THE DIRECTOR OF MILITARY PROSECUTIONS, THE AFGHANISTAN CHARGES AND THE RULE OF LAW

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Address to the 2010 Rule of Law in Australia Conference:
The rule of law, the courts and constitutions

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In his *Introduction to the Study of the Law of Constitution* (10th ed, 1959), Dicey wrote:

> A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

This time-immemorial dilemma of the soldier has been starkly brought into present consciousness by recent events pertaining to the charging of three Australian soldiers with military offences arising out of operations in Afghanistan. From the perspective of the rule of law, these events and their sequelae raise three significant issues which I shall address:

- First, that part of the law of contempt that protects participants in litigation from vilification and reprisals, in order that they not be deterred from approaching the courts;

- Secondly, the moral imperative of holding our own to the standards on which we insist from others; and

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- Thirdly, whether a Chapter III court is necessarily Nirvana when it comes to the trial of service offences.

On 12 February 2009, soldiers of the Australian Special Operations Task Group undertook a compound clearance in Uruzgan province, Afghanistan. What is known is that six Afghan civilians, whose protection is the fundamental purpose of our presence in Afghanistan – of whom one who may have been a combatant, but also a woman and four small children – were killed, and another four injured. Following an investigation by the Australian Defence Force Investigative Service, the matter was referred to the Director of Military Prosecutions (DMP) in November 2009. The DMP requested that further investigations be undertaken, and these proceeded through 2010. After receiving further information as a result, and after seeking and obtaining representations on behalf of the Defence Force as to the service interest in relation to the charges under consideration, the DMP on 27 September 2010 announced that she had decided to prosecute three soldiers: one for manslaughter and alternatively dangerous conduct, with a second count of dangerous conduct; the second for failure to comply with a lawful general order and alternatively prejudicial conduct; and a third, who is currently overseas, who will be charged upon his return.[2]

The DMP's decision has provoked intense, emotional and largely ill-informed debate in military, political and legal circles. Without knowledge of the evidence available to the DMP, many have expressed intemperate views that the charges should not have been brought. Worse, many, who should know better, have embarked upon an entirely inappropriate campaign of vilification of the DMP, not limited to critique of

[2] *Statement by the Director of Military Prosecutions: 12 February 2009 civilian casualty incident in Afghanistan* (Defence Media Release, 27 September 2010); *Defence comment on the Director of Military Prosecutions decision* (Defence Media Release, 27 September 2010).

her decision and the associated process, but personal attacks on her background, competence and personality.

My thesis is that our ability to bring, and dispose justly of these charges, is a mark of a mature civilised society in which the rule of law is well-established.

The Director of Military Prosecutions

The office of Director of Military Prosecutions is created by (CTH) *Defence Force Discipline Act* 1982, s 188G, and is given functions by s 188GA, set out below, at the forefront of which is the carrying on of prosecutions for service offences before courts martial or Defence Force magistrates, whether or not the prosecution was instituted by the DMP:

> **188GA Functions of the Director of Military Prosecutions**
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> (1) The Director of Military Prosecutions has the following functions:
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> (a) to carry on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate, whether or not instituted by the Director of Military Prosecutions;
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> (b) to seek the consent of the Director of Public Prosecutions as required by section 63;
>
> (c) to make statements or give information to particular persons or to the public relating to the exercise of powers or the performance of duties or functions under this Act;
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> (d) to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal;
>
> (e) to do anything incidental or conducive to the performance of any of the preceding functions.
>
> (2) In addition to his or her functions under subsection (1), the Director of Military Prosecutions also has:
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> (a) the functions conferred on the Director of Military Prosecutions by or under this Act or any other law of the Commonwealth; and
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> (b) such other functions as are prescribed by the regulations.

Prosecutions are instituted by charge under s 87(1), which provides that where an authorised officer, including the DMP believes, on reasonable grounds, that a person

has committed a service offence, the DMP may charge the defence member with the service offence.

The DMP has issued a Prosecution Policy, which embraces the concept that not all suspected service offences are to be prosecuted, and that the major considerations are (1) whether there is evidence which if accepted can prove the offence, (2) whether there are reasonable prospects that a service tribunal properly instructed will convict, and (3) a range of discretionary objective and subjective factors. There is nothing unusual or atypical about this, when compared to the prosecution policies of civilian DPPs.

The DMP is independent of the chain of command. Although a military officer, she answers to no-one for her decision. None of us know the whole of the evidence that she has considered in deciding to lay the charges. Whatever views we may hold can only be based on a very imperfect understanding of the evidence. It is only fair to assume that she has acted in accordance with what she perceives to be her duty, to institute prosecutions for service offences where she believes on reasonable grounds that one has been committed.

Which brings us to the first rule of law issue. In the civil (as opposed to military) justice system, it is a contempt of court to engage in conduct that might improperly influence the outcome of pending prosecutions in the civil courts – including by making a public statement that is calculated (as opposed to intended) by abuse or otherwise to influence a party to pending proceedings in the conduct of those proceedings, or which amounts to a threat to or interference with a party to threatened proceedings that is intended or calculated to inhibit him or her in commencing,

continuing or defending them.[3] In *Re William Thomas Shipping Co Ltd,*[4] Maugham J concluded that the publication of injurious misrepresentations directed against a party to proceedings, especially if they hold that party up to hatred or contempt, is liable to affect the course of justice because it may cause the party to discontinue the proceedings or refrain from defending them for fear of public dislike.[5]

It is almost inconceivable that the DMP's civilian counterparts, the Commonwealth and States Directors of Public Prosecutions, would have been subjected to similar obloquy, for doing no more than her job. Strikingly, public criticism of civilian DPPs has almost invariably been of perceived insufficient ruthlessness in the pursuit of domestic criminals, rather than of an excess of zealotry in prosecution of crime. This of itself should give pause for thought as to whether the current debate is informed by logic. For a DPP to be subjected to the type of criticism that the DMP has attracted could very well be a contempt, and the various petitions and other very public attempts that have been launched to endeavour to persuade high authorities to intervene in the prosecution process would almost certainly be so, if directed at a prosecution in a civilian court. Their proponents may be unaware that not only does *Defence Force Discipline Act*, s 53, make it a service offence for a defence member to engage in conduct in respect of a service tribunal which would be a contempt if engaged in in respect of a court; in addition, (CTH) *Defence Act* 1903, s 89, creates a

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[3] See, for example, *Smith v Lakeman* (1856) 26 LJ Ch 305 (threatening letter); *Registrar v Unnamed Respondent* (ACTSC, Miles CJ, 16 March 1994, BC9405547) (ASIO officer taking photographs of parties within precincts of court exerted undue pressure on those attending court); *Resolute Ltd v Warnes* [2000] WASCA 359 (threatening facsimile transmissions); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312 at 335 per Wilcox J, Fed C of A (press conference by Chief Minister of Northern Territory); *Bhagat v Global Custodians Ltd* [2002] NSWCA 160 (threatening letter); *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354; (club member suspended in reprisal for bringing a settled proceeding against the club); *Harkianakis v Skalkos* (1997) 42 NSWLR 22; *Attorney-General v Times Newspapers Ltd (Sunday Times Case)* [1974] AC 273; [1973] 3 All ER 54; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.

[4] [1930] 2 Ch 368, 376.

[5] See also *Vine Products Ltd v Green* [1966] Ch 484, 496 (Buckley J).

similar offence, not limited to service personnel, which extends to all. The *ad hoc* nature of service tribunals may mean that such a contempt can be committed only once a tribunal has been convened, but there is a respectable view that the law of contempt extends to protect the fountain of justice from poisoning as well before it begins to flow as when it is in full flood after proceedings are instituted.[6]

The ADF Representations

There has been a deal of speculation about certain representations made by the Vice Chief of the Defence Force, at the DMP's invitation, as to the "service interest" in the prosecution of the charges. *Defence Force Discipline Act*, s 5A, provides as follows:

> **5A Appointment of superior authority**
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> The Chief of the Defence Force or a service chief may, by instrument in writing, appoint an officer, or each officer included in a class of officers, to be a superior authority for the purpose of:
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> (a) representing the interests of the Defence Force in relation to charges that are being considered by the Director of Military Prosecutions for possible trial by a Defence Force magistrate or a court martial; and
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> (b) exercising the powers and performing the functions conferred on superior authorities by or under this Act or the regulations.

Typically, before deciding whether or not to proceed with a charge, the DMP will invite a "superior authority" to make representations in respect of the service interest. This is intended to allow for a submission as to whether prosecution would or would not be in the general interests of the Defence Force. The letter inviting the representation invariably points out that the DMP is independent, and that any representations should be confined to addressing the impact of a prosecution on defence interests generally, without canvassing the merits of the individual case. Contrary to what seems presently to be a widely-espoused view, this is not an

[6] *Commonwealth Bank v Preston,* 564G; but cf *James v Robinson* (1963) 109 CLR 593.

opportunity for Defence to argue on behalf of the soldier that he or she should not be charged; it as an opportunity for Defence to make representations as to whether the interests of the Defence Force would or would not be served by proceeding with a prosecution.

There have been equally misconceived suggestions that the DMP should have conducted some sort of preliminary hearing, or given reasons, for her decision. Those are not recognised features of prosecutorial decision-making.[7] The DMP had to be satisfied only that there was reasonable cause to believe that an offence had been committed.

The rules of engagement and the rule of law[8]

I expect that ultimately what is likely to be at the heart of these charges is whether the rules of engagement were adhered to, and (perhaps) whether the response of the Australian troops was a reasonable and proportionate one in the circumstances of the threat that they faced.

The nature of military operations has changed enormously over the last fifty years. Where once, in conventional war there was a fairly clear and observable distinction between combatants and non-combatants, in the asymmetrical warfare of today the distinction is often not so apparent. This undoubtedly exacerbates the already difficult position of the soldier, to which Dicey referred. Moreover, nowadays many of our operations are not war-fighting but peace support, and in that context the issue of when and what force can be used is even more blurred.

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[7] See *Commissioner for Police v Reid* (1989) 16 NSWLR 453, 461; *Oates v Attorney-General (Cth)* (1998) 84 FCR 348, 354-5.

[8] The author acknowledges the contribution to the thoughts expressed in this section of Associate Professor Ben Saul, "Criticism of military charges a shameless political attack", *National Times*, 15 October 2010.

Rules of engagement prescribe the circumstances in which the Government of Australia authorises our service personnel to use varying degrees of force, up to lethal force. Because we balance our military objectives with the avoidance of harm to non-combatants, we operate within constraints. That is what separates us from the terrorists, and gives our cause moral authority.

A useful illustration of the potential complexity that a soldier can face in this territory can be obtained from legislation currently before Parliament, the (CTH) *Defence Legislation Amendment (Security of Defence Premises) Bill* 2010, introduced in response to the domestic security threat manifested by the current trial in Victoria of several accused in respect of an alleged plot to attack an Australian defence base. It authorises the use of force, including lethal force, to protect persons from an attack on defence premises, but it is hedged with many conditions. The first two conditions are imposed by (proposed) s 71X(1):

> **71X Security authorised members of the Defence Force may respond to attack**
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> (1) This section applies if:
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> (a) an attack on defence premises is occurring or is imminent; and
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> (b) the attack is likely to, or is intended to, result in the death of or serious injury to one or more persons on the defence premises.
>
> (2) Subject to sections 72G and 72H, a security authorised member of the Defence Force may take action on defence premises to protect persons from the attack.
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> Note: Section 72G provides that defence security officials may use reasonable and necessary force in exercising powers under this Part. Section 72H provides that security authorised members of the Defence Force may, in limited circumstances involving an attack, do a thing that is likely to cause the death of, or grievous bodily harm to, another person. Other defence security officials are not so authorised (see subsection 72G(2)).

Then, proposed s 72G provides that defence security officials can use reasonable and necessary force in exercising powers under the relevant provisions of the Act, but certain classes of "defence security officials" cannot use lethal force (although apparently preserving their right to reasonable and proportionate self-defence which, where the lives of others may be at stake, would ordinarily include lethal force).

> **72G Use of reasonable and necessary force, etc. by defence security officials**
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> *Use of force—general rule*
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> (1) A defence security official may, subject to this section and section 72H, use such force against persons and things as is reasonable and necessary in the circumstances in exercising powers under this Part.
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> *Limit on use of force—defence security guards and defence security screening employees*
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> (2) Despite subsection (1), a contracted defence security guard or a defence security screening employee must not, in using force against a person in exercising powers under this Part, do anything that is likely to cause the death of, or grievous bodily harm to, the person.
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> Note 1: For security authorised members of the Defence Force, see section 72H.
>
> Note 2: This provision does not affect a person's rights under other laws: see section 72S.

Next, additional conditions are imposed on the use by "security authorised members of the Defence Force" of lethal force, and still further conditions if the attacker is attempting to flee:

> **72H Use of force involving death or grievous bodily harm by security authorised members of the Defence Force in responding to an attack**
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> (1) Despite subsection 72G(1), a security authorised member of the Defence Force must not, in using force against a person in exercising powers under this Part, do anything that is likely to cause the death of, or grievous bodily harm to, the person, unless the member believes on reasonable grounds that:
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> (a) doing that thing is necessary to prevent the death of, or serious injury to, another person (including the official); and
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> (b) the threat of death or injury is caused by an attack on defence premises, or on people on defence premises, that is occurring or is imminent.
>
> (2) In addition to the limitations in paragraphs (1)(a) and (b), if a person is attempting to escape being detained by fleeing, a security authorised member of the Defence Force must not, in exercising powers under this Part, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless:

(a) the person has, if practicable, been called on to surrender; and
(b) the official believes on reasonable grounds that the person cannot be apprehended in any other manner.

Thus in some circumstances, a soldier may have to be satisfied of not less than six conditions before being entitled to use lethal force. A lawyer would take some hours, and several pages, to review the available evidence in respect of each of those six conditions and determine whether they were satisfied. Of course, the soldier does not have the luxury of time to do so and must make that judgment almost instantaneously.

Nonetheless, once a soldier steps outside the rules of engagement, he or she is acting without lawful authority. For that reason, a great deal of emphasis is given in the training they receive to rules of engagement, orders for opening fire, and guidance on use of force. If there is a case that there has been arguably a breach of those rules, then there are good policy reasons why it should be fully scrutinised. There is no point in having rules of engagement if they can be breached with impunity. A non-compliance with such orders is not just an individual breach of discipline, but jeopardises the implementation of national policy as reflected in the rules of engagement. While deaths of non-combatants may sometimes be unavoidable, the rules of engagement are designed to minimise this; if there has been a breach of them, then we are potentially hypocrites if we do not hold our own people accountable.

Following the Second World War, hundreds of Japanese were tried by Australian courts-martial for war crimes, and – at a time when in Australia the death penalty, although still on the books, was only rarely enforced – many were executed. Many later distinguished judges of the Supreme Court of New South Wales, and of other states, were involved in those trials. Australia then held to account those of its enemies who had overreached the laws of war. While there is no comparison in quality or gravity between the atrocities for which those prosecutions took place and

what is alleged against our soldiers, to my mind, it is a signal mark of a society in which the rule of law is established and prevails that we can now call to account in that respect not only those who threaten us, but also our own – as have the United States of America, the United Kingdom,[9] and Israel.[10]

The service tribunal

The fact that charges have been preferred of course does not mean that the soldiers will be convicted. They may very well have compelling defences. The charges will be heard by courts-martial, constituted by service personnel who understand the exigencies with which soldiers on operations can be confronted. If there is any reasonable doubt as to their guilt, they will be acquitted.

Following *Lane v Morrison*[11] and the demise of the unconstitutional former Australian Military Court, the last Government announced that it would establish, as a Chapter III Court, the Military Court of Australia. However, neither the legislation nor the architecture for that purpose is yet in place, and these charges will be tried by Courts-Martial under the revived former legislation, the constitutionality of which has been repeatedly, if sometimes narrowly, upheld and is not seriously open to doubt as a valid exercise of the defence power.

The pre-occupation of some with the supposed benefits of a Chapter III Court in this context is, I suggest, misconceived. The military justice system, though something of a hybrid, is fundamentally a disciplinary, not a criminal, jurisdiction. Most of our

[9] See, for example, N. Rasiah, "The court-martial of Corporal Payne and others and the future landscape of international criminal justice", *JICJ* 2009, 7(1), 177-199; and S. Rayment, "Officer faces manslaughter charge over friendly fire death", *Telegraph* (UK), 30 October 2010.

[10] See "Israeli sniper faces Gaza manslaughter charges", *BBC News – Middle East*, 6 July 2010.

[11] (2009) 239 CLR 230.

professional disciplinary systems have tribunals which are dominated by members of the relevant profession, with a legal advisor or chair, for instance in this State, the Medical Tribunal for medical practitioners, and the Legal Services Division of the Administrative Decisions Tribunal (and its various predecessors) for legal practitioners. They bear many similarities to the court-martial, from which they might well be historically derived.

There is a risk that retrospective forensic analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating. I do not think there is much risk of that in a court-martial, in which the tribunal of fact is a panel of military officers, who will bring their specialist knowledge, understanding and experience to the task – just as do the doctors to the Medical Tribunal. For my part, I would suggest that such a court-martial is better equipped to judge prosecutions for service offences than a judge of a Chapter III Court without operational military experience.

Perhaps one positive outcome of these unhappy events may be reconsideration of whether a Chapter III Court is really the ideal tribunal for our military justice system, or whether indeed the traditional use of specialist service tribunals does not remain a superior mode of maintaining disciplinary standards in the services, as it evidently does in other professional fields – with an appropriate right of appeal to a court, as is characteristic also of other professional disciplinary tribunals.

Conclusion

From the debate to date, we can identify three important themes of importance in the rule of law. *First*, that the law of contempt, in its protection of participants and witnesses in litigation from improper pressure and vilification that might otherwise divert the course of justice, is an essential and insufficiently appreciated pillar of the rule of law. *Secondly*, the accountability manifested by our ability to call to account not only our opponents but our own, when it appears that they may have overreached, is the mark of a mature civilised society in which the rule of law is well-established. *Thirdly*, the rule of law does not require, or imply, that a Chapter III court is necessarily the best and fairest mode of delivering justice in the prosecution of service offences; specialist service tribunals bring to the task the same specialist experience and knowledge that specialist disciplinary tribunals do in other professional fields.

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