

Justice in Arms: Military Lawyers in the Australian Army's First One Hundred Years

Book Launch

Chief Justice Robert French AC

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Brigadier Gaynor, Major General Sengelman, your Honours, ladies and gentlemen, thank you for inviting me to launch this important new publication. Military law is an aspect of public law which is generally applicable to the Australian Defence Force. The interaction between the public law generally applicable to the community and the Defence Force has, from time to time since Federation, made distinctive contributions to the development of Australian law generally. Constitutional Law teachers trying to stimulate students into an interest in the arcane reaches of the judicial power of the Commonwealth will no doubt be immensely grateful for the unseemly but pedagogically useful incident which led the High Court, in 2009 in *Lane v Morrison*,¹ to hold that the Australian Military Court was not validly established. The conduct which led to the charge in that case would have been no more out of place in a reality TV show than some of the other incidents which have been known to occur on such entertainments. The sequelae of that disorderly moment in military history went further than the invalidation of the Australian Military Court. It led to the enactment of interim measures restoring the system of military disciplinary tribunals that had existed before the establishment of the Australian Military Court and giving effect to punishments already imposed. Those measures in turn led to a further constitutional challenge, this time from an Able Seaman in the Royal Australian Navy who had been found guilty by the Australian Military Court of 11 counts of misusing a defence 'travel card'. In upholding the validity of the interim measures the High Court in *Haskins v The Commonwealth*² reaffirmed, as it had done on more than one previous occasion, the validity of legislation permitting the imposition by non-judicial service tribunals of punishment on service members for service offences. The Court said:

¹ (2009) 83 ALJR 377; (2009) 252 ALR 605.

² (2011) 244 CLR 22.

Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force: they are not steps taken in the exercise of the judicial power of the Commonwealth.³

High profile cases, like *Lane* and *Haskins* and earlier constitutional cases involving military discipline such as *R v Bevan; Ex parte Elias*⁴ and *Re Tracey; Ex parte Ryan*⁵, which involved a challenge to the constitutional validity of the *Defence Force Discipline Act 1982* (Cth), are only the very small tip of the iceberg of the evolving legal framework within which the Australian Army has operated since it came into existence as an entity in 1901.

A significant part of the law relating to the Australian Army is that which concerns military discipline in war and in peace. It is that area of the law in which military lawyers in the Australian Army have predominantly been engaged. However, it is by no means the only body of law which affects the operations of the Army and requires the services of military lawyers.

Army governance has been affected by the rise of administrative law in the civil justice system since the late 1970s. As Brigadier Dunn's chapter in this book points out, advice in that area for both Command and soldiers has become an increasing part of the legal officers function within the Army Office and in military districts. Further, with the growth of regional and United Nations Peace Keeping Operations and joint operations, and with the ratification of additional Protocols to the Geneva Conventions, there has been an increasing focus on international law and with it a developing role for the Australian Army Legal Corps in providing legal advice to commanders on the planning and conduct of operations.

Colonel Oswald describes, in the last chapter of the book, the dramatic increase in the number of offshore deployments for Australian Army Legal officers since the late 1980s. Those deployments have taken them to offshore locations which include Fiji, Namibia,

³ (2011) 244 CLR 22, 36 [21].

⁴ (1942) 66 CLR 452.

⁵ (1989) 166 CLR 518.

Kurdistan, Cambodia, Somalia, Rwanda, Bougainville, Kuwait and East Timor. Colonel Oswald writes:

A major factor in the increased demand for AALC officers to deploy on operations was the burgeoning legal complexity associated with the conduct of military operations, particularly UN operations. Added to this was the increased recognition at all levels of command of the importance of operations law.

As I have said in the Foreword to this very engaging book, the historical development which it traces over more than a century since Federation highlights the distance that Australian Army Legal Officers have travelled since the Army as an entity came into existence. Their journey reflects societal changes and changes in the general system of law, as well as the variety and complexity of the tasks which are expected of the modern Army.

This book is of course a history, and happily for its readers, it is a history full of colour and movement brought to life by some of the extraordinary, and occasionally quirky, Australians who have contributed their legal skills to the work of the Army since its creation.

A high-profile practitioner of the legal arts during the Boer War, whose contribution was thought in some circles to be rather questionable, was Major Thomas, who had previously practiced as a solicitor at Tenterfield. He unsuccessfully defended Breaker Morant. One unkind commentator has suggested that his incompetence helped Morant to an early grave at the hands of the firing squad. Major Thomas' reputation was not enhanced when, after his return to practice at Tenterfield, he was struck off for misconduct involving trust moneys. A more distinguished contributor was the first Deputy Judge Advocate General, so designated in deference to the Imperial Judge Advocate General, namely Robert de Courcy Talbot, whose name attracted a rather snide attack from a newspaper of the day which wrote:

A name so imposing must mean an office and a work of corresponding importance.

The book records a rather ironic observation by Edward Brissenden, a King's Counsel from Sydney, who enlisted as a Private at the time of the First World War and was put to work drafting Divisional Standing Orders and promotion rules in England. He wrote to a friend in 1916:

There is a place for every man in a modern army, even a lawyer.

The ironic observation has been shown with the rear-ward perspective of over 100 years, to be a considerable understatement. If the book demonstrates anything, it is the critical importance of military lawyers in the Australian Army which, notwithstanding the extremities of wartime operations and the acute challenges of peace-keeping and joint task force operations, is an organisation whose management and functions are subject to the rule of law which is part of our larger societal infrastructure.

The rule of law incorporates a notion of equality before the law which I found reflected in the 1941 Australian edition of the *Manual of Military Law*, formerly the property of Justice McTiernan of the High Court of Australia. Dealing with the offence of drunkenness at page 17, paragraph 42 of the Manual, it is said:

Under the Army Act, an officer should be tried for the specific offence of drunkenness, whether on duty or not on duty, as the case may require; instead of being charged, as formerly, in the case of drunkenness not on duty, with conduct unbecoming the character of an officer and a gentleman.

Lawyers, of course, are not always believers in equality when it comes to the consideration of their own talents. The saga of Major Thomas Fry, who acted as General Blamey's principal legal adviser in the Middle East, demonstrates that lawyers with large egos can be found as readily in the Army as outside it. It is well described in the book. Major Fry had had a successful practice at the Bar before enlisting. He held degrees from Oxford and Harvard and a Diploma in International Law from Hague Academy of International Law. In 1941, he was appointed as Judge Advocate to the General Court

Martial of Lieutenant Colonel Ralph Hutchison in Palestine. Major General Edmund Herring, later to become Chief Justice of Victoria, was the President of the Court Martial. Fry insisted on sitting to the immediate right of the President at the Court Martial. The President told him he had to sit down the end of the table. Fry took his case for priority seating up to the Military Board. In the end it seems he may have won a symbolic but not a practical victory. There was recognition of a convention that the Judge Advocate sit to the right of the President, but it was characterised as a matter of procedure only. The tale of Blamey's attempts to appoint Fry as Deputy Judge Advocate General for the Middle East in 1940 is another saga of military and political push and pull. In the course of that struggle, Fry produced a legal opinion that his own purported appointment by Blamey was legally valid. He thereby demonstrated the proposition that nobody should be a judge in his own cause or, as people sometimes say, that a person who is his own lawyer has a fool for a client. In the end, as another military lawyer pointed out, the office of Deputy Judge Advocate General could only be conferred, under the Regulations, by the Governor-General.

The pages of this history are populated by many legal luminaries, some of whom were later to serve as judges of superior courts, including a number of Chief Justices. They included Sir Edmund Herring, Sir Victor Windeyer, Russell Le Gay Brereton, Sir Harry Gibbs, Athol Moffatt, Kenneth Townley, Martin Kriewaldt and many others.

As I have written in the Foreword, the book is no mere sequence of minor biographies. It is a history which brings out the dynamic interaction of institutional and political imperatives in tension and the personalities who managed those tensions over the decades. It has eleven chapters, written by nine different authors. It is comprehensive, detailed and absorbing. The system of military justice law and the legal service whose development it outlines is concerned with discipline and cohesiveness but also with the rule of law and respect for the rights, liberties and fair treatment of the men and women of the Army. It is an invaluable resource for a wide range of readers. I congratulate its editors and contributors.