

**MILITARY JUSTICE AND CHAPTER III:
THE CONSTITUTIONAL BASIS OF COURTS MARTIAL¹
COMMENTARY**

The Hon Justice Paul Brereton AM, RFD

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The authors have convincingly demonstrated that while the High Court has consistently upheld the validity of laws that vest power to try and punish service personnel for disciplinary offences in service tribunals, their constitutional basis has never been satisfactorily resolved. When many judges of the highest court in the land over many years have advanced various rationales, it is unsurprising that opinions will differ. That mine differs from the authors' is no reflection on the scholarship that underlies their paper.

My comments will address the following: *first*, the obstacles to adoption of the "third theory", favoured by the authors; *secondly*, responses to the authors' critique of the first and second theories; and *thirdly*, my suggested rationale for the constitutional validity of courts-martial.

The obstacles to the third theory

In my view, there are at least two practically insuperable obstacles to adoption of the third theory, that an exception to Ch III permits the vesting of judicial power in tribunals that are not Ch III courts.

The first is that any theory that rests on an implied exception to the strict separation of judicial power from the executive and legislative powers is fraught, because of "Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates",² and that "no part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III".³ The language of s 71, in the light of these authorities, just does not admit of exceptions.

¹ Crowe J and Ratnapala, S, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial', (2012) 40 *Federal Law Review* 161.

² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33.

³ *R v Kirby; ex p Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

The second is that if the theory were correct, then *Lane v Morrison* was wrongly decided, and the Australian Military Court was validly constituted – as the authors contend.⁴ Thus a recent unanimous decision of a full seven-judge bench of the High Court is inexplicable if the theory were correct.

Criticisms of first theory

The authors criticisms of the first theory are *first*, that the notion of a free floating *sui generis* judicial power unfettered by usual constitutional principles is contrary to the spirit of Ch III and the High Court’s jurisprudence; and *secondly*, that if the power is judicial but outside Ch III, then there is doubt whether an offence in identical terms could be tried by a Ch III court, and the same conduct may give rise to two incompatible forms of jurisdiction, which cannot be exercised by the same tribunal.

As to the first, I suggest that the primary distinction of “the judicial power of the Commonwealth” in s 71 is *not* between ‘the judicial power of the Commonwealth’ and that of the States, but between ‘the *judicial* power of the Commonwealth’ and its legislative and executive powers. I am not convinced that there is a marked difference between the first and second theories: ultimately, each holds that while service tribunals act judicially, they do not exercise “the judicial power of the Commonwealth”.

As to the second criticism, while many service offences and criminal offences are constituted by substantially the same conduct, they will never be identical: in a service offence – even a so-called “territorial offence”, there is always the additional element that the accused be a “defence member”. This element – which reflects the ‘service status’ test – means that there is always a fundamental distinction between a service offence and an analogous criminal offence. It also means that the service offence and the criminal offence will never be identical. Next, given that *Defence Force Discipline Act*, sub-ss 190(3) and (5), were held constitutionally invalid in *Re Tracey; ex parte Ryan*,⁵ the service and criminal jurisdictions are not alternative but parallel jurisdictions, and the same conduct can result in prosecution in both jurisdictions – in a service tribunal for the service offence, and in a criminal court for the criminal offence. The notion that non-judicial disciplinary tribunals can impose disciplinary sanctions for conduct that is also a criminal offence, without offending the rule against

⁴ See p178.

⁵ (1989) 166 CLR 518, 547, 575, 602-3.

double jeopardy, is well established.⁶ As was said (by the Full Federal Court) in *Hardcastle* (a case concerning disciplinary proceedings against a police officer for misconduct which was also a criminal offence) (at 597):

If the appellant were charged with, and convicted of, the same unlawful assaults as are the subject of the disciplinary offences he would not face double jeopardy or be punished twice for the same offence. He would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code of the Australian Federal Police. The two proceedings are essentially different in character and result.

Likewise, if a defence member be convicted of a service offence under the *DFDA* and subsequently prosecuted under civilian criminal law in respect of the same conduct, he or she does not face double jeopardy, but would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code constituted by the *DFDA*. There is no such problem of the same conduct giving rise to “two incompatible forms of jurisdiction” as the authors contemplate.⁷

Criticisms of the second theory

The authors’ criticisms of the second theory are: *first*, that the determination of criminal guilt is a central case of judicial power; *secondly*, following Henry Burmester’s article on the AMC,⁸ that the susceptibility of service tribunals to review within the chain of command does not deprive their decisions of a judicial character, and that the reviewing authorities must exercise judicial power; and *thirdly*, that the chameleon doctrine should be rejected.

As to the first of these, a service tribunal does not determine criminal guilt, but guilt of a disciplinary offence, even though that offence may be constituted by substantially the same the same conduct as an analogous criminal offence. The determination of guilt and the imposition of punishment for a disciplinary offence is not inherently judicial and can be administrative. A case referred to by the authors⁹ as supporting the third theory in fact establishes that disciplinary proceedings, though curial in nature, and though in respect of “offences” for which “punishment” is imposed, are properly characterised as administrative. *R v White; ex parte Byrnes*¹⁰ concerned disciplinary proceedings under the *Public Service Act*

⁶ See, for example, *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 596-7.

⁷ 40 *Federal Law Review*, at p 171.

⁸ Henry Burmester, ‘The Rise, Fall and Proposed Rebirth of the Australian Military Court’ (2011) 39 *Federal Law Review* 195, 205.

⁹ 40 *Federal Law Review*, at p176.

¹⁰ (1963) 109 CLR 665.

1922 against a Defence employee who had been, in the language of the Act, found “guilty of an offence” and was thereby “liable to such punishment as is determined ...”. The High Court (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ) unanimously held that these were disciplinary offences created by a law governing the relationship between the Commonwealth and its servants, and thus a law with very special application (notwithstanding the substantial size of the Commonwealth public service), as distinct from offences against a law having general operation over all the members of the community; that the provisions creating “offences” and providing for their “punishment” did no more than define what was misconduct by a public servant warranting disciplinary action and the disciplinary penalties that may be imposed, and did not create offences punishable as crimes; and that the “judicial trappings” of the procedure were directed to safeguarding public servants from injustice, but did not indicate that the public servant was being tried for a criminal offence.¹¹ Thus the relevant tribunals did not sit as a court of law exercising judicial power, but as an administrative tribunal maintaining the discipline of the Commonwealth service in the manner prescribed by law.¹² The same analysis can be applied to service tribunals. Far from supporting the third theory, this case supports the second.

As to the second, I agree with Burmester that the proposition in *Lane v Morrison*¹³ that service tribunals are not judicial because of their susceptibility to review by the chain of command has its difficulties, because if left at that point it is implicit that the reviewing or confirming authority is exercising judicial power. However, I suggest that the proper explanation of *Lane v Morrison* is not so much that the existence of rights of review and confirmation within the chain of command deprive the decision of the tribunal of the conclusivity of a judicial determination, but that the position of the tribunal within the chain of command demonstrates that it is a function in the command of the Defence Force, and thus part of the executive as distinct from judicial power.

As to the chameleon doctrine, I do not think it is so unsafe as the authors portray, and Kirby J hardly condemned it in the passages cited¹⁴ – rather, his Honour indicated that it could not be decisive. In *Visnic v Australian Securities and Investments Commission*,¹⁵ while noting that

¹¹ (1963) 109 CLR 665, 670.

¹² (1963) 109 CLR 665, 671.

¹³ (2009) 239 CLR 230.

¹⁴ 40 *Federal Law Review*, at 174.

¹⁵ (2007) 231 CLR 381, 393.

there are dangers in reflexive reliance on the theory in order to render *Boilermakers* impotent, his Honour also observed that in “the right context it can serve a useful function”.

Conclusion

The Constitution vests command of the Defence Force in the Governor-General as Commander-in-Chief. Command of the Defence Force is an aspect of the executive power. The discipline of the force is an aspect of its command. Service tribunals may act judicially, but they operate within the chain of command to ‘inform the conscience of the commanding officer’.¹⁶ Ultimately they function as part of the command (executive) function, albeit that they act judicially; the presence of the “trappings” of a trial are necessary and appropriate concomitants of any formal process of adjudication of alleged violations of a disciplinary code in order to afford procedural fairness, but they do not transform the essentially administrative nature of the function of maintaining a disciplined and effective defence force into a judicial one.¹⁷

Once it is accepted that service discipline is a function of command, albeit informed by tribunals that act judicially, the “service status” test becomes attractive, because a defence member is under command of the relevant Service Chief and ultimately the Governor-General. It also provides a much clearer and cleaner test than that of “service connection”. The objects of disciplinary proceedings conventionally include protecting the public, maintaining proper standards of professional conduct by members of the relevant profession (here, the ADF), and protecting the profession’s reputation. Thus conduct extraneous to professional practice can attract professional discipline – because it can inform questions of “fitness” of the individual, and reputation of the profession as a whole. In the military context, the commission of crimes by defence members, even when off duty and extraneous to their service, can reflect on their fitness, and on the reputation of the ADF as whole.

¹⁶ *Mills v Martin* 19 Johns 7, 30 (1821), cited with approval in *Lane v Morrison* (2009) 239 CLR 230, 257.

¹⁷ Cf *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 65; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 544; *R v Quinn; ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 5, 6, 8-9, 12.