CASE NOTES

WHITE v DIRECTOR OF MILITARY PROSECUTIONS [2007] HCA 29

COULD SECTION 68 BE A BETTER SOURCE OF CONSTITUTIONAL AUTHORITY FOR MILITARY JUDICIAL POWER THAN SECTION 51(vi)?

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I. INTRODUCTION

In *White v Director of Military Prosecutions*[1] ('*White*') Callinan J stated,

> In *R v Bevan; Ex parte Elias and Gordon* Starke J saw that section [s 68] as an instance of the "special and peculiar" provision contemplated for the management and disciplining of the defence forces and so do I. Another way of putting this is to say that the command and that which goes with it, namely discipline and sanctions of a special kind, for the reasons that I earlier gave, are matters of executive power...The presence of s 68 in the *Constitution* alone provides an answer to the plaintiff's submission that by necessary implication military judicial power may only be exercised by a Ch III court.
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> The presence of s 68 in the Constitution may even, arguably, have further relevance to military justice, with the result that it may not be subject to judicial supervision under Ch III of the Constitution and is administrable only militarily and not by Ch III courts, whether specially constituted or not. ... A point about s 68 is that it vests a power of command which cannot be rejected or diminished, ... there may be a question whether any derogation from the absolute command, including discipline, vested in the Governor-General (in Council) is constitutionally open.[2]

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1 [2007] HCA 29 (Unreported, Gleeson CJ, Gummow, Hayne, Crennan, Kirby, Callinan and Heydon JJ, 19 June 2007).

2 Ibid [paras 240-242].

Callinan J's view expressed in *White* raises some intriguing possibilities. It might provide a more satisfactory explanation for the exception of military justice from the requirements of Chapter III of the *Constitution*. This would be because it is an exception that requires less contortion to the text of the *Constitution* than the current reliance on s 51(vi). This raises two further questions though. The first is whether command inherently includes discipline. There is some authority for this, including in *White* itself. The second question is, assuming that command does include discipline, whether it follows that s 68 'vests a power of command which cannot be rejected or diminished'. That is to say, can military disciplinary jurisdiction be exercised by a Chapter III court or only militarily? Further, could it be the case that 'it may not be subject judicial supervision under Ch III of the *Constitution*' mean there is not even room for judicial review by the High Court? This paper will attempt to address each of these questions in turn.

II. THE MAJORITY REASONING IN *WHITE*

The joint judgment of Gummow, Hayne and Crennan JJ[3] and the separate judgment of Gleeson CJ[4] in *White* relied upon s 51(vi) of the *Constitution* as the source of authority for military judicial power. This section provides for

> 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 majority in *White* found that the exercise of military judicial power is a requirement of the 'control of the forces', and is an exception to the exercise of the judicial power of the Commonwealth under Chapter III.[5] Section 51 though expressly states that it is 'subject to this constitution'. On a plain reading of the words, the power to legislate for defence in s 51(vi) is therefore subject to the requirements of Chapter III of the *Constitution*. Chapter III provides for an independent judiciary in a way that constitutionally entrenches the independence of the judiciary established legislatively in the *Act of Settlement* 1701 (Imp.). Within Chapter III, s 71 vests the judicial power of the Commonwealth in the High Court and such other courts as it vests with federal jurisdiction. Importantly, s 72 provides for judicial tenure and remuneration in a way that minimises executive interference. At least since *R v Kirby; Ex parte Boilermaker's Society of Australia*[6] in 1956, the High

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3 Ibid [paras 27 - 77].

4 Ibid [paras 1 to 26]. The separate judgment of Heydon J is consistent with that of the majority also.

5 Ibid [paras 5 & 14] (Gleeson CJ) & [para 60] (Gummow, Hayne & Crennan JJ).

6 (1956) 94 CLR 254.

Court has treated the judicial power of the Commonwealth as exclusive and independent. It is normally not valid to vest judicial power in a body other than a Chapter III court and it is not possible to mix judicial functions with legislative or executive functions. This is a means of ensuring the independence of the judiciary and due process.[7] The military discipline system under the *Defence Force Discipline Act 1982* meets few, if any, of the requirements under Chapter III.

The majority judgments in *White* explain the source of authority for military judicial power being in s 51(vi), and an exception to Chapter III, by reference to legal history.[8] They rely on a number of previous High Court authorities.[9] The essence of this position is that the defence power is a special and distinct power among the other 38 legislative powers provided for in s 51.[10] The system of offences, trials, punishments and appeals provided by the *Defence Force Discipline Act 1982* derives from a longstanding system of statutory control over military discipline dating back to 1688.[11] There seems to be little current disagreement that this system is an exercise of judicial power, albeit military judicial power.[12] The military judicial system was never part of the civilian court system, even though it could be subject to its supervision.[13] This system was in place during the development of the *Constitution* and the Founding Fathers did not contemplate that it would be subject to the requirements of Chapter III.[14] This legal historical analysis is compelling but nevertheless sits at odds with the plain words of sections 51 and 71 of the *Constitution*.

The legal historical basis for the exception of military judicial power from Chapter III also sits at odds with the plain words of s 80, which provides

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury...

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7 See *White v Director of Military Prosecutions* [2007] HCA 29 [para 127-143] (Kirby J).

8 [2007] HCA 29 [para 14] (Gleeson CJ) & [para 58] (Gummow, Hayne & Crennan JJ).

9 Most notably *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 and *R v Cox; Ex parte Smith* (1945) 71 CLR 1 among others.

10 See *White v Director of Military Prosecutions* [2007] HCA 29 [paras 9 & 21] (Gleeson CJ).

11 See ibid [para 37] (Gummow, Hayne & Crennan JJ).

12 Ibid [para 14] (Gleeson CJ) [paras 49 – 59] (Gummow, Hayne & Crennan JJ) & [para 121] (Kirby J).

13 Ibid [para 39] (Gummow, Hayne & Crennan JJ).

14 Ibid [paras 7 & 8] (Gleeson CJ) [paras 57-58] (Gummow, Hayne & Crennan JJ).

15 *Defence Legislation Amendment Act 2006* s 2.

16 *Defence Force Discipline Act 1982* ss 122-124.

Until the establishment of the Australian Military Court on 1st October 2007[15], there was no provision for military trial by jury. Even now under the new statutory provisions, a military jury does not conform to the requirements of a civilian jury[16] and therefore probably does not meet the requirement of s 80. Kirby J addresses this issue in *White*[17] but the majority judgments do not, nor does that of Callinan J.

III. SECTION 68 AS A MORE SATISFACTORY GROUND OF EXCEPTION FROM CHAPTER III THAN s 51(vi)?

There has been considerable debate in the cases[18] and academic literature[19] as to whether having an exception to Chapter III based on s 51(vi) and legal history rather than the text of the *Constitution* itself is satisfactory, except in the case of uniquely military disciplinary offences.[20] Indeed, it is a question as to whether it is even sustainable, notwithstanding that the High Court decided *White* very recently, given the resistance to implications in the *Constitution* in other recent High Court jurisprudence.[21] Kirby J dissents strongly in *White* on these points, drawing on the dissent in the earlier military discipline cases as well as the academic debate.

The strength of the majority judgments other than that of Callinan J is that they clearly stay within the authority of the decided cases. Indeed, McHugh J was not satisfied with the s 51(vi) analysis in *Re Nolan; Ex parte Young*[22], yet in *Re Tyler; Ex parte Foley*[23] yielded to the weight of authority. No previous

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17 [2007] HCA 29 [paras 166-170].

18 See Kirby J's discussion of *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 in *White v Director of Military Prosecutions* [2007] HCA 29 [paras 160-165].

19 See Matthew Groves, "The Civilianisation of Australian Military Law" (2005) 28(2) *University of New South Wales Law Journal* 364; Andrew Mitchell & Tania Voon, "Justice at the Sharp End – Improving Australia's Military Justice System" (2005) 28(2) *University of New South Wales Law Journal* 396 and Richard Tracey, "The Constitution and Military Justice" (2005) 28(2) *University of New South Wales Law Journal* 426, Justice Margaret White, "The Constitution and Military Justice: *Re Colonel Aird; Ex parte Alpert*" (Paper presented at the Constitutional Law Conference, Sydney, 24 February 2006) and John Devereux, "Discipline Abroad: *Re Colonel Aird; Ex parte Alpert*" (2004) 23(2) *University of Queensland Law Journal* 485.

20 See Kirby J's discussion of *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 in *White v Director of Military Prosecutions* [2007] HCA 29 [paras 160-165].

21 See *White v Director of Military Prosecutions* [2007] HCA 29 [para 186] (Kirby J).

22 (1991) 172 CLR 460, 499.

23 (1994) 181 CLR 18, 38-39.

case has seen s 68 as possibly providing authority for military judicial power. Sir Ninian Stephen, writing extra-curially as Governor-General, did not see s 68 as anything more than a symbolic provision.[24] Although Gleeson CJ and Kirby J touch on s 68 in their judgments neither saw the section as having the significance that Callinan J did.[25] Notwithstanding this, from a plain textual point of view, s 68 may be less problematic than reliance on s 51(vi).

Finding a basis for military judicial power in s 68 as an exception to Chapter III could be more arguable than a position based on s 51(vi) because s 68 is not 'subject to this constitution' as s 51 is. Rather, s 68 needs to be read beside, not subject to, the requirements of Chapter III. The legal historical arguments in favour of military judicial power being outside the requirements of Chapter III, whilst backed by considerable authority, would be less at odds with the text of the *Constitution* itself were the source of the power s 68 instead of s 51(vi). This would not eliminate concerns about military judicial independence, due process and trial by jury, but it may lessen the textual contortions that possibly threaten the integrity of Chapter III.

White expressly did not reopen the service nexus/ service status issue[26] that has arisen in military discipline cases from *Re Tracey; Ex parte Ryan* in 1989 to *Re Aird; Ex parte Alpert* ('*Re Aird*') in 2004.[27] Even so, another possibility that arises if military judicial power derives authority from s 68 is that the service nexus test may be less significant. Although deriving from the minority judgment of Brennan and Toohey JJ in *Re Tracey*, as of *Re Aird* the service nexus test seems well established.[28] This is that proceedings under the *Defence Force Discipline Act* will only be constitutional where such 'proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.'[29] The reasoning behind this test is that it limits the exception for military discipline from Chapter III to matters of military discipline.[30] The alternative possibility is that applying in the United States, the service status test, which is that military disciplinary jurisdiction applies to members of the armed forces solely by virtue of their status as members of the military.[31] It is conceivable that there may be less concern with limiting a

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24 Sir Ninian Stephen 'The Governor-General as Commander in Chief' (1983) 14 *Melbourne University Law Review* 563.

25 *White v Director of Military Prosecutions* [2007] HCA 29 [para 7] (Gleeson CJ) & [para 188] (Kirby J).

26 See ibid [para 4] (Gleeson CJ).

27 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 & *Re Aird; Ex parte Alpert* (2004) 220 CLR 308.

28 See *White v Director of Military Prosecutions* [2007] HCA 29 [para 160] (Kirby J).

29 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 570.

30 See *White v Director of Military Prosecutions* [2007] HCA 29 [para 160] (Kirby J).

31 See ibid [para 4] (Gleeson CJ).

military disciplinary exception to Chapter III where that jurisdiction derives from s 68, and is not 'subject to this constitution' as under s 51(vi). This might change the underlying rationale for the service nexus test and possibly permit the application at some future stage of a service status test to military disciplinary proceedings.

IV. DOES COMMAND INHERENTLY INCLUDE DISCIPLINE?

Deriving authority for military judicial power from the 'absolute command, including discipline, vested in the Governor-General' by s 68 relies on command inherently including a power with respect to discipline. Callinan J refers to a suggestion of this by Starke J in *R v Bevan; Ex parte Elias and Gordon*.[32] The Chief of the Defence Force exercises the power of command under s 9 of the *Defence Act 1903*. Section 9 has effect subject to s 68 of the *Constitution*, which grants command in chief to the Governor-General as the Queen's representative. This appears to connect the power of command directly to the Crown.

In order to illustrate the venerable quality of this command relationship and its inherent inclusion of discipline, it useful to quote from Charles Clode, writing in 1874,

> Now and for the last 200 years and upwards the substance of the Officer's and Soldier's engagements with the Crown has been the same. The officer's agreement is:- 1. As towards his inferiors, to take charge of the Officers and soldiers serving under him, to exercise and well discipline them in arms, and to keep them in good order and discipline (those under him being commanded to obey him as their superior Officer). 2 As towards the Crown and his superiors, to observe and follow such orders and directions as from time to time he shall receive from the Sovereign or any of his superior Officers, according to the rules and discipline of law. The Soldier's agreement (usually confirmed by his oath) is:- 1. To defend the Sovereign, his Crown and dignity against all enemies; and 2. To observe and obey all orders of his Majesty and of the Generals and officers set over him.[33]

Williams J in *Commonwealth v Quince*[34] would appear to support Clode's view of the relationship between the Crown and the armed forces. His Honour

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32 (1942) 66 CLR 452, 467-468.

33 Charles Clode, *The Administration of Justice Under Military and Martial Law: As Applicable to the Army, Navy, Marines and Auxiliary Forces* (1874) 73.

34 (1944) 68 CLR 227.

stated the following on the power of command and the requirements of military discipline.

> In *Clode, Administration of Justice under Military or Martial Law*, 2nd ed. (1874), at pp. 72-82, ... "The general purview of the Military Code shows that a soldier gives himself up wholly to his superior officer in ... civil relations, loyalty, internal and external behaviour. He wears his clothes, cuts his hair, holds his person, and regulates his step and action at the command of officers appointed by the Sovereign." [35]

In *White*, on the question of whether command includes discipline, Gleeson CJ quoted with apparent approval this contribution of Mr O'Connor's in the *Official Record of the Debates of the Australasian Federal Convention*,

> You must have someone Commander-in-Chief, and, according to all notions of military discipline as we aware of, the Command-in-Chief must have control of questions of discipline, or remit them to properly constituted military courts.[36]

Kirby J also commented that,

> It is of the nature of naval and military (and now air) forces that they must be subject to elaborate requirements of discipline. This is essential both to ensure the effectiveness of such forces and to provide the proper protection for civilians from service personnel who bear, or have access to, arms.[37]

There is then both venerable and recent authority on the connection between command and discipline. Discipline has long been seen as an inherent aspect of command and the exercise of military judicial power is an inherent aspect of discipline. It is quite arguable that military judicial power could have a source of authority in the Governor-General's command in chief as provided in s 68.

V. COULD BEING INHERENT IN S 68 PUT MILITARY DISCIPLINE BEYOND CH III?

The more difficult proposition Callinan J raises is whether military discipline must lie outside Chapter III. There would appear to be considerable weight against this proposition in legal history and the text of the *Constitution* itself. On what basis would military judicial power necessarily be excluded from exercise by Chapter III courts? Callinan J does not explain this but an argument

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[35] Ibid 254.

[36] [2007] HCA 29 [para 7] (Gleeson CJ).

[37] Ibid [para 152] (Kirby J).

in favour of his Honour's view could be that vesting command in chief of the forces in the Governor-General in s 68 clearly places this function in the executive branch. This could possibly give rise to arguments of separation of powers and non-justiciability that would place military disciplinary issues beyond the competence of Chapter III courts. As Callinan J suggests, supervision of military discipline could then only come from parliament.

> It may be that the means of checking any misuse of that command, or threat of oppression by it, lies with Parliament under ss 64 and 65, in particular in its control of the executive and the raising and appropriation of revenue for the maintenance of the military.[38]

There is no obvious authority to support this argument though. Three of the five judgments in *White* specifically state that there is no constitutional reason why parliament could not vest military disciplinary jurisdiction in a Chapter III court.[39] It is difficult to take Callinan J's proposition that Chapter III courts may not be able to exercise military disciplinary jurisdiction further as there is very little to support it and recent authority against it.

VI. IF MILITARY DISCIPLINE MUST BE OUTSIDE CH III THEN IS IT STILL SUBJECT TO JUDICIAL REVIEW?

A further point Callinan J raises is that it may be that military judicial power is not even 'subject to judicial supervision under Ch III'. Callinan J acknowledges the textual difficulties in s 75 giving original jurisdiction to the High Court 'In all matters' relating to the constitutional remedies in s 75(v) available in respect of an 'officer of the Commonwealth'.[40] There is also the difficulty of s 75 (iii), which provides the High Court with original jurisdiction in matters in which the Commonwealth is a party. It also does not necessarily follow that a military judicial power reliant upon s 68 must be excluded from judicial supervision under s 75. As Kirby J stated with respect to a comparable power in the President of the United States,

> And if such a view were now belatedly accepted in Australia, the powers would, in any case, be subject to Ch III of the Constitution because Ch II, like Ch I, is subject to the separated judicial power in Ch III.[41]

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38 *White v Director of Military Prosecutions* [2007] HCA 29 [para 243] (Callinan J).

39 Ibid [para 11] (Gleeson CJ), [paras 39 & 40] (Gummow, Hayne & Crennan JJ) & [para 134] (Kirby J).

40 Ibid [para 242] (Callinan J).

41 Ibid [para 188] (Kirby J).

Even if military judicial power was administrable only by the military, judicial supervision under s 75 would not necessarily be the exercise of military judicial power. Judicial supervision under s 75 on its face is a procedural check on executive power, whatever the substance of that exercise of power is - including military judicial power. Callinan J's suggestion would appear to merge a substantive and a procedural power unnecessarily.

The comments in the paragraphs on this point are clearly *obiter dicta* and expressed to be not even 'tentative'[42]. Still, even a suggestion such as this is surprising given the expansion of judicial review in recent decades and the apparent general willingness of the High Court in that time to assert jurisdiction rather than decline it.[43] Even though it has shown considerable deference to military authority, the High Court has decided a number of cases on military matters,[44] and military discipline matters in particular. Solely parliamentary oversight of military judicial power would certainly make military judicial power more anomalous in the legal system than it already is. His Honour's suggestion is also contrary to the trend of greater accountability of the executive to the courts, and the military to civilian institutions in particular.[45] It appears unlikely that a High Court would decide that military discipline was a matter over which it was unable to exercise judicial supervision.

VII. CONCLUSION

White stands as authority for military judicial power being an exception to the requirements of Chapter III of the *Constitution*. Military judicial power instead derives from the defence power in s 51(vi), as informed by the history of military discipline law. There has been considerable dissenting judicial opinion against military judicial power being an exception to Chapter III, based on a concern for the erosion of the judicial independence and due process provisions found in Chapter III. The intriguing prospect that Callinan J raises is that there may be a textual source of constitutional authority for the exercise of military judicial power in s 68. This could be a more satisfactory basis than s 51(vi) because s 68 is not expressly 'subject to this constitution' as s 51(vi) is. It is less at odds with text and the integrity of Chapter III. It also may permit reconsideration of the debate over the service nexus/ service status test.

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42 Ibid [para 243] (Callinan J).

43 *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566, 599. See *White v Director of Military Prosecutions* [2007] HCA 29 [para 186] (Kirby J).

44 See Mitchell Jones, 'Judicial Review of Administrative Action against Members of the Australian Defence Force: Can a Warrior Win in Court?' (2005) 13 *Australian Journal of Administrative Law* 8.

45 See Commonwealth Parliament, Senate Foreign Affairs, Defence and Trade Legislation Committee *Report on Australia's Military Justice System* June 2005 and Groves, above n 19.

Relying on s 68 as a source of authority for the exercise of military judicial power relies on the Governor-General's command in chief of the armed forces of the Commonwealth necessarily including a power with respect to discipline. A connection between command and discipline is clearly drawn in *White* by Gleeson CJ and Kirby J. The judgment of Williams J in *Quince* also supports it. Whilst no other High Court judgment has drawn the connection between s 68 and military discipline that Callinan J has, it is quite arguable and not really a significant step to make.

It is harder to sustain Callinan J's suggestion that taking s 68 as the source of authority for military judicial power puts it beyond the reach of Chapter III. There is no authority in the text of the *Constitution* or the case law that would support Callinan J's position on this point. The cases have consistently made clear that military judicial power could be made subject to Chapter III if parliament so enacted. Similarly, it would strain the text of the *Constitution*, and be quite contrary to the trend of cases on judicial review, to argue that a military judicial power based upon s 68 would be beyond the reach of judicial supervision by Chapter III courts.

Not everything Callinan J put in *White* with respect to s 68 and military judicial power may be sustainable. Nonetheless, his Honour's view that s 68 could be a constitutional source of military judicial power is arguable, and raises a new possibility for reconciling the history of military discipline law with the text of the *Constitution*.