RE TRACEY: SOME IMPLICATIONS FOR THE MILITARY-CIVIL AUTHORITY RELATIONSHIP

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In exploring the extent to which the civil courts can be excluded from exercising their criminal jurisdiction over members of the Defence Force, *Re Tracey; Ex parte Ryan*[1] ("*Tracey*") was dealing with a particular aspect of the constitutional relationship between civil authority and the military. This note is directed to another aspect of that sometimes troublesome relationship; namely, the extent to which the civil authority, in the form of the Commonwealth,[2] can use the Defence Force for the purpose of ordinary law enforcement operations, such as the apprehension and arrest of persons suspected of offending against Commonwealth laws. Whilst this issue was not directly raised in *Tracey*, references in that case to the constitutional principle of the subordination of the military power to civil authority might be taken to cast doubt on the validity of Commonwealth laws that expressly authorise defence personnel to engage in arrest and detention of civilians.

Difficulties in observing the demarcation of the military's role in civilian affairs have a long history in Australia. Soon after the establishment of the colony of New South Wales, Governor Hunter encountered troubles with the officers of the New South Wales Corps over his attempts to assert the authority of the civil administration in relation to

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1. *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.
2. In the sense of the *Executive* Government, acting in relation to matters such as fisheries, customs, immigration and quarantine.

the management of Crown lands, public stores and the use of convict labour.[3] His successor, Governor King, frequently found it necessary to court-martial recalcitrant officers. One such court martial was terminated by the Corps' arrest of the Deputy Judge Advocate.[4] These ructions were a prelude to the more notorious antagonism between McArthur and Governor Bligh resulting in the arrest of the latter in 1808.[5]

More recently, concerns have been raised about the use of army personnel to break the Great Coal Strike in 1949,[6] the undertaking of reconnaissance flights in 1983 by the Air Force to gather evidence in support of an application for an injunction against the Tasmanian government to prevent construction of the Franklin dam,[7] and the making available for public use of Royal Australian Air Force ("RAAF") aircraft and air crew during the industrial dispute between pilots and domestic airlines in 1989.[8] In two instances of potential civil disturbance in the last two decades, Defence Force personnel have engaged

3. H V Evatt *Rum Rebellion: A study of the overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Sydney: Angus & Robertson, 1938) (rep 1975) 20-22.
4. Ibid, 51.
5. Ibid, 221-222. One question agitated in those extraordinary times was the constitutional basis of law enforcement in the penal colony of New South Wales. The better view appears to have been that the Governor, as the Chief Executive Officer of the colony, derived his powers from the Imperial Statute of 1784 [24 George III c 56] by which the King was empowered to appoint places to which convicts could be transported.
6. Mentioned by Prime Minister Chifley, Commonwealth of Australia Parliamentary Debates (1949) Vol HR204, 580. An altogether different use of the armed services occurring at the same time as the Coal Strike, was the provision by the Commonwealth of 40 RAAF crew to participate in the allied air lift to break the Berlin blockade: see Chifley, Commonwealth of Australia Parliamentary Debates (1949) Vol HR201, 1636.
7. Joint Statement by Attorney-General and Minister for Defence, Commonwealth of Australia Parliamentary Debates (1983) Vol S98, 26; also the Attorney-General Senator Evans, 54, 66-67 (referring to a prior statement of Defence Minister Killen, 7 April 1978, outlining procedures for use of the regular forces); and, 64 (responding to an objection by Senator Durack about the over-flight raising a "fundamental constitutional issue"). At 256, Senator Evans referred to Defence Instruction DI(G) OPS 05-1 covering assistance to the community. More generally, the use of the Defence Force in crises such as Cyclone Tracey on Christmas Day 1975 was mentioned at 865, and in relation to flood relief at 894.
8. Defence Minister Beazley, Commonwealth of Australia Parliamentary Debates (House of Representatives) 25 October 1989, 1788.

in peace keeping and security operations.[9] Less controversially (because the impact of such operations is wholly beneficial) Defence Force members have often been made available to provide assistance during emergencies such as bush fires, floods, cyclones, and earthquakes. Speaking in the English context, Lord Justice Lawrence made the following relevant comment in respect of this latter kind of assistance:

> I know of no authority which prevents the Crown, if so minded, from employing any available soldiers in time of peace as well as in time of war in rendering services to private individuals....[10]

The specific issue addressed in this note has in fact been the subject of a somewhat cursory, and therefore unsatisfactory, examination by the High Court.

In *Li Chia Hsing v Rankin*[11] ("*Li Chia Hsing*") the conferring of power upon members of the Defence Force to arrest persons suspected of breaching the Commonwealth Fisheries Act 1952 ("Fisheries Act") was alleged to be unconstitutional. As briefly outlined in the statutory notice of a constitutional matter issued pursuant to section 78B of the Commonwealth Judiciary Act 1903, the argument was that:

> The Naval Officer who arrested the boat and its master had no authority to do so in so far as the inclusion of the Officer of the Defence Force in the definition of 'Officer' as applied in s. 10 of the Fisheries Act was beyond the legislative competence of the Commonwealth in that it authorised the use of the Defence Force for purposes of civil arrest contrary to prohibition implicit in s. 51(vi.) s. 68 and s. 119 of the ... Constitution that the Defence Force be confined to defence purposes.[12]

The relevant provisions of the Constitution state:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

9. The Pacific Islands Regiment was called out on 19 July 1970 to maintain order on the Gazelle peninsula, Rabaul. See Defence Minister Fraser (Resignation Speech), Commonwealth of Australia Parliamentary Debates (1971) Vol HR71, 683-684; Prime Minister Gorton, 688-689.
   In February 1978, following a bombing outside the Hilton Hotel, Sydney, where the Commonwealth Heads of Government Meeting was being held, elements of the army were called out by order of the Governor-General and deployed around the NSW town of Bowral. See A R Blackshield "The Siege of Bowral - The Legal Issues" (1978) 4 no 9 Pacific Defence Reporter 1, 6-7.
10. *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197, 230.
11. (1978) 141 CLR 182.
12. Ibid, 186.

> (vi.) The naval and military defence of the Commonwealth and of the several States, *and the control of the forces to execute and maintain the laws of the Commonwealth.* (emphasis added)
>
> 68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.
>
> 119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

In response to the claim of a constitutional limit on the use of naval personnel, Chief Justice Barwick stated:

> The final submission of the applicant was that the evidence of the Naval officer who boarded the said boat was inadmissible because the action of that officer in boarding the boat was illegal. The illegality was said to result from the fact that he was a member of the defence forces of Australia, a fact which was said to preclude him acting under the *Fisheries Act* in the detection of an offence against a provision of that Act. But, in my opinion, there is no substance in his submission. *There is no constitutional objection to the employment of a member of the defence forces in the performance of acts in furtherance of the provisions of the Fisheries Act.*[13] (emphasis added)

To similar effect, Justice Gibbs said tersely:

> The final argument advanced, that the evidence was illegally obtained, is impossible to accept. There is no constitutional reason why an officer of the naval forces should not assist in the enforcement of a law of the Commonwealth such as the *Fisheries Act.*[14]

Justice Murphy was more reserved. In leaving the matter open, he commented:

> Another point raised by the applicant ... was that the naval vessel commander who arrested the applicant's boat was acting illegally and that his evidence was therefore inadmissible or should have been excluded as having been illegally obtained. The contention was that his action was an abuse of the defence power in that the naval defence forces could not be employed on such a task. Literally no argument was advanced to support this contention and for that reason I would reject it. There may be serious questions as to how far the defence forces may properly be involved in civil affairs but this is not the occasion to consider such questions.[15]

13. Ibid, 192.
14. Ibid, 195. It is not apparent whether His Honour meant the naval officer acting as a civilian, or in his role of officer. As the former, any member of the public could assist a police constable or officer of the peace in an arrest. The issue before the Court, however, was whether the Fisheries Act could validly confer original powers of arrest on naval personnel. It is probable that His Honour was addressing the latter case.
15. Ibid, 203.

Given the lack of reasoning for these conclusions, one may ask on what basis can a constitutional objection be made to a law of the Commonwealth which empowers defence personnel to engage in law enforcement? Essentially this must be founded on an *implied* prohibition which, in its widest form, would confine members of the Defence Force to defence activities with the explicit exception of where they are authorised to be used in aid of the civil power as envisaged in section 119.[16]

Whether it is permissible to *imply* limitations on Commonwealth legislative power, either from the constitutional text or from external standards of reference such as the common law or historic tradition, is itself a matter of controversy. The departure of the late Justice Murphy from the Court meant a curtailment of developments towards an explicit jurisprudence of implied constitutional protections.[17] There have been, nevertheless, occasions in the last decade when other Justices have resorted to constitutional implications to restrain excessive and arbitrary exercises of Commonwealth power. These give some respectability to arguments depending on such an approach.[18]

To the extent that the limitation claimed in *Li Chia Hsing* relies on implications from the constitutional text, it derives faint support for a

16. Essentially this argument is that the express inclusion in s 119 of a limited provision for use of the Defence Force in times of a specific kind of civilian disorder excluded more general recourse to the armed forces.

17. J Scutt (ed) *Lionel Murphy: A Radical Judge* (Sydney: McCulloch Publishing, 1987) 65-66, 187-210. In *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 667-670 Murphy J recognised an implied constitutional freedom of communication. In *Hammond v The Commonwealth and Others* (1982) 152 CLR 188, 201 he asserted that it was inconsistent with the right of trial by jury assured by s 80 of the Constitution that a person charged with a Commonwealth offence should be subject to executive interrogation. He also regarded that such interrogation was an interference with the exercise of the judicial power of the Commonwealth. In *Sillery v R* (1981) 35 ALR 227, 234 he spoke of an implied restriction on the use of Commonwealth power to inflict cruel and unusual punishment. See also *McInnis v The Queen* (1979) 143 CLR 575, 588-593.

18. In *Hammond v The Commonwealth* supra n 17, Deane J also regarded an inquisitorial investigation as derogating from the proper exercise of the judicial power of the Commonwealth. Brennan J, in *Davis v The Commonwealth* (1988) 166 CLR 79, 116-117, gave a limited reading to the express incidental power in s 51(xxxix) of the Constitution where the Commonwealth relied on it to create offences that would unduly interfere with the freedom of minority groups to express political dissent. See also *Street v Queensland Bar Association* (1989) 63 ALJR 715 Deane J, 737 and Toohey J, 754.

substantial constraint on the Commonwealth's use of its military and naval forces. It is true that in time of peace, the High Court has read section 51(vi) narrowly as not authorising a Commonwealth instrumentality to engage in general commercial engineering work in order to make viable its operations in regard to docking and repair of naval vessels.[19] But against this it can be argued that the Commonwealth is not limited just to the defence power to make laws providing for the use of the defence force in non-defence activities. Thus powers of arrest of offenders against the Fisheries Act could be supported as an exercise of the Commonwealth's legislative power under section 51(x) (fisheries), (xxix) (external affairs) and (xxxix) (the express incidental power).

Further, so far as section 51(vi) itself is concerned, its own words, in its second limb, appear to contemplate such a possibility. This finds support in the leading[20] judgment in *Tracey* where, referring to the phrase "the control of the forces" in the second clause of section 51(vi), it is said: "It seems to us ... that phrase relates to the work of law enforcement".[21] Significantly, however, they commented: "It is *not the ordinary function of the armed services* to "execute and maintain the laws of the Commonwealth"," adding that: "Of course, the powers bestowed by s.51 are subject to the Constitution...."[22] The qualifying remarks of their Honours leave room for an argument that such permissible law enforcement is restricted to aid to the civil authority in time of civil commotion or emergency, that is, in extraordinary events.

Also supporting an unrestricted view of the Commonwealth's power, Justice Hope in his report to the Commonwealth Government on Protective Security concluded:

> It is clearly within the constitutional power of the Commonwealth under the secondary aspect of s.51(vi.) to use the Defence Force in executing and maintaining laws of the Commonwealth ... involving 'civilian security', and it doubtless has the same power in respect of its laws which have nothing to do

19. *The Commonwealth v Australian Commonwealth Shipping Board and Another* (1926) 39 CLR 1. Contrast *Attorney General (Vict) v The Commonwealth* (1935) 52 CLR 533 where the High Court held that the Commonwealth could establish clothing factories, which besides making uniforms for defence personnel, supplied State authorities such as the prison service with uniforms for their staff.
20. That of Mason CJ and Wilson and Dawson JJ; in view of the lack of a clear ratio among the various judgments, one could not describe it as a majority judgment.
21. Supra n 1, 540.
22. Ibid.

> with 'civilian security'. Executing and maintaining the customs and excise laws is an example.[23]

In coming to that conclusion, Justice Hope relied on an opinion of former High Court Justice and Brigadier General, Sir Victor Windeyer, who said:

> I do not doubt the Commonwealth Government can, of 'its own initiative' employ members of its Defence Force 'for the protection of its servants or property or the safeguarding of its interests.'[24]

To these statements can also be added supportative comments by Quick and Garran,[25] endorsed by Justice Dixon in *R v Sharkey*.[26]

In their totality, this range of views would seem to deny any significant limitation on the use of military personnel in the course of execution of Commonwealth laws. To this formidable array of opinion one may make the cautious rejoinder that the focus of these comments is the need for the Commonwealth to *protect itself* against serious threats to its *existence*, a matter incontestably within Commonwealth competence.[27] Although mere interference with its *interests*[28] has also been given as a basis for invocation of the aid of the Defence Force, there has been no definitive judicial endorsement of that claim.

23. *Protective Security Review, Report, Unclassified Version* Australia, Parliament 1979, Parl Paper 397, Canberra para 10.27, 149 ("the Hope Report").
24. "Opinion of Sir Victor Windeyer, K.B.E., C.B., D.S.O. on Certain Questions Concerning the Position of Members of the Defence Force when Called Out to Aid the Civil Power" Appendix 9, Hope Report supra n 23, 277.
25. J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Websdale & Shoesmith, 1901) 964 where they said:
    > [I]f a riot in a State interfered with the carriage of federal mails, or with inter-State commerce, or with the right to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself.
26. (1949) 79 CLR 121, 151.
27. *Burns v Ransley* (1949) 79 CLR 101 Latham CJ, 109-110; *Australian Communist Party and Others v The Commonwealth* (1951) 83 CLR 1 Dixon J, 188; *Victoria and Another v The Commonwealth and Hayden* (1975) 134 CLR 338 ("AAP"). See also F M Auburn and P W Johnston "Some Constitutional Aspects of ASIO" 1978 Australasian Universities Law Schools Conference Paper No 9, 1-3, 9-12.
28. As mentioned by Windeyer supra n 24. An alternative approach in determining when resort to the Defence Force is constitutionally justifiable is to focus on the *gravity of the risk* and the *nature of the persons* engaged in breaking a Commonwealth law, instead of the *kind* of Commonwealth interest entailed. No one would quibble about calling in specialist military units to counter terrorist assaults, for example. This comment is concerned, however, with use of the armed services in normal operations, such as apprehension of illegal foreign fishermen.

If section 51(vi) itself yields no or little support for implying restrictions on the deployment of the Defence Force for civilian law enforcement, section 68 may be more propitious. Whilst it is undeniable that the 'command'[29] vested in the Governor-General is merely titular, the effective command being exercised, in accordance with the principles of responsible government, by the government itself,[30] section 68 does reflect, symbolically, what former Governor-General Sir Ninian Stephen has described as "the quite special relationship between the Governor-General and the armed forces of the Commonwealth."[31] He went further, describing it as "a close relationship of sentiment, based neither upon control nor command but which in our democratic society expresses on the one hand the nation's pride in and respect for its armed forces and, on the other, the willing *subordination of the members of those forces to the civil power*".[32]

The subjugation of the military to civil authority is arguably more than a mere matter of sentiment: it is a great constitutional principle which is given recognition in section 68.[33] The question is, however, whether in relation to the issue under discussion that principle can be elevated to the status of an implied constitutional limitation.

29. 'Command', it should be noted, does not entail control. Operational control of the forces is vested in the service officers.
30. J E Richardson "The Executive Power of the Commonwealth" in L Zines (ed) *Commentaries on the Australian Constitution* (Sydney: Butterworths, 1977) 52, 56.
31. N Stephen "The Governor-General as Commander-in-Chief" (1984) 14 MULR 563, 571.
32. Ibid.
33. S 68, it should be noted was adapted from Article II of the US Constitution which recognised the President as Commander in Chief. As pointed out by W Cox "The Army, the Courts, and the Constitution: The Evolution of Military Justice" (1987) 118 Mil L Rev 1, 4 this reflected the concern of the drafters of the US Constitution to ensure the subordination of the military to civil authority. He comments further: "Thus, the separation of the war powers between the executive branch and the legislative branch - with the President as Commander-in-Chief under article II, and with Congress empowered to raise, support and regulate the forces under article I - was not an accidental result. It was a carefully planned scheme, following British experiences of the previous century, to disabuse the potential for military takeover of the government." Similarly, D Zillman "The Young Lecture: A Bicentennial View of Military-Civilian Relations" (1988) 120 Mil L Rev 1, 4 confirms the concerns of the drafters of the US Constitution to assert civilian control in the light of 17th century English experience.

The third provision that may indicate the boundaries of the functions which the Defence Force can constitutionally perform is section 119. As Blackshield has correctly demonstrated, section 119 is concerned with but a single special case in which a constitutional duty is imposed on the Commonwealth to employ its armed forces in suppressing civil disturbance, namely when called upon to do so by the executive government of a State.[34] It does not exhaust the capacity of the Commonwealth government to employ its forces in the protection of Commonwealth interests and associated persons against violence, as was the case in the Bowral incident in 1978,[35] or in a Commonwealth territory.[36]

In the result, it must be conceded that these textual references provide no strong support for the kind of limitation advanced in *Li Chia Hsing*. However, in the light of the approach adopted by some of the Justices in *Tracey*, the proposition contended for in the former case may have greater force.

In the joint judgment of Chief Justice Mason, Justices Wilson and Dawson, historic considerations were taken to be a significant indicator of the limited extent to which the military could claim an identity separate from the civilian community, and consequentially, dispensations and immunities from civil authority. Relying on earlier judicial pronouncements,[37] they emphasised that the crimes of soldiers had always been amenable to the civil law except where special circumstances required otherwise, the corollary being that martial law was confined to the area of military discipline.[38] Whilst the assertion of parliamentary control over the Crown's forces through the enactment of disciplinary legislation had seen "a lessening of resistance to the intrusion of court martials ... into areas which had been the exclusive control of the civil courts",[39] such enlargements of military criminal jurisdiction nevertheless had still been confined to what Parliament

34. Supra n 9, 6-8.
35. Note "Legal and constitutional problems of protective security arrangements in Australia" (1978) 52 ALJ 296.
36. In a territory, the Commonwealth can rely on its executive power under s 122 and s 61 of the Constitution: *Johnson and Others v Kent and Others* (1975) 132 CLR 164.
37. *Groves v The Commonwealth* (1982) 150 CLR 113; *Burdett v Abbott* (1812) 128 ER 384.
38. Supra n 1, 538.
39. Ibid, 542.

might determine, in its discretion, was *necessary* for the discipline of the defence forces themselves.[40] Their Honours emphasised any such qualification to the jurisdiction of the civil courts did not affect the responsibilities of soldiers as ordinary citizens nor alter the ultimate supremacy of the civil courts.[41]

While these remarks were directed to the matter of criminal jurisdiction over defence personnel, they reflect a concern that members of the armed services should not, at least in times of peace, occupy a position of special exemption or immunity from normal legal process. Except where necessity required, they were to be treated in all respects as if they were civilians.

By way of contrast, it is relevant to note that the common law did not concede to the military a privileged position similar to that enjoyed by "constables of the peace". Indeed, there is good reason to distinguish between police officers and military personnel in this constitutional context. Historically, the police were not subject to the control of government,[42] whereas the whole tenor of the constitutional struggles in the United Kingdom from the seventeenth to the nineteenth centuries was to ensure the military were subject to the civil authority. The centrality of this objective provides a platform for developing an extended argument that regard to this historic confinement of the military, outside war, to no greater participation in law enforcement than that of the ordinary citizen, should provide a guide to the extent to which the Commonwealth may make laws under section 51 authorising Defence Force engagement in ordinary law enforcement.

Justices Brennan and Toohey in their judgment also rely on elements of the historic struggle for civil control over the armed forces. Referring to the successive assertions of authority through the Petition of Right, the Declaration of Rights, the Bill of Rights 1689, the Mutiny

40. Ibid, 545.
41. Ibid, 546 citing A V Dicey *Introduction to the Study of the Law of the Constitution* 10th edn (London: MacMillan, 1959) 302.
42. P Rowe *Defence: The Legal Implications: Military Law and the Laws of War* (London: Brassey's Defence Publications, 1987) 39, supported by *Attorney General (NSW) v Perpetual Trustee Co Ltd and Others* [1955] AC 457. The responsible Minister administering police affairs may, however, retain a prerogative power to take special measures, such as supply riot equipment, in order to keep the peace: *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1988] 1 All ER 556.

Acts, the United Kingdom Army Act 1881 and the United Kingdom Naval Discipline Act 1866,[43] they commented:

> The significance of the history of naval and military court martial lies in its explanation of the scope and purposes of the jurisdiction they exercised and in the priority which naval and military authorities were required to accord to the jurisdiction of the civil courts. True it is that, by the time of federation, the scope of naval and military law and of the special jurisdiction to enforce that law were governed by statute but the provisions of those Acts, especially the *Army Act*, reflected the resolution of major constitutional controversies.
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> The discipline which naval and military law was intended to secure was no mere obedience by individual sailors and soldiers to lawful commands nor even their conformity with particular canons of naval or military behaviour. The most important aspect of the discipline which that law was intended to secure was the control of armed forces to ensure that their existence as a permanent armed body under hierarchical command should not threaten the peace and civil order of the Realm.[44]

To that end, their Honours concluded, members of the armed forces should primarily be subject to the processes of the ordinary courts so far as it is practically convenient, notwithstanding their liability to discipline within the courts martial system where the control of the forces so required. Linking these observations to the relevant constitutional provisions, they continued:

> It is in this context that s.51(vi) of the Constitution empowers the Parliament "subject to this Constitution" to make laws with respect to:
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> "The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".
>
> The armed forces of the Commonwealth are under the command of the Governor-General as the Queen's representative: Constitution, s.68. Section 119 contemplates the employment of the forces of the Commonwealth not only to protect every State against invasion but also to protect a State against domestic violence.[45]

In the Australian context, they indicated, the power conferred by section 51(vi) to provide for a permanent defence force on its face includes a power to create a military jurisdiction to discipline members of that defence force. They commented further:

> The traditional jurisdiction to discipline military personnel has two aspects. The first is an authority to compel military personnel to conduct themselves in a manner which is conducive to efficiency and morale of the service; the

43. Supra n 1, 555-562.
44. Ibid, 562.
45. Ibid, 563.

> second is an authority to punish military personnel who transgress the ordinary law of the land while acting or purporting to act as military personnel. These two aspects of the traditional jurisdiction are reflected in the two limbs of s.51(vi). If that sub-section supports a law creating a military jurisdiction, the jurisdiction has two aspects: first, to compel members of the armed forces to conduct themselves in a manner which is conducive to the efficiency and morale of the forces charged with the defence of the Commonwealth and of the several States; and secondly, to control persons who, being part of the armed forces and acting or purporting to act in that capacity, transgress the ordinary law of the land or fail to obey the lawful directions of the Executive government as to the activities of the armed forces and the conduct of persons who are part of the armed forces.[46]

Turning to whether the Commonwealth could make any breach of the ordinary criminal law a service offence to be dealt with exclusively within the military discipline system, they pointed out:

> If the latter view were adopted without qualification, service tribunals would be *authorized to trespass* upon the proper jurisdiction of the civil courts over defence members and defence civilians and their civil rights would be impaired. The protection of Magna Charta [sic] and the victory of Parliament over the Royal Forces which resulted in the Bill of Rights would become the unintended casualties of the Australian Constitution.[47] (emphasis added)

Summing up their position, they emphasised the broader constitutional purposes involved, stating:

> There are two sets of constitutional objectives to be reconciled. The first set of objectives, dictated by s.51(vi), consist of the defence of the Commonwealth and of the several States and the control of the armed forces. To achieve these objectives, it is appropriate to repose in service authorities a broad authority, to be exercised according to the exigencies of time, place and circumstance, to impose discipline on defence members and defence civilians. The second set of objectives, dictated both by Ch.III and s.106 of the Constitution and by the constitutional history we have traced, consist of recognition of the pre-ordinate jurisdiction of the civil courts and the protection of civil rights which those courts assure alike to civilians and to defence members and defence civilians who are charged with criminal offences. To achieve these objectives, civil jurisdiction should be exercised when it can conveniently and appropriately be invoked and the jurisdiction of service tribunals should not be invoked, except for the purpose of maintaining or enforcing service discipline. These two sets of constitutional imperatives point to the limits of valid operation of the Discipline Act.[48]

Although these remarks were made with respect to the specific issue of the jurisdictional relationship between civil courts and the courts

46. Ibid, 564.
47. Ibid, 569.
48. Ibid, 569-570.

martial system, the reliance on the historical and traditional constraints upon the intrusion of military operations into the realm of civil law enforcement provides a licence to argue, by analogy, that similar concerns for the capacity of the Defence Force to become a law unto itself and threaten civil order imposes a constitutional constraint on the legislative competence of the Commonwealth to authorise the use of service personnel in roles properly the province of the police.

The recognition of similar concerns also finds expression in the judgment of Justice Deane who commented:

> This traditional confinement of the nature and range of the disciplinary powers of military tribunals has long been rightly recognised as fundamental to our system of government.... It avoids the creation of a military class removed from the reach of the ordinary law and courts of the land.... It protects the civilian from being subjected to military law and deprived of the benefits and safeguards of the administration of justice by independent courts. It limits the extent to which those subject to military authority are deprived of those benefits and safeguards to what is "thought necessary" for the maintenance and enforcement of military discipline and duty.[49]

In their totality, these dicta fall short of an iron-clad constitutional limitation upon the Commonwealth's legislative power to use its armed forces for maintenance of ordinary civil order. Nevertheless, the willingness of several members of the Court in *Tracey* to have regard to extra-textual, historic principles and constitutional objectives gives greater plausibility to the contention advanced in *Li Chia Hsing*. At the least, they suggest the Court is likely to engage in stricter scrutiny of a law that tends to diminish the distinctive "defence" character of the armed forces, and will read narrowly any law that purports to allow those forces to exercise an intrusive presence in civilian affairs that might involve the possible use of coercive force.

49. Ibid, 584.