DIRECTOR’S REPORT

In October last year Professor Robin Creyke began an appointment as a Senior Member of the Administrative Appeals Tribunal (AAT) in Canberra. Accordingly she had to stand down as the foundation Director of the ACMLJ. I would like to pay tribute to Robin for her vision, energy and enthusiasm in proposing, establishing and running the ACMLJ. I also wish her well in her AAT appointment and express the hope and expectation that we will see her often, including at ACMLJ events. I know that she continues to have a keen interest in the world of military law and wants to keep in the loop.

I also wish to thank Professor Simon Bronitt, who is now Director of the ARC Centre of Excellence in Policing and Security at Griffith University. Simon ably stood in as Director of the ACMLJ immediately after Robin left. I know that Simon, too, wants to keep in touch with the ACMLJ and its research agenda.

Cameron Moore has been a very energetic Deputy Director of the ACMLJ from the beginning of the year. He has kick-started a new seminar program. He has also done a huge amount of work developing, with Defence, a grant application under the Australian Space Law Research Program to expand space law expertise among ADF legal officers. We expect a decision about the application in July.

We are also pleased to be jointly hosting the Protecting Civilians During Violent Conflict conference on 25 & 26 August this year. We are partnering with the University of New Wales at the Australian Defence Force Academy and the ANU Centre for Applied Philosophy & Public Ethics in organising the conference. The program includes a mix of academic, military and NGO presenters. It will also bring some international scholars to Australia, including Michael Schmitt and David Whetham from the UK and Richard Rosen from the US. Details are available at:


Gary Tamsitt

Director, ACMLJ & Director, Legal Workshop, ANU College of Law
ACMLJ RECENT NEWS & EVENTS

ACMLJ SEMINAR SERIES

The ACMLJ was delighted to have Alexander Street SC present the inaugural seminar in the new ACMLJ seminar series on Monday 22 March 2010. Mr Street spoke on the case of Lane v Morrison, in which he appeared for Mr Lane. Mr Street spoke on the role of a legal officer, the range of arguments used in White v Director of Military Prosecutions (in which he also appeared in 2007) and Lane v Morrison, the significance of those arguments for the reforms to the Federal Magistrates Court, and also on the Constitution’s s.80 jury trial protections being a right extending to any offence carrying a two year penalty. Mr Street fielded a range of very interesting questions.

On 5 May 2010 the Centre hosted a seminar on the proposed Maritime Powers Bill, in which senior officials from the Office of International Law, Attorney-General’s Department—Andrew Walter and Stephanie Ierino—both spoke. Offshore law enforcement and the role of the ADF in that process is an area of the law which has attracted some considerable interest in the past decade with Australian and international courts making observations on the operation of the law, and its consistency with Australia’s international legal obligations. During this seminar Andrew and Stephanie outlined the legal issues which were the foundation for revisiting this area of Commonwealth law and the current initiative to draft a Maritime Powers Bill for eventual introduction and consideration by Parliament. A key element of the new legislation will be to consolidate relevant offshore enforcement legislation in one Act while at the same time ensuring a comprehensive approach which takes into account Australia’s international legal obligations, and existing legislative frameworks.

The Centre is planning a program of seminars for the rest of the year which will cover discipline, operations and administrative law issues. We will advertise these widely as we finalise the details.

The ACMLJ and the ANU Centre for European Studies recently organised a lecture by Rain Liivoja (University of Helsinki) entitled ‘Disciplining Soldiers, Spouses and Contractors: Criminal Jurisdiction of States over Service Members and Associated Civilians’. Details of this lecture (including a podcast) can be viewed at http://ces.anu.edu.au/events/disciplining-soldiers-spouses-and-contractors-criminal-jurisdiction-states-over-service-membe

RECENT MILITARY DISCIPLINE LAW COURSE (LEGAL TRAINING MODULE 2)

The remaining LTM 2 courses for 2010 are:

- Military Operations Law: 6 – 10 September
- Advocacy for Military Lawyers: 15 – 19 November
The case of *Lane v Morrison* [2009] HCA 29 gave the High Court an opportunity to consider the validity of the 2006 amendments to the *Defence Force Discipline Act 1982* (Cth) creating the Australian Military Court (AMC).

Earlier High Court cases had considered the validity of the provisions of the Act conferring jurisdiction on pre-AMC military tribunals to try military offences. *Lane v Morrison* tested Parliament’s power to confer jurisdiction to hear such offences on a body having many of the trappings of a federal court, but not having been established as a court under the judicature provisions of the Constitution.

In *Lane v Morrison*, the plaintiff had been charged with ‘an act of indecency without consent’ under s61 of the Act picking up s60(2) of the Crimes Act 1900 (ACT). By operation of the 2006 amendments, the charges were to be heard by the AMC. The plaintiff sought prohibition to prevent the Court from hearing the charges, and a declaration that the provisions in Div 3 of Pt VII (the 2006 amendments), creating the AMC, were invalid. Picking up suggestions by Callinan J in *White v Director of Military Prosecutions* (2007) 231 CLR 570, the plaintiff claimed that the creation of an independent court outside the command structure in the Australian Defence Force was inconsistent with s68 of the Constitution. The plaintiff further claimed that the conferment of jurisdiction on the AMC was beyond the scope of ss51(vi) of the Constitution. In two joint judgments, the High Court unanimously held that the creation of the AMC, and the conferral of military jurisdiction on it, were invalid. Thus, the 2006 amendments were held to be invalid.

The plurality judgment

The joint judgment of Hayne, Heydon, Crennan, Kiefel and Bell JJ put forward two grounds for holding that the provisions were invalid, although the first, alone, was sufficient to secure invalidity. First, the AMC impermissibly exercised the judicial power of the Commonwealth because it was independent of the chain of command. In their Honours’ view, the reason why pre-AMC military justice systems were held not to exercise the judicial power of the Commonwealth in contravention of constitutional limitations was because military tribunals exercised their power within the command structure. Having reviewed the history of pre-AMC military tribunals, both before and after federation, their Honours concluded that the decisions of those tribunals were subject to ‘confirmation or review by higher authority within the chain of command of the forces’ (at [84]). Hence, they were not ‘definitive’ of guilt: ‘[d]ispositive decisions about guilt and punishment were made on confirmation or review within the chain of command. Those tribunals were ’established to ensure that the discipline administered within the forces was just’ (at [86]).

By contrast, the whole reason for creating the AMC was to enhance independence from command structures: ‘the decisions of the AMC were not to be subject to any review or confirmation within the chain of command’ (at [95]). A central purpose of the AMC, their Honours said, ‘was to have the new
body make binding and authoritative decisions of guilt and determinations about punishment which, without further intervention from within the chain of command, would be enforced’ (at [97]). That was ‘reason enough’ to conclude that the AMC impermissibly exercised Commonwealth judicial power.

Thus, pre-AMC military tribunals did not impermissibly exercise the judicial power of the Commonwealth because their decisions were subject to review and confirmation within the command structure. The AMC, on the other hand, impermissibly exercised Commonwealth judicial power because it made binding and authoritative decisions independently of the chain of command. The differentiating factor, in their Honours’ view, which pushed the AMC to the wrong side of the line, was its independence from the chain of command.

With respect, this reasoning is unpersuasive. While independence from the chain of command was certainly a point of differentiation between the AMC and pre-AMC military tribunals, that point, without more, does not take us very far in working out whether an exercise of Commonwealth judicial power is involved. It is well established that the exercise of military discipline involves an exception to the exclusive exercise of Commonwealth judicial power by federal courts and courts exercising federal jurisdiction (ie, those referred to in s71 of the Constitution). What makes an exercise of that power within the chain of command permissible, but an exercise of power by an independent body impermissible? It has never been suggested that non-judicial bodies cannot have (or aspire to have) the characteristics of independence and impartiality. The Administrative Appeals Tribunal, for example, exercises an independent and impartial function. That does not, however, transform the nature of the decision that it makes from administrative to judicial. The problem is that their Honours do not explain why the independence of the decision-maker in the military discipline context transforms the nature of the power exercised from disciplinary to judicial. Indeed, in support of their analysis, their Honours referred to a passage from Dixon J’s judgment in *R v Cox; Ex parte Smith (1945) 71 CLR 1* at 23, which identified disciplinary ‘tribunals acting judicially’ as ‘essential to the organization of an army or navy or air force’. It is difficult to see why an independent and impartial body would necessarily fall outside Dixon J’s conception.

The second basis relied upon by Hayne, Heydon, Crennan, Kiefel and Bell JJ to support their conclusion of invalidity was the insertion of s 114(1A) into the Act. That provision provided that the AMC was to be ‘a court of record.’ The combination of a power to make ‘decisions about guilt of offences against the general criminal law’ (at [107]), and its designation as a ‘court of record’, would have the consequence that ‘the decision of the AMC would preclude subsequent prosecution in the civil courts for an offence substantially the same as the offence tried by the AMC’ (at [113]). Their Honours concluded that the making of ‘a binding and authoritative determination of such issues pursuant to the [Defence Force Discipline Act] is to exercise the judicial power of the Commonwealth’ (at [113]). Even if this reasoning is correct, the difficulty could be cured by severing the provision. However, it was unnecessary for their Honours to consider whether severance was possible since they had already concluded that the AMC was invalid because it made binding and authoritative decisions independently of the chain of command (at [115]).

**The judgment of French CJ and Gummow J**

A more persuasive reason for invalidity was put forward by French CJ and Gummow J. Military justice, their Honours said, as authorised by s51(vi), was in a special position outside Ch III. As a result, the power in s51(vi) was to be narrowly confined to historical understandings of military tribunals. Although the 2006 amendments were designed ‘to supersede, and improve upon’ those tribunals, ‘[t]here was an attempt by the Parliament to borrow for the AMC the reputation of the judicial branch of government for impartiality and non-partisanship, upon which its legitimacy has been said ... ultimately to depend ..., and to thereby apply “the neutral colours of judicial action” ... to the work of the AMC’ (at [11], footnotes omitted). Thus, Parliament’s attempt to create the AMC outside Ch III went beyond the scope of s51(vi).
Their Honours (at [61]) emphasised the need for a military justice system to connect with the ‘historical stream’ of the systems of military justice in order to fall within the scope of s51(vi), that is, to fall within the recognised exception to the exclusive exercise of Commonwealth judicial power by Ch III courts. Here, however, Parliament had tried ‘to create a body with the character of a court created by the Parliament under Ch III of the Constitution, save for the manner of appointment and tenure of its members’ (at [32]). That intention was reinforced by the insertion of s114(1A) (at [20], [32]). The creation of the AMC in this way was too much of a ‘break with the past’ (at [62]).

This analysis is more appealing than that in the other joint judgment. On this view, Parliament was here identifying the AMC too closely with Ch III courts. It was a court of record; it had judges; it had a jury, it was independent and impartial, and it was broadly doing the same thing as a Ch III criminal court. The public might not be capable of differentiating between the two. While the exercise of judicial power by a military tribunal might be distinguishable from what Ch III courts do if the tribunal is clearly stamped with a military character, identifying it with too many Ch III characteristics would blur the distinction to an impermissible extent. This is particularly the case given the range of disciplinary offences set out in the Defence Force Discipline Act, especially those picked up by s61 from the ACT Crimes Act.

On this account, the characteristics of independence and impartiality are largely beside the point and, presumably, although not addressed by French CJ and Gummow J, Parliament would not necessarily be prevented from creating an independent and impartial tribunal to exercise military jurisdiction. They could not, however, identify it as a court in a way that would blur the division of justice systems between Ch III and s51(v). Historical streams need not be frozen at 1900, and adaptability to contemporary values of good decision-making need not be seen as breaking that historical connection. Although pre-AMC military tribunals, both before and after federation, were within the command structure, it does not necessarily follow that military discipline within the command structure is an essential characteristic of military justice. As indicated earlier, the passage from Dixon J in Cox might suggest otherwise.

Unanswered questions

One of the main controversies involved in previous military justice cases, the most recent being White v Director of Military Prosecutions, was the question of the proper test to be applied when determining whether the prosecution of a disciplinary offence is within power. Following White, the position was somewhat unclear. The judgments in Lane do not resolve the uncertainty. It was ‘neither necessary nor desirable to go beyond what was said in White v Director of Military Prosecutions on these issues or to consider reopening that decision’ (at [117] per Hayne, Heydon, Crennan, Kiefel and Bell JJ). Hayne, Heydon, Crennan, Kiefel and Bell JJ also considered it unnecessary to consider one of the main arguments put forward in this cases, that is, how s68 operates, and whether it could impose limitations on the exercise of power under s51(vi). French CJ and Gummow also declined to re-open White (at [63]). Their Honours, however, considered that s68 does not operate as a limitation on legislative power (at [59]).

Conclusion – where to from here for the Commonwealth?

Following the decision, the Defence Minister, Senator John Faulkner, announced that the pre-AMC military tribunal system would be reinstated as an interim measure, and that consideration would be given to ‘alternative models for establishing the jurisdiction in a Chapter III court’ (‘Australian Military Court’, Press Release, 26 August 2009). As a policy matter, it would seem undesirable to return permanently to a military tribunal within the command structure: the policy intention behind the 2006 amendments was to reform the military justice system to make it more independent and impartial. Indeed, as French CJ and Gummow J hinted (at [16]), a return to the old system might bring it into conflict with Australia’s obligations under Art 14(1) the International Covenant on Civil and Political Rights, which recognises a person’s entitlement to have criminal charges heard by an independent and
impartial tribunal. An independent tribunal, without the judicial trappings, would also appear to be out of the question following the plurality judgment in *Lane*.

The only real alternative, that is desirable as a matter of policy, would appear to be to give effect to the 2005 Senate Committee recommendations to create a Ch III-consistent military court, at least for some of the current disciplinary offences. A Ch III military court, with jurisdiction over more serious offences, could operate in combination with a military tribunal system for less serious offences. This would require a complete remodeling of the structure of the Defence Force Discipline Act. The only remaining question would be whether s68 imposes any limitations on the investiture of a Ch III court with jurisdiction to hear disciplinary offences.

James Stellios  
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James is an Associate Professor at the ANU College of Law where he teaches constitutional law and international trade law. His primary research interest is constitutional law, and he has published widely in that field. Prior to joining the College, he spent a number of years in legal practice working for the Attorney-General’s Department and the Australian Government Solicitor, principally in the area of constitutional litigation. As Counsel Assisting the Solicitor-General of the Commonwealth he has appeared as junior counsel for the Commonwealth in a number of constitutional cases before the High Court of Australia.
REPORT

REPORT ON THE ARMED FORCES LAW ASSOCIATION OF NEW ZEALAND CONFERENCE

by Cameron Moore

28–30 August 2009, Wellington NZ

The Armed Forces Law Association of New Zealand has again staged a highly successful conference, which built upon the success of the 2008 conference in Christchurch.

The theme of the conference was Human Rights and the Military. This attracted a wide range of speakers from the Netherlands, Canada, the United Kingdom, Ireland, Germany, New Zealand and Australia. The first keynote address from Anthony Cleland-Welch OBE set the scene through a personal perspective of the British experience of human rights in military operations over recent decades. The first day then had a focus upon operational issues with a number of papers discussing the interaction between international humanitarian law and human rights—particularly with respect to extra territorially, detention, targeting in Afghanistan and also the European Convention on Human Rights.

Other papers addressed piracy, insurgency, gender issues in peacekeeping operations, command responsibility and cluster munitions. A highlight was the lunchtime address by Greens MP Dr Kennedy Graham on the International Non-Aggression and Lawful Use of Force Bill currently before the New Zealand Parliament. Brigadier Kevin Riordan NZDF and Captain Rob McLaughlin RAN closed the day with presentations on current operations and legal issues in the NZDF and ADF respectively.

Following a very convivial formal dinner at the Wellington Club on Saturday night, the second day focused primarily on discipline issues. Commander Tish van Stralen RAN presented on ADF military justice reforms and Cameron Moore presented on the then four day old decision of Lane v Morrison. Commander Chris Griggs RNZN and John Rowan QC presented on New Zealand’s new military justice system. The turmoil over military justice in Australia provided a backdrop to the vigorous debate in New Zealand over the interaction between military justice and human rights. European and Canadian perspectives greatly enhanced the discussion.

Lane v Morrison

My paper on this case focused on the collision between a human rights approach and Australia’s traditional systems protection approach of a written federal constitution, independent judiciary and military subordination to the civilian government. In establishing the Australian Military Court (AMC), the ADF sought to respond to UK and Canadian cases which overturned the existing courts martial system on the basis that it did not provide a trial by an independent and impartial tribunal. Equally, the AMC was a response to years of parliamentary criticism of poor performance in the military justice system. Discipline being a function of command dated back to the
Cameron Moore joined the School of Law at the University of New England in 2005. He also works part-time as Deputy Director for the Australian Centre for Military Law and Justice at the ANU College of Law. His practice experience includes six years as a Navy legal officer, as well as private practice. Cameron’s teaching, research and supervision interests are Executive Power, Environment Law, Law of the Sea, International Law, the Law of Armed Conflict and Military Law. He is Consulting Editor for the New Zealand Armed Forces Law Review.

Mutiny Act 1689 which required the standing army to be kept in good discipline, while also providing some due process in discipline matters and preserving the jurisdiction of the civilian courts.

Lane v Morrison can be seen as the traditional approach of systems protection, that is an independent judiciary and a subordinate military, prevailing over the human rights approach to which the AMC was a response. The challenge will now be to establish a military justice system which is consistent with Chapter III, provides an independent and impartial tribunal and which keeps the ADF in good discipline. In some respects, the ADF is returning to the constitutional questions of 1689.

Cameron Moore
University of New England & ANU College of Law

UPCOMING EVENTS

Public Seminar
Dr Jeremy Farrall
Governance and Power-sharing in Cyprus: Facilitating preliminary peace talks
16 July 2010,
Phillipa Weeks Staff Library, ANU

Conference
Protecting Civilians During Violent Conflict
25 & 26 August 2010, Finkel Theatre, ANU
http://law.anu.edu.au/COAST/events/ProtectCivilians/web.htm

The ACMLJ is co-sponsoring this conference together with the School of Humanities and Social Sciences, UNSW @ ADFA and the Centre for Applied Philosophy and Public Ethics, ANU.

The program incorporates military, academic and NGO speakers, including Major-General Stephen Day (Australian Army), Professor Michael N. Schmitt (University of Durham) and Professor Richard D. Rosen (Centre for Military Law & Policy, University of Texas).