

**WELCOME BY THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
“THE LEGAL PROFESSION AND THE DEFENCE FORCES:
HISTORICAL CONNECTIONS”
SYMPOSIUM
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It is a great pleasure to welcome you to this Symposium on the Historical Connections between the Legal Profession and the Defence Forces. I would first like to extend my congratulations and thanks to the Francis Forbes Society, the NSW Bar Association and the UTS Faculty of Law, and in particular to Shaunnagh Dorsett, Tony Cuneen and Geoff Lindsay for their efforts in organizing and hosting this event.

It must be acknowledged that popular stereotypes of the legal profession probably do not include an association with the physical rigours of armed service. In the last two months I have presided over a number of ceremonial occasions at the Supreme Court. I confess that I can understand why anyone who has witnessed the sumptuousness and regalia of such occasions could harbour a little skepticism about how successful I, for example, would have been, if required to swap the fur

lined robes and long wigs of judicial office for fatigues and the Pacific jungle.

In my case that skepticism is well justified but, as you know, the truth is that the Australian legal profession's association with the armed forces has been both lasting and extensive. Three hundred barristers served in the Second World War alone for example, and at least 117 of those went on to be judges. Amongst those members of the judiciary who saw active service are three of my predecessors as Chief Justice, Sir Kenneth Whistler Street, who fought in WW1, his son Sir Laurence Whistler Street and Sir John Kerr, both of whom served in WW2. This tradition is by no means confined to the World Wars. I note that Justice Brereton, who will chair a panel this afternoon, is a Senior Officer of the Army Reserves of long standing.

I do not mean to suggest by these example that judges have been the only representatives of the legal profession in active service, although I am sure that you would not believe me if I did make that claim. As today's Symposium will highlight, the historical contribution of the legal profession to the Defence Forces has been both rich and diverse. Perhaps surprisingly, it has also received relatively little scholarly attention to date. I have no doubt that this event will make an

important contribution in this respect, as well as throwing up new areas for future research.

Today's presentations will explore the connection between the legal profession and armed forces through a number of lenses. You will hear of the contribution and experiences of members of the profession in active service, particularly in WW1 and WW2, as well as of the role of the legal community in supporting the war effort more broadly. The important contribution made by the profession through provision of legal services, both in the field and at home will also be discussed.

As I am not a historian and cannot hope to compete with the expertise of the speakers who will follow me, I will confine myself to a sketch of just some of these many areas of connection.

It is worth first considering the extent of lawyers' historical contribution as servicemen. Members from all branches of the legal profession have been involved in active service in each war that Australia has fought. In WWI and WW2 in particular, the professional skills, education and in many cases socially privileged position of the legal profession meant many lawyers held positions of command and leadership within the armed forces.

This is no way shielded them from the realities of war. The armed service of some members of the profession was so colourful that it reads like the script of a Hollywood action film. David Selby for example, who was later appointed as a judge of the Supreme Court and made significant contributions to reforming divorce laws in this country, was in Rabaul when it fell to the Japanese in 1942. He and his men were stranded in enemy territory and spent three months hiding out in the jungle, in constant fear of discovery and often without food. Eventually, they managed to make their way to a safe plantation and escaped via ship to Townsville. On arriving back in Australia, Selby promptly re-enlisted and headed back to Papua New Guinea. It is hard to say whether tempting fate in this way was extremely brave or extremely foolhardy. Thankfully, his luck held.

Others were not so lucky. Philip James Woodhill, a popular NSW barrister, had the misfortune to meet his end at the hand of a bad batch of scones. Stationed in Syria, he complained of a sore stomach after lunch, and was dead by 10pm that night. As it turned out, the scone ingredients had been stored in a barrel that once held strong cockroach killer. It was a bitterly ironic end to a military career that had seen

Woodhill distinguish himself in Middle East campaigns at Bardia and in Greece.

Told with more than 60 years retrospect, these stories have a tinge of the fantastical and even of morbid humour. At the time however, the losses suffered amongst the legal profession were, simply put, a tragedy. During WWI six of the then eight NSW Supreme Court judges had sons enlist. Almost all were wounded, and three were killed. The strain and grief of those times is hard for me to imagine. In recognizing and paying tribute to the important contribution made by legal professionals through active military service, we must be careful not to glorify their history, and thereby obscure the reality of their sacrifices.

The significance of that sacrifice is made even greater by the fact that the legal profession was not only represented in active service but over represented. In the Second World War for example, at least one third of NSW barristers were involved in war related service. We can only speculate about the reasons for this numerical over representation. However, I would suggest that the fundamental values of the legal profession – a commitment to public service, through duty to the court, and to others, through faithful representation of one's client – share a lot with the ethics of duty and service at the heart of military service. It is

therefore perhaps not surprising that many legal professionals committed themselves to the armed forces, particularly in the context of the existential threat of the World Wars.

In addition, the legal profession at that time was, as in many ways it remains, a close-knit community. Members of the profession had often grown up, studied, socialized and worked together. I mentioned both Philip Woodhill and David Selby a moment ago. I omitted that Selby had been best man at Woodhill's wedding. That example is emblematic of the profession at the time. No doubt the strong sense of community motivated individuals to sign up along with their friends and colleagues, and may therefore have contributed to the strong representation of legal professionals in the Defence Forces.

Certainly the legal community rallied to support those of its members who were in active service. During WW2, for example the Sydney Law School established a Comfort Fund especially for legal professionals. The fund sent a monthly parcel of books, tailored to each individual's taste, and a Quarterly Legal Digest. The Digest was made up of gossip and light news from legal circles at home, and from other lawyers serving overseas. Law school romances, the exploits of counsel appearing before Military Court inquiries into gin drinking contests, and

the cricketing scores and cross cultural challenges of those serving in far flung theatres of war were just a few of the topics covered.

It would be easy to dismiss the importance of this type of assistance. Certainly it is different from the packages of food and warm clothing that are typically associated with Comfort Funds. Yet one can easily imagine the significance of these packages in linking individuals far from home back into a familiar and supportive network. It is a powerful example of the importance of community to the legal profession, both historically and today. At a more mundane level, there was a practice of barristers taking briefs originally intended for members of the bar on active service, but giving the brief fee to the family of that other barrister.

So far, I have spoken of the contribution made by lawyers who participated in active combat, and of those who supported them. However, the legal profession's historical links with the army go beyond participation as armed personnel. The profession also has a long history of using its specialist skills to support the armed forces and military objectives, through the provision of legal services and professional expertise.

This has occurred in a number of ways. First, many lawyers provided general legal services to those serving in the Defence Forces. During WW1 for example many legal firms and individual solicitors offered free legal advice to soldiers. Given the numbers of men taking part in the war, and their need for assistance in areas as diverse as being charged for disciplinary offences through to preparing wills, this was a substantial undertaking.

Secondly, the legal profession was pivotal in the development and administration of military law in Australia. Although military law – that special body of law applicable to the armed forces - has existed for as long as armies have operated, it has not always been well regarded. In the 18th Century Blackstone described it as ‘not built upon any settled principles’ and ‘entirely arbitrary in its decisions’. That was certainly a common sentiment amongst Australian troops by the end of WWI, with many feeling they had been unfairly treated by those dispensing military justice.

Members of the legal profession played an important role in remedying this situation, by both clarifying and modernizing the law, and ensuring it was better understood by the officers applying it. For example lawyers were involved in the drafting of the first official guides

to military law. At a more unofficial level, lawyers who had previously served as soldiers also contributed by writing “pocket books” which outlined, in simple terms, how military offences should be approached by commanding officers. These pocket books were available for sale at bookshops like Angus & Robertson and likely made a significant contribution to improved legal understanding in WW2.

The legal profession also made an important contribution at an institutional level, through the development of the Australian Army legal Department. As this is a topic taken up by Colonel James Waddell in his presentation on the history and evolution of the Army Legal Corp, let me simply say that lawyers were unsurprisingly at the heart of the expansion and professionalisation of the Army Legal Corp.

In turn, legal professionals of course served in the Legal Corp over the course of its history, and have continued to do so to the present day. I would like to focus on one important historical example to illustrate the significance of that role.

Between 1945 and 1951 Australian Legal Corp officers were responsible for conducting war crimes trials of 814 enemy – predominantly Japanese – soldiers. Australian legal professionals

served as prosecuting officers, judge advocates, reviewing officers, and defence counsel on these cases. They worked in extremely difficult conditions, conducting trials in remote, malaria-ridden locations such as Rabaul, Darwin, Singapore, Hong Kong and Manus Island. As the army had largely demobilised by this time, they were often extremely isolated and severely under-resourced. In addition the cases themselves were incredibly taxing. They were large and complex, with the largest trial for example involving 91 accused. They also centred around harrowing allegations of torture and murder of prisoners of war and civilians, and massacres of fellow Australian troops.

Despite these circumstances, the Australian Legal Corp officers involved conducted the trials with integrity and diligence. The post WW2 war crimes trials of the Japanese at Tokyo have often been derided as 'victors' justice'. In contrast, Australian lawyers brought the best of the traditions of the common law to their work – dedicated service to their clients and the court and commitment to equality and justice before the law for all. Those defending Japanese soldiers had often lost fellow service personnel in the war, and were faced with clients who admitted to horrendous crimes. Despite this, they maintained professional ethics and mounted strong defences, including for example on the constitutionality of the *War Crimes Act* under which the prosecutions

were conducted. Many received letters from their clients thanking them for their efforts.

The integrity of those officers and their commitment to both serving the Defence Forces and the ethics of the legal profession deserves our highest praise. It is this type of commitment that is found repeatedly in the history of lawyers' involvement with the armed forces, and it continues to be demonstrated by legal professionals working in, and with, the Australian Defence Forces today.

Indeed, exploring the historical connections between the legal profession and defence forces reveals not only a fascinating history, but a history of which both professions can be rightly proud. On that note, it remains only for me wish you an engaging and informative day as you continue to explore it further. Thank you once again for the opportunity to take part in this Symposium.