has led to the decline in exercise of summary jurisdiction by that superior summary authority.

The proceedings conducted by summary authorities are 'trials' involving the application of rules of procedure as established by the Judge Advocate General (a statutory appointment under the Act), application of the rules of evidence in force in the Jervis Bay Territory, a record of the proceedings, a prosecutor and, if requested, a defending officer. Effectively, summary proceedings reflect the formal proceedings of a court martial. The Act draws a clear distinction between the administrative decisions made preliminary to a summary disciplinary proceeding and the summary 'trial' of the offence. A commanding Officer has jurisdiction to 'deal with' any charge against any person being a defence member or a defence civilian - the latter being a civilian who accompanies the Defence Force and agrees to subjection to the Act - but has a limited jurisdiction to 'try' offences. If the offender is two or more ranks junior and the offence is not prescribed, the matter falls within his trial jurisdiction. I have set out s104, 107 and 110 of the Act under the heading 'jurisdiction of Commanding Officer' in note 2 of the explanatory notes in the hope that the relevant sections will provide an insight that my brief words cannot.

I turn now to the offences.

The jurisdiction of a Commanding Officer is to try 'service offences' that are 'not prescribed'. 'Service offence' means an offence against the Act or regulations, or an ancillary offence, committed when the person was a defence member or defence civilian. Under the Act an offence is 'ancillary' if it contravenes ss6, 7, 7A and 86(1) of the *Crimes Act 1914* (Clth) - dealing respectively with, in broad terms, accessory after the fact, attempts, inciting or urging the commission of an offence. and conspiracy.

Service offences are set out in ss15 to 60 and in s62 of the Act. The offences range from purely military offences such as mutiny (s20) desertion (s22) absence without leave (s24) to offences clearly recognised in the ordinary criminal law, such as assault (s33 and see also assault on a superior officer at s25, assault on a guard at s30 and assault on an inferior at s34) stealing and receiving at s47 and false statement in relation to application for a benefit at s56. Section 61 incorporates as a service offence acts or omissions which, if they took place in the Jervis Bay Territory, would constitute 'Territory Offences'. We now approach, at last, the crux of the concern of this paper. Territory offence is defined in s3(1) and means an offence against a law of the Commonwealth in force in the Jervis Bay Territory (other than the Discipline Act), an offence punishable under the *Crimes Act 1900* (NSW) in its application to the Jervis Bay Territory as amended by Ordinances in force in that Territory, and an offence against the *Police Offences Act 1930* of the Australian Capital Territory in its application to the Jervis Bay Territory.

In relation to a Commanding Officer, recall that he may 'deal with' any offence, but his jurisdiction to 'try' is limited by reference to prescribed offences. The prescribed offences include treason, murder, manslaughter, bigamy (yes bigamy) and certain sexual offences, offences ancillary to those offences, and service offences in respect of which a person is liable to more than two years imprisonment (other than an offence against s43 (intentional destruction of service property), s48 (false evidence) and certain other offences where circumstances may allow that they be dealt with as relatively minor matters. Particular other offences are also prescribed, they relating to endangering morale, dangerous behaviour, loss or hazard to a service ship and unauthorized disclosure of information. The latter are particular offences which Service authorities considered warranted trial at a higher level. The effect of the definition of 'prescribed offence' in s104 is to remove serious criminal offences and the vast majority of Territory offences from the trial jurisdiction of the Commanding Officer - particularly most of the offences under the *Crimes Act 1900* (NSW) as applied in the Jervis Bay Territory, and offences under the Commonwealth Crimes Act. Nevertheless he is able to 'deal with' such offences and refer them to a Convening Authority for decision as to

their trial by Defence Force Magistrate or Court Martial.

There is a further general limitation to jurisdiction contained in s63 of the Act. This limitation has already been referred to as it is also reflected in the definition of prescribed offence in s104. Section 63 is to the effect that proceedings for offences caught by s61 NSW Crimes Act in its application to the Jervis Bay Territory shall not be instituted in Australia without the consent of the Director of Public Prosecutions (necessarily the Commonwealth Director of Public Prosecutions, despite the following reference to State offences) where the relevant offence is treason, murder, manslaughter or bigamy, or certain of the serious sexual offences (ss92A-E of the NSW Crimes Act in its application to the Jervis Bay Territory - being serious sexual assaults, sexual intercourse without consent and sexual intercourse with young persons).

The result of this brief survey is that a wide range of offences under the Discipline Act, which include offences such as assault and stealing and receiving, together with offences under the NSW Crimes Act in its application to the Jervis Bay Territory and offences under the Crimes Act (Commonwealth) - and other Commonwealth legislation creating offences, are caught by the disciplinary offence net. Commanding Officers do not have jurisdiction to 'try' many of these offences but may refer them to a Convening Authority for his consideration as to convening a court martial or referring the offences to a Defence Force Magistrate.

It will be readily apparent to you, as it was to Service authorities in 1985, that there were likely to be problems with the operation of this expanded disciplinary jurisdiction and the overlap of civil and military law. It is pertinent to point out that s190 of the Act purported to deal with the jurisdiction of *civil courts* in relation to offences. In broad terms the section sought to remove the possibility of double jeopardy - perhaps a sound step in light of the development of a comprehensive, modern disciplinary system which appeared to all intents and purposes to operate parallel to the criminal justice system of the States and the Commonwealth.

The problem was not new as courts in the United States had dealt with the issues of interaction of the military and civilian jurisdictions for some time, particularly in the landmark cases *O'Callahan v Parker* (1969) 395 US 258 and *Relford v Commandant United States Disciplinary Barracks Ft Leavenworth* (1971) 401 US 355. When the possibility of jurisdictional problems arose between the DPP (Commonwealth) and the military it was to these cases that attention was directed. In the earlier case the United States Supeme Court had held that military jurisdiction under the Uniform Code of Military Justice depended upon the 'service connection' of the offence. The latter case pointed to factors which were relevant in deciding whether that service connection existed. Not unusually they became known as the 'Relford factors'.

These factors formed the basis of guidelines arrived at in 1986 by consultation between military authorities and the Office of the Commonwealth DPP. The 'mutual' arrangement was considered preferable because doubt was expressed as to whether the Services would fall within the category of persons to whom guidelines could be furnished or directed under the DPP Act. In very broad terms the guidelines:

(a) recognized a legitimate role for military law in complementing the ordinary criminal law;

(b) generally defined the military interest as offences created by Part III of the Discipline Act (ss15-60);

(c) stated the DPP's interest in offences constituting an identifiable breach of the ordinary law, most obviously the offences incorporated by s61;

(d) set out criteria to be applied in assessing a service connection which would justify the application of military jurisdiction (a development of the Relford factors); and

(e) established a process of consultation.

The underlying concept in the guidelines was phrased in this manner:

> The basic question to ask is whether there is any reason why the exercise of jurisdiction by a service tribunal would not be appropriate rather than to begin from some underlying assumption that civil jurisdiction should be exercised unless inappropriate.

These guidelines appeared to operate quite satisfactorily for several years although minor and conflicting warning signals on the operation of the disciplinary system as a whole were being sounded. It became apparent to Service authorities that guidelines similar to those arranged with the DPP should be in place in relation to the criminal laws of the States. In fact the likelihood of a closer relationship with State jurisdictions, rather than the Commonwealth, had been intimated in the Commonwealth guidelines. It remains a relatively innocuous but unusual provision that the Commonwealth DPP is the authority to be approached should Service authorities seek to deal in disciplinary fashion (in Australia) with offences of murder, manslaughter, bigamy and certain sexual offences. Clearly such offences against the person are the subject of State laws and the appropriate officer would be the relevant State DPP. Service efforts to make arrangements in respect of State laws promoted awareness of the overlap in criminal and military laws.

On a different tack an article prepared by Dr R A Brown, then a Professor of Law at the University of Tasmania and an officer of the Army Reserve in the Legal Corps, called in question the constitutionality of service tribunals under the Act (see 59 *ALJ* 319). He argued that service tribunals exercised the judicial power of the Commonwealth and violated s72 of the Constitution. The proposition has now clearly been denied by the High Court but it created some consternation.

At about the same time the case of *Solorio v United States* (1987) 97 Law Ed (2d) 364 quite changed the direction of the military jurisdiction issue in overturning the two cases earlier referred to. As was subsequently pointed out in the High Court of Australia the United States Supreme Court concluded that it was a sufficient foundation for the jurisdiction of courts martial that the person charged was a member of the armed forces at the time of the offence charged (see *Re Tracey; Exparte Ryan* 166 CLR at 545). The Relford factors on which our guidelines were based were denied, the Supreme Court majority pointing to the confusion created by the complexity of the service connection requirement and the considerable time and energy expended in litigating the issue.

A provision in the Discipline Act itself, providing for the appointment of an independent Defence Force Discipline Legislation Board of Review after three years operation of the Act, next placed formal disciplinary measures under a spotlight, at least within the Services. After a quite searching inquiry the Board, headed by retired Federal and ACT Supreme Court Judge Mr Xavier Connor, QC, concluded that the Act was operating 'reasonably satisfactorily' and was 'generally accepted' within the Services but that it was important that some changes be made. The Board identified some 40 odd issues relating to offences, punishments, and procedures. In particular, the Board considered it quite inappropriate that minor breaches of discipline should be equated with offences, be dealt with by elaborate legal procedures, and be finally entered on a conduct record in a way that may permanently stain the member's character in both service and civil life. The Board recommended the creation of a Discipline Officer empowered to deal with minor infringements of about seven offences. The infringements would not constitute offences, and the Discipline Officer would not be a service tribunal.

In relation to proceedings before the summary tribunals the Board considered it odd, 'and bordering on the bizarre', to impose on the service relationship (commanders and their subordinates) a set of legal rules designed to govern

proceedings before judges and magistrates where accused persons are complete strangers to them and the only relationship is the temporary one arising out of the trial itself (see paragraph 3.12 of the Report of the Board). The Board recommended that the rules of evidence not be applied to summary proceedings, but that principles of natural justice be observed and that the best evidence available be led in such proceedings.

The recommendations of the Board constitute a step back from what seemed a headlong rush to constitute 'courts' at every level.

Against this general backdrop the first of several cases on the issue of military/civil jurisdiction was raised in the High Court.

In *Re Tracey* Staff Sergeant Ryan was charged with absence without leave and with making a false entry in a service document. He raised the constitutional argument foreshadowed by Professor Brown and applied to the High Court for a writ prohibiting the Defence Force Magistrate from proceeding to try the charges. In one of the subsequent cases, *Re Nolan*, Chief Justice Mason and Dawson J. described the *Re Tracey* judgements thus:

> Re Tracey presented the Magistrate with a very considerable problem. There was no majority for any one of the three opinions expressed in the judgements; indeed there was a majority rejection at least by way of preferred view, for each of the three opinions.

Chief Justice Mason and Justices Wilson and Dawson took what might be called the 'service status' view (by reference to the United States Supreme court decision in *Solorio* on which they implicitly relied) namely that it is open to Parliament to provide that any conduct that constitutes a civil offence also constitutes a service offence if committed by a defence member. The Parliament's view will prevail so long as the proscription of that conduct is relevant to the maintenance of good order and discipline. Justices Brennan and Toohey took a more restrictive view, akin to that of earlier United States cases namely that military proceedings may be brought against a member if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. Justice Deane restricted the issue further, holding that the comprehensive jurisdiction purportedly conferred upon service tribunals is valid in relation to offences in Australia in time of peace only to the extent that it deals with *exclusively disciplinary offences*. Justice Gaudron's position was not dissimilar. It is also important that the judgements clearly struck down s190(3) and (5) of the Act, which I have earlier referred to generally as the 'double jeopardy' provision.

In implementing the *Tracey* judgement in practice the military was obliged to rely on what Professor Brown, ruefully and critically examining the decision (13 *Crim L J* 263) referred to as the 'highest common factor', that being the joint judgement of Justices Brennan and Toohey.

In *McWaters v Day* (1989) 168 CLR 289, Sergeant Day was charged by civil police with a drink driving offence under the Queensland Traffic Act in relation to an accident that occurred on a road in Enoggera Barracks. Day sought prohibition on the ground that the Traffic Act had no application because s40(2) of the Discipline Act (use of vehicles) entirely covered his situation. Accordingly there was an inconsistency and the Commonwealth law should prevail. The High Court held that there was no inconsistency as the Discipline Act is supplementary to and not exclusive of the criminal law. It does not deal with the same subject matter or serve the same purposes as the ordinary criminal law.

In *Re Nolan: Ex Parte Young* (1991) 172 CLR 460 Sergeant Young, an Army pay representative, was charged with two offences in respect of each of seven documents. The offences involved falsification of a service document under s55(1)(a) of the Discipline Act and using a false instrument under s61 of the Discipline Act, picking up s135C(2) of the

Crimes Act 1900 (NSW) in its application to the ACT (this case arising prior to amendment of the Discipline Act which now applies the *Crimes Act 1900* (NSW) in its application to the Jervis Bay Territory).

In the intervening period, since *Tracey's case*, Mr Justice Wilson had retired to be replaced by Mr Justice McHugh. In the event Chief Justice Mason and Justice Dawson found no reason to resile from the view they expressed in *Re Tracey*. Justices Brennan and Toohey adopted the same line that they had taken in *Re Tracey*, although it could be said that some substance was added to the bones of principle that they then enunciated insofar as they clearly indicated that it could reasonably be said that the maintenance and enforcement of service discipline would be served by proceeding on all charges against Young before a service tribunal. The charges in this case, you will recall, included s135C of the *Crimes Act 1900* (NSW) in its application in the ACT. In *Re Tracey* they had suggested that in assessing whether the substantial purpose of prosecution is *reasonably* able to be regarded as for the maintenance and enforcement of service discipline, factors of convenience, accessibility to, and appropriateness of, civilian courts loomed large. The factors of convenience and accessibility would seem, in peacetime, to weigh in favour of civilian courts so that the issue of appropriateness must have taken on added significance. The significance is perhaps found in their words:

> Perhaps Sergeant Young's alleged service offences might have been charged as offences under the law of South Australia ... but, however that may be, it would usually be prejudicial to service discipline to exempt an offender from service punishment when the offence consists in the malperformance of his service duties. Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions.

Mr Justice Deane maintained his firm position enunciated in *Re Tracey* and took the view that it was an imperative judicial necessity that he adhere to that view, it being impossible to identify in the earlier decision any general principle accepted by the majority as justifying the actual decision. Justice Gaudron was in essential agreement with Justice Deane and Justice McHugh adopted the reasons expressed by Justice Deane in *Re Tracey*.

What is the effect of the matters I have raised with you: what is the position of the military?

As always there is good news and bad news. In my opinion, and I stress that the following comments are my personal views, the advantage flowing from the High Court cases is that the military is in a position to conduct its disciplinary business in pretty much the same way as it has done since inception of the Discipline Act. Judgements will have to be made as to whether the disciplinary jurisdiction is appropriate, but that situation has applied since the Act was implemented. There is some express support for the exercise of disciplinary jurisdiction, even where substantially similar civilian offences are involved, as long as it can reasonably be regarded as substantially serving the purpose of maintaining or enforcing discipline. So far as the recommendations of the Defence Discipline Legislation Board of Review are concerned there is a quite firm indication that summary proceedings should be less technical and more in keeping with the ethos promoted in service life. The proposal for a Discipline Officer is reminiscent of a proposal of the Discipline Working Party in 1973 (subsequently discarded) when the Working Party stated:

> ... The basic reason for the introduction of a two tier summary system is our reluctance to extend the features of a criminal trial to minor breaches of discipline which

should not be classified as crimes and which, in the industrial setting would be regarded as management problems.

This proposal, along with the recommendation to eliminate application of the rules of evidence of the ACT (to be replaced with rules of natural justice and the best evidence available), will likely have the dual effect of reducing the administrative burden that has resulted from the conduct of essentially criminal trials at unit level and will tend to realign some of the Service positions on summary proceedings with that of traditional allies such as Canada, the United States, Great Britain and New Zealand. Broadly speaking these countries rely on what the United States terms 'non judicial' procedures and punishments to deal with day to day minor disciplinary infractions.

These positive results are consistent with the military requirement to have in place a disciplinary system which operates effectively in peace or in war service and at home or overseas. The requirement for discipline has not ever been seriously challenged but questions remain about the manner of its maintenance. Our traditional western allies have also wrestled with this issue. The *Solorio Case* in the United States resolved the issue in favour of military tribunals. In some European countries the issue has been resolved in favour of the civil courts although many other social factors are at play in those countries. In the case of Germany, for example, there was real concern at the possibility of resurgence of an elitist military and stringent steps were taken to eliminate what were seen as privileges and elitist traditions. The same issue has not been raised to that extent in this country although you may recall that I earlier referred you to Mr Lance Barnard's prophecy of the elimination of the last vestiges of the military caste structure.

That brief digression leads me to the bad news. As Mr Justice Deane points out in *Nolan's Case*, there is no identifiable general line of reasoning in *Tracey's case* in relation to service-related offences enjoying the support of a majority of the seven Justices. The present break up of opinion is two, two, three with the 'highest common factor' being based on the judgement of Justices Brennan and Toohey, namely whether proceeding on charges of service offences can reasonably be regarded as serving the purpose of maintaining and enforcing service discipline. That highest common factor appears to be a recipe for further litigation, as was demonstrated in the range of cases in the United States following *Relford*. Chief Justice Rehnquist in delivering the majority decision of the Supreme Court in *Solorio* said:

> 'Since *O'Callahan* and *Relford*, military courts have identified numerous categories of offences requiring specialized analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offences committed on a military base, offences committed off base, offences arising from events occurring both on and off a base, and offences committed on or near the boundaries of a base. Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.'

In addition to that possibility a dispute of sorts has arisen with the Office of the Director of Public Prosecutions (DPP) over the exercise of disciplinary jurisdiction where the disciplinary offence reflects an offence against the ordinary criminal law. It seems to be the position of the DPP that in every situation where such an overlap arises, the relevant DPP (Commonwealth or State) should be approached for a decision as to whether the disciplinary jurisdiction can be exercised. This position appears to me to reflect something of the view of, for example, Mr Justice Deane, who would limit disciplinary jurisdiction to purely disciplinary infractions, but at the same time concedes that disciplinary tribunals may exercise jurisdiction over disciplinary offences which overlap the ordinary criminal law, if the DPP agrees to the exercise.

In my view that position is contrary to the Discipline Act and out of step with the 'highest common factor' to be gleaned from *Tracey's Case* and *Nolan's case*. In *Tracey's Case*, after reciting the test I have now often referred to, Justices Brennan and Toohey stated that:

> In the application of this test, much depends on the facts of the case and the outcome may depend upon matters of impression and degree, especially on the needs of service discipline.

They later continued:

> ... the test is an objective one. It must be applied by those in whom the Discipline Act vests certain procedural powers. The repositories include the Attorney-General (s.63(1)) [now amended and replaced by the DPP (Cth) in respect of the serious criminal offences therein set out - treason, murder, manslaughter, rape and particular sexual offences] a convening authority (ss 103(1), 129A(1)) a commanding officer (s 110(1)) ...

In my view the plain procedural powers in the Act place the decision as to whether a disciplinary issue is involved in the hands of disciplinary authorities. A contrary view would place the discipline of the Defence Force in the hands of the respective Commonwealth and State DPP's.

I add for the sake of completeness that the Justices went on to point out that decisions that proceedings be taken on a charge of a service offence seem to be excluded by schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) from review under that Act. In fact decisions made under the Defence Force Discipline Act are not amenable to appeal or review in any forum other than those referred to in the Act itself and in the Defence Force Discipline Appeals Act.

Specifically, no rights of appeal or review are created under the following provisions:

Administrative Decisions (Judicial Review) Act (Schedule 1 paragraph (o));

Ombudsman Act (s19(5)(d));

Administrative Appeals Tribunal Act (no right of appeal in DFD Act as required by s25 of AAT Act); and

Defence Force redress of grievance system (Defence Force Regulation 82(1)).

I add also that where, for example, a Defence Force Magistrate decides that there is no military jurisdiction, there is presently no appeal available to a Convening Authority, who has quite clearly, in referring the matter to a DFM, made a decision that the discipline of his command has been affected.

The view that military authorities decide whether or not to institute disciplinary proceedings in respect of offences that have counterparts in the ordinary criminal law creates a range of other philosophical and practical issues. It is said that the serviceman is subject to both the disciplinary and the criminal jurisdiction. If the disciplinary jurisdiction vindicates the disciplinary issue in an 'overlapping' offence of say, theft, how is the community interest to be vindicated? Section 190(3) and (5) of the Act purported to protect servicemen against double jeopardy but were struck down as involving an unconstitutional intrusion. Section 4C of the Commonwealth Crimes Act may provide protection aginst double jeopardy in respect of Commonwealth offences, but that section does not purport to preclude the prosecution and punishment of an offender for any offence against a law of a State. If a State prosecution for a criminal offence were maintainable following prosecution for a substantially similar disciplinary offence, serious questions would arise if different results were reached. There is also the issue of punishment, bearing in mind the fact that the punishments for 'overlapping' offences are most likely to be the same in the disciplinary and the criminal jurisdiction.

Where the military identifies one of these overlapping offences and decides to prosecute in the disciplinary jurisdiction, these issues will arise for, most likely, State authorities. Where State authorities discover an offence which has significant disciplinary connotations and prosecute it as a criminal offence, they are under no duty to notify military authorities, and the State prosecution will preclude any formal disciplinary action for an offence.

There is no easy answer, if indeed there is an answer, to these concerns. The military organization has not relied and will not rely solely on the legislative provisions which appear to give it both the responsibility and authority to prosecute a wide range of offences dealt with under the ordinary criminal law. The military has social responsibilities in the community too. At the same time it is charged with maintaining an effective force ready to meet the legitimate demands of government, and must balance this obligation, within its authority, with other social needs. In relation to disciplinary matters the discipline legislation supplements the ordinary criminal law, it does not supplant it. This is well recognized and there are many instances where military authorities have referred particular matters to civil police as the most appropriate investigatory agency.

The matters I have dealt with do not provide a clear answer to the implicit question in the title I adopted for this paper. There is no doubt in my mind that the 'convergence' process raised by Mr Barnard in the early 1970's is taking place and at an increasing rate. In my view there are limits to the process but they are as much subject to fluctuation warranted by technological and sociological developments as is the process itself. It is a dynamic process and that is reflected in societal issues such as military disciplinary procedures. Our disciplinary legislation has been evolving as distinctly Australian legislation for some time and I see no end to the evolutionary process. The Discipline Act represented a quite dramatic step in the process, but it was consistent with other developments underway. The Connor Review took stock of practice, and in my view called for a temporary respite in the headlong application of civil courtroom procedure and practice to ensure that sight was not lost of the objectives in maintaining a disciplinary system. The difficulties created as a result of the differing opinions in the High Court can be seen in the same light. There is no doubt of the requirement for a disciplinary system to support effectiveness and efficiency in our Defence Force, but the means and measures of its process are in a state of flux. The discipline of the Defence Force is not threatened, and real opportunities to cast off obsolete practices and to propose and develop new ones more suited to the modern force are presenting themselves. It seems to me that a sound foundation for a disciplinary system which meets our military and societal needs has been laid. It is not perfect, the disciplinary dream, but neither is it a nightmare of administration. A balance is being maintained which ensures that we will not be hampered by the last war's equipment in dealing with the modern threat.