Senate Foreign Affairs, Defence and Trade References Committee

SUBMISSION COVER SHEET

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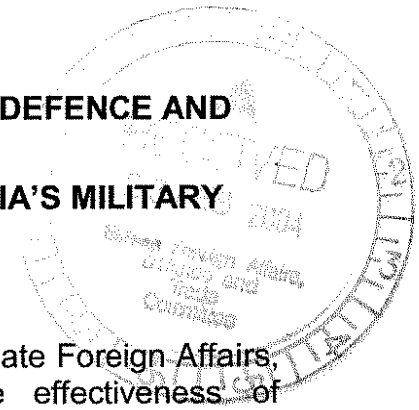

SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

INQUIRY INTO THE EFFECTIVENESS OF AUSTRALIA'S MILITARY JUSTICE SYSTEM

Introduction

1. This submission, to the inquiry conducted by the Senate Foreign Affairs, Defence and Trade References Committee into the effectiveness of Australia's military justice system, is provided by the Australia Defence Association (ADA) at the request of the committee. The ADA thanks the committee for the invitation to provide a submission. This submission is formatted with numbered paragraphs to assist with any follow-up questions.

2. Founded in Perth in 1975 by a retired RAAF Chief, a leading trade unionist and the director of a business peak body, the ADA remains an apolitical national organisation spread across every state and mainland territory of the Commonwealth. The Association is not formally or informally affiliated with any other body and is commonly acknowledged as Australia's only truly independent and bipartisan community watchdog and 'think-tank' on national security issues. Apart from limited numbers of standard subscriptions for ADA publications, the Association receives no funding from the Government or from sources outside Australia.

3. The policies and activities of the ADA are supervised by a board of directors elected by the membership. This submission has been approved by the ADA Board of Directors and was prepared by a group of retired defence specialists and other experts, including QC/SC-level legal advisers, convened for the purpose. Not all these contributors are ADA members.

4. In terms of national defence, the ADA seeks to promote, foster and encourage the development and implementation of national security structures, processes and policies encompassing:

   a. an accountable, integrated, responsive and flexible structure for making national security decisions;

   b. robust means of continually assessing Australia's strategic situation;

   c. adequate national resources being allocated to national security according to such assessments;

   d. the implementation of a defence strategy based on the protection of identifiable and enduring national interests;

   e. the development and maintenance of adequate forces-in-being capable of executing such a strategy; and

   f. the development and maintenance of manufacturing and service industries capable of sustaining defence force capability development and operations.

5. The Association notes that the subject of this parliamentary inquiry is an essential part of the requirement for operational adequacy raised at paragraph 4e above.

6. On a national basis the ADA maintains a comprehensive website at >www.ada.asn.au< and publishes a quarterly journal, *Defender*, and a monthly bulletin, *Defence Brief*. Both publications enjoy a high-level and educated readership in political, military, public service, academic and community circles. The Association also contributes to parliamentary and official inquiries, media coverage, and public, academic and professional debates on national security matters in the broader sense (including intelligence and security intelligence matters).

7. **Terms of Reference.** This submission does not address all the terms of reference detailed in the Senate motion establishing the inquiry. As a community-based organisation, rather than one necessarily representing the interests of ADF members, the ADA's proposals are confined to issues of principle or major public importance and do not address individual cases of perceived injustice in any detail. The ADA believes that submissions covering the latter detail are best made by those involved, including those specialised organisations collectively representing the interests of serving or previous ADF members.

Background

8. This submission is based on the principle that it is simply not feasible to maintain an effective defence force during peacetime, or use it effectively during wartime or in semi-wartime conditions such as peacekeeping, without the members of such a force being subject to a statutory code of military discipline. Wars cannot be fought using a civil criminal code, not least because such codes lack the disciplinary provisions required to keep order and encourage discipline and cohesive teamwork in armed bodies training for, or engaging in, battle.

9. The military discipline system is also an adjunct to lawful command and the constitutional and statutory foundation for civil political control of the defence force. It is an essential contributor to the ADF being a defence force and not an undisciplined rabble. This aspect was recently summed up well in the 2003 UK case, Queen Versus Spear, especially in the reliance the law lords judgement placed on evidence provided by Air Chief Marshal Sir Anthony Bagnall.[1] Relevant excerpts are attached at Annex A to this submission.

10. The ADF always operates under Australian national command but usually as part of a multinational coalition or alliance. A distinct Australian disciplinary code for the ADF is also essential to protect the rights of ADF personnel, and those under their protection, in such situations.

11. Australia's international obligations under the laws of armed conflict in particular, and international humanitarian law generally, would also be impossible to meet without the ADF being subject to its own statutory code of discipline. ADF operations in failed states, such as in Somalia in 1992-93

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[1] R Vs Spear (2003) 1 AC 734; [2002] UKHL 31. On the House of Lords website the case appears as Boyd, Hastie and Spear Saunby and Others (Appellants) Vs The Army Prosecuting Authority.

where no local civil code existed in practice, need to be underwritten by a comprehensive and mature military disciplinary code.

12. The defence force disciplinary code should, however, be harmonised with Australian civil codes as much as possible. This is required to protect the civil rights of ADF personnel as Australian citizens. It is also required to eradicate, or ameliorate, the potential for unlawful or unfair discrimination stemming from the necessary conditions or exigencies of their military service.

13. Understanding of the constitutional, legal and practical requirements for a defence force disciplinary code has become deficient or confused over recent years. This is largely due to the increasing bureaucratisation of the Department of Defence and the unwise dilution of the dividing line between military professional and departmental administrative matters. This has resulted in many forgetting that the ADF is a distinct professional institution in Australian society not just a specialised agency of the federal Public Service.

14. With regard to the military justice system the ever-increasing civilian bureaucratic meddling in military professional matters has had an insidious effect on the discipline and good order of the ADF. There appear to be several inter-related causes underlying this trend.

a. The seemingly ever-increasing bureaucratisation of the Department of Defence, and the unwise assimilation into it of ADF higher command structures, has resulted in:

   (1) dilution or distortion of the Westminster constitutional principle that the ADF is under the control of the Minister for Defence but he exercises this control only through the CDF and the Service Chiefs, and only members of the ADF are entitled to give lawful orders to subordinate ADF personnel;

   (2) a mixed cultural climate in 'Australian Defence Headquarters' (as the unwieldy bureaucratic amalgam is currently termed) which inhibits the operation of clear chains of command for ADF operations (including discipline) and their administrative and logistic support;

   (3) an unnecessary and detrimental cultural flux between ADF and departmental institutional and professional cultures which has too often resulted in a tendency for timid, unscrupulous or careerist officers to too easily achieve senior rank in the ADF.

b. The increasing impingement on defence force administrative procedures and disciplinary law of external legislation, such as various anti-discrimination laws, whose provisions are not easily translatable, or indeed relevant, to many defence force operational conditions, working environments or other situations.

c. An incorrect emphasis on implementing uniform or 'homogenous' policies on many employment matters across the Department of Defence and the ADF when the working conditions, tasks and operational cultures of the two institutions are quite different. This causes serious stresses at unit level and below in the ADF, and has

unnecessarily complicated the interplay between defence force disciplinary and administrative law processes.

INQUIRIES INTO WHETHER ADMINISTRATIVE ACTION OR DISCIPLINARY ACTION SHOULD BE TAKEN AGAINST MEMBERS OF THE ADF

15. The Australia Defence Association notes that it is essential for the discipline, operations and administration of the ADF that defence force members be subject to both a disciplinary code (incurring criminal penalties) and administrative law processes designed to maximise the efficiency and administration of the force.

16. There is a serious problem, however, with the apparent growing reluctance to use the disciplinary code in certain circumstances. There is an unfortunate and strengthening tendency instead to wrongly use administrative processes to investigate and/or punish alleged criminal acts or disciplinary transgressions by Service personnel.

17. In addition to the general causes noted in paragraph 14 above, there appear to be several inter-related specific causes underlying this trend.

a. The overall growing reliance on achieving due process in DFDA proceedings to the detriment of the swift and summary efficiency that was historically one of the great strengths of military law, especially in summary jurisdictional matters at and below unit level.

b. A decline in the experience, and possibly the standard of regular ADF legal officers. This is exacerbated by the increased reliance on complex legal procedures (Defence Force Magistrates, written summaries of evidence, prosecuting and defending officers, etc) for the low grade offences that used to be handled in summary hearings administered by sub-unit and unit commanders. The legitimate desire to eradicate perceived injustices in summary hearings has resulted, paradoxically, in increasingly ineffective summary justice.

c. An overall decline in the experience of ADF officers, warrant officers and non-commissioned officers in the DFDA due to its seemingly ever-increasing complexity and the delays involved, a consequent greater reliance on Defence Force Magistrates rather than unit summary hearings, and the growth of 'administrative dispute reporting mechanisms' which, in reality or perception, bypass the unit chain of command (and command responsibility) - such as the growing use of anonymous complaint 1800 telephone numbers. In terms of complexity and technicality, it is worth noting that until the advent of the DFDA virtually all instruction in lower-level military law was provided to officer cadets and junior NCO by warrant officers from any corps or specialisation in the ADF. Most military law now has to be taught by qualified lawyers. This is not an improvement.

d. A desire to test 'evidence' in administrative proceedings where the evidentiary material was originally gathered to support disciplinary proceedings, even when such proceedings do not eventuate, because there are insufficient or unworkable in practice alternative legal processes to otherwise test the 'evidence'. If the system of boards or courts of inquiry was more flexible, there would probably be a decline in the number of administrative proceedings improperly targeted at individuals.

e. The need to hold inquiries to gather information to prevent a recurrence of a dangerous practice for operational or safety reasons clashing with the need to gather evidence on the same matter for disciplinary proceedings. This especially affects matters of self-incrimination and the use immunities from prosecution to establish the facts. The ADF is not alone here and general civil air safety investigations face the same dilemma.

18. This incorrect use of administrative law processes rather than disciplinary proceedings can mean, in effect, if not strictly by the law or by intent, that an ADF member can be 'tried' twice for the same alleged offence or incident. In practice, this means that ADF members (and in some limited circumstances, public servants) are the only Australian citizens subject to a 'double jeopardy' legal situation - including for quite trivial transgressions.

19. Several recent examples of such abuse of process can be cited. The most well known recent case involves the member of the Special Air Service Regiment accused of several alleged offences stemming from a skirmish in the early days of the 1999 East Timor deployment. The ADA notes that the member concerned was acquitted under the DFDA but then subjected to administrative proceedings concerning the same or similar matters. Following a subsequent independent inquiry by a senior RANR legal officer who is a Victorian County Court Judge in civil life, the Army has subsequently acknowledged that 'the administrative action taken against the soldier, of which he was also found not guilty, while possible under current policy, in this case, on reflection, would have been best not taken'.[2]

20. The 'double jeopardy' problem is compounded by the unfair nature of the administrative law processes used:

a. First, in administrative procedures involving the issue of a notice-to-show cause, the member receiving the notice is assumed to be guilty and has to, in effect, prove their innocence. This reversal of the onus of proof can be justified in some circumstances. It is unjustifiable where the administrative proceedings are undertaken because of a belief, honest or not, that the accused would not be found guilty using disciplinary proceedings.

b. Second, in administrative procedures the 'evidence' cited cannot usually be tested by cross-examination. This has too often resulted in administrative proceedings being initiated on evidence that would not stand up in a disciplinary hearing at any level. It also allows

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2 Department of Defence Media Release PACC 23/04 dated 17 Feb 04.

proceedings to be too easily based on false or mistaken evidence, even where this is malicious, because witness statements in administrative proceedings need not be taken on oath. This is grossly unfair and illogical.

c. Third, in administrative proceedings the senior officer issuing a notice-to-show cause is too often also involved in considering the consequent answer to the notice from the member concerned. More to the point, they could also be involved in the background circumstances underlying the whole situation. There are simply too many cases where timid or unscrupulous senior ADF officers proceed against a subordinate administratively, rather than charge them under the DFDA, because the senior officer involved knows that his or her culpability, or other failings, in the particular matter would be examined and highlighted in disciplinary proceedings against the subordinate.

21. This gross misuse of the authority to initiate administrative proceedings is clearly avoiding the intent of parliament in the DFDA and other associated legislation. The 'double jeopardy' problem involved could be largely fixed by the introduction of five changes to the DFDA and ADF administrative law procedures. These changes should be enshrined in statute.

22. First, if an ADF member has charges dismissed under the DFDA the mounting of administrative proceedings covering essentially the same matter or matters against that member should be absolutely prohibited, or at least heavily circumscribed.

23. Second, the laying of charges under the DFDA as a command prerogative only must be amended in serious cases to allow an accused ADF member the right to insist on being charged in order to be able to clear his or her name in subsequent disciplinary proceedings. This right may have to be qualified, but it should apply to all situations where the offences allegedly committed are serious enough to threaten the continued service, promotion or professional or private reputation of the member concerned.

24. Third, all administrative action involving possible or actual censure or reprimand of an ADF member must be firmly based on fair and acceptable rules of evidence, and include reasonable provisions for such evidence to be fairly and impartially gathered and tested. In particular, unsworn evidence gathered as part of any disciplinary investigation, whether disciplinary proceedings resulted or not, must be absolutely prohibited from use in any administrative proceedings concerning the same circumstances.

25. Fourth, all witness statements taken during Service police investigations must be taken on oath to eliminate the common situation where witnesses make false or otherwise maliciously prejudicial statements but cannot be themselves charged with an offence (perjury, etc) or be subject to defamation action (because the witness statements are not public). At the very least, all witness statements containing prejudicial matters about another person should be taken on oath and/or it should be made an offence to make a false statement for use in investigative, disciplinary and administrative proceedings.

26. Fifth, the command procedures for issuing a notice-to-show cause must not involve an officer substantially involved in the circumstances concerned. A senior officer attempting to proceed administratively against a subordinate should be automatically disqualified from doing so if a reasonable presumption can be made, to an independent authority outside the chain of command concerned, that a conflict of interest arises. The onus of proof should be on the senior officer not the subordinate.

27. The inappropriate use of administrative procedures for disciplinary matters can be eradicated by simple and clear amendments to the relevant Defence Instructions and to the DFDA.

INQUIRIES INTO PEACETIME DEATHS IN THE ADF

28. For most of the 20th century the ADF largely investigated its own affairs involving the death of ADF members and it did so quite efficiently. This began to change after several flawed naval inquiries led Prime Minister Menzies to institute a Royal Commission into the loss of HMAS *Voyager* in order to restore public confidence.

29. The first investigations by a State Coroner into an ADF death occurred in the mid 1980s. The first one was in 1986 following the death of a pilot when his Mirage fighter crashed in the sea off the northern NSW coast. The second was after the tragic loss in 1987 of two sailors when HMAS Otama dived without checking all personnel were safely inside the pressure hull. The NSW State Coroner undertook these inquiries following representations from family members of those lost because, rightly or wrongly, the coroner lacked confidence in the ADF inquiries conducted. As State Coroners increasingly become statutory appointments their willingness to undertake such inquiries is likely to increase not decrease.

30. Over the last 15 years there have been several incidents involving all three Services where the families of ADF members who have died have not had full confidence in the integrity or efficiency of subsequent ADF investigations or inquiries. In some of these cases the concerns of the family involved appear unjustified, including probable cases of unreconciled grief. In other cases, the ADF has not handled the matters as well as it should have. The overall result has been a growing loss of public confidence in the probity and efficiency of ADF investigations and inquiries.

31. The Australia Defence Association considers that it is not in the overall public interest for the ADF to lose its authority to conduct investigations and inquiries into the death or injury of ADF members, or the damaging, crashing or sinking of ADF platforms. The professional authority and operational efficiency of the ADF, and its responsibilities for occupational health and safety, would be greatly impaired if it was not allowed to conduct its own boards or courts of inquiry.

32. It should also be noted that the ADF will always have to retain the authority and ability to conduct such inquiries when forces are committed on overseas operations. It therefore makes little sense to exclude the ADF from doing so in Australia in peacetime. It also makes little sense to exclude the

ADF entirely because the defence force often has the only current expertise, or depth of expertise, in the professional or technical matter involved (such as warship, tank or jet fighter manoeuvres).

33. Defence (Inquiry) Regulations make allowance for the participation of State Coroners in ADF inquiries at the Commonwealth's discretion. It is not in the public interest for State Coroners to conduct inquiries into ADF deaths on an ad hoc basis as at present.

34. The Commonwealth should reach agreement with the States for the automatic participation of State coroners or other appropriate experts in ADF courts of inquiry into major incidents (aircraft crashes, vessel sinkings, etc) resulting in the death of an ADF member, and inquiries into multiple deaths of ADF members. Such an agreement should also include provision for the discretionary participation of State Coroners in investigations into individual deaths of ADF members in the state concerned. Such an agreement should involve the implementation of procedures whereby only one, joint, inquiry or investigation is conducted.

CONCLUSIONS

35. The unwieldy bureaucratic structure of the Department of Defence, inappropriately uniform personnel administration policies across the department and the ADF, and inappropriate mixing of institutional cultures partly underly problems in the ADF with the implementation of the DFDA and administrative law processes. The frequent meddling of civilian bureaucrats in ADF professional matters dilutes the constitutional and statutory basis of defence force discipline and operational effectiveness. This detrimental trend should be reversed forthwith.

36. Under the political control of the Minister for Defence, the command and discipline of the ADF should be exclusively exercised by the CDF and his military subordinates. The command and discipline of the ADF should not be subject to continual and harmful meddling from civilian public servants with no lawful, moral or professional authority to do so.

37. The ADF must be subject to a statutory disciplinary code. The efficient management of the ADF also requires administrative law procedures. Many of the problems currently being experienced are because administrative procedures are too often used instead of disciplinary ones.

38. If an ADF member is acquitted under the DFDA the mounting of administrative proceedings covering essentially the same matter or matters against that member must be absolutely prohibited or heavily circumscribed.

39. An ADF member accused of serious matters affecting his or her continued service, promotion or professional or private reputation must have the right to insist on being charged under the DFDA in order to be able to have the matter heard and determined, in a conclusive and appropriate manner, using disciplinary proceedings.

40. Unsworn evidence gathered as part of any disciplinary investigation, irrespective of whether disciplinary proceedings resulted or not, must be prohibited from use in any administrative proceedings covering substantially the same circumstances.

41. All witness statements taken during Service police investigations, especially those containing prejudicial matters about another person, must be taken on oath or subject to testing by cross-examination on oath.

42. A senior officer attempting to proceed administratively against a subordinate should be automatically disqualified from doing so if a disinterested observer would reasonably conclude that a conflict of interest arises.

43. It is not in the public interest for the ADF to lose its authority to conduct investigations and inquiries into the death or injury of ADF members, or the damaging, crashing or sinking of ADF platforms.

44. The Commonwealth should reach agreement with the States for the conduct of joint civil-military coronial inquiries, and investigations where warranted, including:

a. automatic participation of State Coroners in military courts of inquiry into major accidents resulting in the death of an ADF member;

b. automatic participation of State Coroners in military courts of inquiry into incidents resulting in the multiple deaths of ADF members; and

c. discretionary participation of State Coroners in investigations into the individual deaths of ADF members.

RECOMMENDATIONS

45. The Australia Defence Association recommends that the committee recommend the following in their report:

a. the ADF chain of command be formally and organisationally separated from the Department of Defence at all levels;

b. steps be taken to significantly reduce civilian bureaucratic meddling in ADF professional matters;

c. separate personnel administration policies be used for the ADF and the Public Service where justified by their different working conditions or other distinctive factors;

d. where an ADF member is acquitted under the DFDA the mounting of administrative proceedings covering essentially the same matter, or matters, against that member be absolutely prohibited or heavily circumscribed;

e. an ADF member accused of serious matters affecting his or her continued service, promotion or professional or private reputation have the right to insist on being charged under the DFDA in order to be able to have the matter heard and determined, in a conclusive and appropriate manner, using disciplinary proceedings;

f. unsworn evidence gathered as part of any disciplinary investigation, irrespective of whether disciplinary proceedings resulted or not, be prohibited from use in any administrative proceedings covering substantially the same circumstances;

g. all witness statements taken during Service police investigations, be taken on oath or tested by cross-examination on oath;

h. a senior officer attempting to proceed administratively against a subordinate be automatically disqualified from doing so if a conflict of interest arises;

i. the Commonwealth and States reach agreement on there being only one, and if necessary a joint, inquiry into incidents resulting in the death of ADF members in or over Australian territory or territorial seas;

j. the Commonwealth and States institute the automatic participation of State Coroners in military courts of inquiry into major accidents resulting in the death of an ADF member;

k. the Commonwealth and States institute automatic participation of State Coroners in military courts of inquiry into incidents resulting in the multiple deaths of ADF members; and

l. the Commonwealth and States institute participation of State Coroners, at the coroner's discretion, in investigations into the individual deaths of ADF members.

ANNEX A TO
ADF SUBMISSION
DATED 23 FEB 04

EXCERPTS FROM THE 2003 JUDGEMENT BY LORD RODGER OF EARLSFERRY

Introduction

Set out below is an excerpt from the speech of Lord Rodger of Earlsferry (with whom Lords, Steyn, Hutton and Scott of Foscote agreed) in the UK House of Lords decision in R. v. Spear [2003] 1 AC 734; [2002] UKHL 31. >http://www.publications.parliament.uk/pa/ldjudgmt/jd020718/boyd-1.htm<.

Excerpt

I should therefore not wish to leave unmentioned the substantial arguments that can be advanced in favour of a system of trial by court-martial that covers both military and civil offences. The case is put forcefully in the witness statement dated 12 July 2001 of Air Chief Marshal Sir Anthony Bagnall, the Vice Chief of the Defence Staff. Before making the statement Sir Anthony had consulted senior members of all three Services. Describing what he regarded as the special circumstances underpinning section 70 of the Acts and section 42 of the Naval Discipline Act 1957, he said inter alia:

"4. First and foremost of the special circumstances of the armed forces is that the willingness and readiness of every member and unit of the armed forces to act with the greatest possible speed and efficiency is essential for the defence of the realm from outside attack, for acting in operations outside the United Kingdom and sometimes for acting in aid of the civil power (as in Northern Ireland). It is essential that this readiness be maintained at all times, not only in times when a threat is immediate. It applies with equal importance wherever a unit is based. The RAF, for example, must be ready to act anywhere from its bases within the United Kingdom. Success in operations depends on the ability of all members of a unit to act together as a single fighting force, in other words on operational efficiency.

5. Second, the requirements of Service discipline reflect the fact that their fundamental purpose is essentially to fight. The Services are armed organisations, required to train and fight in circumstances of extreme hardship, as has most recently been demonstrated in Northern Ireland, the Gulf, Kosovo and Sierra Leone.

6. The performance of their functions involves, not merely working together, but living together, often in conditions - whether in Northern Ireland, the Falkland Islands or Kosovo - of hardship, stress and danger. Yet, in carrying out these functions it is of the greatest importance that they retain respect for the civilians among whom they operate, civilians who, whether in Northern Ireland or abroad, may be unsympathetic or even hostile. The fundamental purpose of a military justice system is to foster and promote the discipline and self-control required for the maintenance of the capability to act as an efficient fighting force, that is to say, operational effectiveness.

7. It is the combination of the need for utmost readiness, unit solidarity and deeply imbued self-control over long periods and often in most difficult situations which necessitate a comprehensive system of command and discipline, and require that this system should be capable of dealing fairly and, where possible, promptly with misconduct involving a criminal offence.

8. These factors make Service life unique, but, while they are all important, I should make a further point about one of them. Members of the regular armed forces do not simply do a job. They are at all times members of the armed forces, very often sharing accommodation, whether barracks or temporary accommodation, even in peacetime.

9. The special status of members of the armed forces means that an act which may be a criminal offence under civilian criminal law also has a disciplinary aspect when committed in a Service environment. The commanding officer is at the centre of the system of discipline. He is responsible for the behaviour of those under his command, both among themselves and in relation to the local community. As a result of the circumstances I have already referred to, the CO's powers of discipline are necessarily wide. He is able to deal summarily with a wide range of misconduct, including both criminal and purely Service offences. His powers include limited powers of detention (basically a maximum of 28 days but up to 60 days with the permission of higher authority). A CO may typically deal with cases of minor theft or assault. These cases are often nonetheless of importance to discipline and morale. A minor theft, which might be insignificant in some civilian contexts, can erode trust between members of a unit and undermine the effectiveness of what should be a close-knit team. More serious cases are likely to go [to] court-martial. The CO and the Service courts are uniquely placed to understand the circumstances of Service life and the significance of misconduct by Service personnel, especially where misconduct occurs in a Service context.

10. A requirement for all criminal offences in the United Kingdom to be dealt with by civilian courts would seriously undermine the CO's authority. Moreover it seems to me that the exclusion of courts-martial from dealing with criminal cases in the United Kingdom would inevitably bring with it the exclusion of the COs from dealing with such criminal offences on a summary basis.

11. Subject to a point which I shall deal with at paragraph 18 and following below [as to the exclusion of certain serious offences], section 70 broadly makes no distinction between criminal offences committed in the United Kingdom and those committed abroad. The fundamental reasons for this are the circumstances of Service life which, as explained above, require a distinct system of command and discipline. Moreover the circumstances of Service life, and Service needs, would render artificial an exclusion of Service courts for crimes in the United Kingdom. If, for example, a serviceman stole from another serviceman abroad, he could be dealt with by Service discipline; but, if the theft occurred in England and the thief was identified only after the unit had gone abroad, the case could only be dealt with by a court in the United Kingdom. If section 70 did not apply to an offence committed in England, no disciplinary action could be taken against the guilty person; nor could the Service police arrest him. He would not have committed a disciplinary offence.

12. A distinction between criminal and Service offences is also in my view artificial. The same facts may amount both to a criminal and a purely Service offence. A theft may sometimes be looting; the circumstances of an assault may amount to mutiny. It would be anomalous if criminal misconduct could be dealt with, but only where the circumstances also amounted to a Service offence. Nor is there a simple distinction in terms of seriousness. Looting, mutiny and desertion may be as serious as theft or even murder."

52. This authoritative and up-to-date statement of the reasons why the armed forces wish to maintain the jurisdiction of courts-martial in civil offences complements passages in certain of the authorities where judges have recognised that a distinct system of justice for the armed forces can be justified by their peculiar position."