DISCIPLINE ABROAD: *RE COLONEL AIRD; EX PARTE ALPERT*

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> The meaning of the [defence] power is, of course, fixed but, as according to that meaning, the fulfillment of the object of the power must depend on the ever changing course of events. The practical application of the power will vary accordingly.[1]

It has been 20 years since the *Defence Force Discipline Act 1982* (Cth) ('the Act') was proclaimed. The Act, which unified tri-service discipline law under one streamlined series of procedures, has served the Australian Defence Force (ADF) well. There has been remarkably little by way of appellate court review of proceedings.

Given the paucity of appellate review in this area, the High Court's recent decision in *Re Colonel Aird; Ex parte Alpert* ('*Aird*')[2] is of considerable interest. The Court's decision clarifies the jurisdictional breadth of the application of the Act, when what is sought is the prosecution in Australia of a crime allegedly committed in another country. Importantly, the crime allegedly committed in *Aird* was not committed by a serviceman while on duty — but a serviceman on leave. In addressing the issue of whether a serviceman on leave is subject to the jurisdiction of the Act the High Court has left open the possibility of further argument as to the exact scope of the service discipline nexus.

I THE FACTS

The Colonel Aird referred to in the judgment, it is important to note, is not the accused — but rather the President of the Court Martial conevened to hear and determine the charges against the accused. The accused was a soldier in the Australian Regular Army. In August 2001, along with his company, he was deployed to the Royal Malaysian Air Force base at Butterworth in Malaysia. On 22 September 2001, he was granted leave. Leave from Butterworth was governed by the Land Command Staff Instruction. That Instruction required that, in the absence of express prior approval of the Officer Commanding his Company, the accused had to take leave in Malaysia, Thailand or Singapore.

The accused elected to take his leave in Phuket, Thailand. He was driven to the Thai border by a Royal Australian Air Force bus. From the border, he and some

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[1] *Australian Communist Party v the Commonwealth* (1951) 83 CLR 1, 85 (Dixon J).
[2] (2004) 209 ALR 311.

other soldiers engaged private transport to take them to Phuket. The accused entered Thailand from Malaysia on his civilian passport. He did not present his military identification. There is no Status of Forces Agreement between Australia and Thailand which reserves Australian jurisdiction over visiting members of the Australian Defence Force. The accused's visit was recreational. He paid for his own accommodation and meals. At no time while he was in Thailand did he wear a uniform.

On 28 September 2001 the accused met a woman at Patong Beach, Phuket. The woman alleged that he raped her in the early hours of 29 September 2001.

The accused was subsequently charged with contravening s 61 of the Act. That section incorporates into the Act, by reference, all provisions of the law of the Jervis Bay Territory, in particular, the *Crimes Act 1900* (ACT). Section 54 of the latter Act makes it an offence for a person to engage 'in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse'. The clear intent of s 61 of the Act is to allow the ADF to 'take with it' Australian criminal law wherever in the world it travels.

The accused argued that s 61 of the Act should not apply to him. At the time of the alleged offence, he was not in uniform nor was he on duty. In these circumstances, he argued, the ordinary criminal law applying to civilians should apply to him — not the Act.

The matter came before the High Court, not as an appeal against a decision of a General Court Martial, but as an application before a single Judge of the High Court for Writs of Prohibition and Certiorari against the Court Martial and the Judge Advocate General appointed to assist that Court Martial. A single Judge of the High Court stated a case to the Full Court as to the constitutional validity of s 61 of the Act.

II THE HIGH COURT'S DECISION

By majority (Gleeson CJ, McHugh, Hayne and Gummow JJ; Kirby, Callinan and Heydon JJ dissenting), the High Court determined that the application of s 61 to the prosecutor's circumstances was a valid exercise of the defence power of the Commonwealth.

The majority took the view that punishing a defence member for a sexual offence, committed while the service member was on leave, was a legitimate exercise of the defence power. This was because the section had the purpose of maintaining or enforcing service discipline.

The majority also confirmed that the exercise of jurisdiction by a court martial was not the exercise of the Commonwealth's judicial power and was not, therefore, subject to the strictures of Chapter III of the *Constitution*.

III COMMENTARY

In three earlier cases the High Court had decided that, although a court martial tribunal exercises judicial power, it does not exercise the judicial power of the Commonwealth.[3] This was because the power to make laws with respect to the defence of the Commonwealth under s 51(vi) of the *Constitution* contained the power to enact a military discipline law that stood outside Chapter III of the Constitution.

There was a clear divergence of views as to whether, as a precondition to exercising the defence power, there had to be 'a service connection' with the offence charged or merely that an individual charged had a 'service status'. The former required that, in order for the Act's jurisdiction to arise in respect of an individual service member, the nature of the transgression with which the service member was charged must be such that prosecution and conviction would ensure enforcement or maintenance of military discipline. The latter posits that, membership simpliciter of an arm of the ADF makes one liable to punishment under a Military Code.

The service status view is the test which is currently in favour in the United States.[4] The 'service connection' view no longer applies. The 'service connection' view reached its zenith in the United States in *Relford v US Disciplinary Commandant* ('*Relford*'),[5] where the Supreme Court referred to twelve factors which the Court considered *O'Callahan v Parker*[6] had emphasised in requiring a service connection. They were:

1. The serviceman's proper absence from the base.

2. The crime's commission away from the base.

3. Its commission at a place not under military control.

4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

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[3] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.
[4] See, eg, *Re Solario v United States* 483 US 435 (1987).
[5] *Relford v US Disciplinary Commandant* 401 US 355 (1971).
[6] *O'Callahan v Parker* 395 US 258 (1969).

6. The absence of any connection between the defendant's military duties and the crime.

7. The victim not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian court in which the case can be prosecuted.

9. The absence of any flouting of military authority.

10. The absence of any threat to a military post.

11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense being among those traditionally prosecuted in civilian courts.

The Australian High Court's approach to the service connection test has in the past been a little different to that of the US Supreme Court. Justices Brennan and Toohey in *Re Nolan* stated the following:

> Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions. *Here, the charges are obviously 'service connected' but that is not the ultimate criterion though it is an important element in determining whether proceedings on those charges could reasonably be regarded as serving the purpose of maintaining and enforcing service discipline.*[7]

IV PRIOR HIGH COURT DECISIONS

The prior High Court decisions are ably summarised by McHugh J in his judgment in *Aird*.[8] In *Re Tracey; Ex parte Ryan*,[9] a majority of the High Court held that a Defence Force magistrate, not appointed in accordance with Chapter III of the *Constitution*, had jurisdiction to hear charges of making an entry in a service document with intent to deceive and being absent without leave. Mason CJ, along with Wilson and Dawson JJ, held that 'it is not possible to draw a clear and satisfactory line between offences committed by defence

[7] (1991) 172 CLR 460, 489 (emphasis added).
[8] *Aird* (2004) 209 ALR 311, 318–320.
[9] (1989) 166 CLR 518.

members which are of a military character and those which are not'.[10] Their Honours plumped for a "service status" approach by stating:

> It is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. As already explained, the proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces. The power to proscribe such conduct on the part of defence members is but an instance of Parliament's power to regulate the defence forces and the conduct of the members of those forces. In exercising that power it is for Parliament to decide what it considers necessary and appropriate for the maintenance of good order and discipline in those forces.[11]

Brennan and Toohey JJ took a narrower view of the power of Parliament to invest service tribunals with jurisdiction to hear offences. Brennan and Toohey JJ said that two constitutional objectives had to be reconciled.[12] The first was dictated by s 51(vi) which empowered the Parliament to give service authorities a broad authority to impose discipline on defence members and defence civilians. The second was dictated by Chapter III and s 106 of the *Constitution*. The latter recognised the pre-eminent jurisdiction of the civil courts and the protection of civil rights which those courts afforded civilians and defence members charged with criminal offences. Their Honours said:

> 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 ... proceedings may be brought against a defence member or a defence civilian for a service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.[13]

Brennan and Toohey JJ said that the power conferred on service tribunals was 'sui generis which is supported solely by s 51(vi) for the purpose of maintaining or enforcing service discipline'.[14]

The differences in approach in *Re Tracey* appeared again in *Re Nolan; Ex parte Young*.[15] In *Re Nolan*, a majority of the Court held that a Defence Force magistrate, not appointed in accordance with Chapter III of the *Constitution*, had jurisdiction to hear charges concerning falsifying a service document. Mason CJ and Dawson J adopted the same approach to the scope of legislative power as

[10] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 544.
[11] Ibid 545.
[12] Ibid 569–570.
[13] Ibid 570.
[14] Ibid 574.
[15] (1991) 172 CLR 460.

they had *Re Tracey*.[16] Brennan and Toohey JJ also re-iterated the views that they had expressed in *Re Tracey*.[17]

In *Re Tyler; Ex parte Foley*,[18] a majority of the High Court held that a general court martial had jurisdiction to hear a charge against a Defence member that he had dishonestly appropriated property of the Commonwealth. No clear majority in *Re Tyler* emerged in favour of either the service connection or the service status approach.

All three prior High Court cases focused on prosecutions of members of the ADF, while those members were on duty and were purporting to act in the exercise of their duties. The accused in *Aird* was in an entirely different situation. He was a member of the ADF, on leave, not purporting to act in the exercise of his duties.

V THE APPROACH IN *AIRD*

In *Aird*, there seems finally to be a settled majority in favour of a service connection approach. The approach found favour with Gleeson CJ and McHugh, Callinan and Heydon JJ. Interestingly, though, while the service connection approach was adopted by four Judges, only two of them found that the necessary service connection was satisfied on the facts, the other two finding the necessary service connection was not satisfied. Gleeson CJ was of the view that, since the conduct impugned involved serious violence and disregard for the dignity of the victim, it clearly had the capacity to affect discipline, morale and the capability of the ADF to carry out its assignments.[19]

McHugh J was more specific. His Honour thought that representatives of the ADF were in a different position to 'ordinary Australian tourists' since, 'when overseas, they are likely to be perceived by the government of the foreign country and members of the local population as representatives of the Australian government'.[20] Repeated anti-social behaviour by Defence members on leave could lead to other countries denying access for 'R and R' which 'would have a direct impact on the morale and discipline of the Defence force'.[21] His Honour also was concerned about rape being a crime of violence stating that:

> It is central to a disciplined force that its members are not persons who engage in uncontrolled violence. And it need hardly be said that other members of the Defence force will be reluctant to serve with personnel who are guilty of ...

[16] *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 474.
[17] Ibid 489.
[18] (1994) 181 CLR 18.
[19] *Aird* (2004) 209 ALR 311, 314.
[20] Ibid 322.
[21] Ibid.

> rape or sexual assault. This may be out of fear for personal safety or rejection of such conduct or both.[22]

Finally, his Honour noted that there were factors which connected the accused with his ADF service.[23] He was in Thailand following his deployment. He was not a free agent permitted to take leave wherever he wished and he was liable to immediate recall to his duty at any time.

Callinan and Heydon JJ used the United States Supreme Court's decision in *Relford*,[24] and the factors noted therein, as their 'touchstone' in determining whether or not the necessary nexus to service discipline existed. Running through the "checklist" from *O'Callahan v Parker*[25] suggested to Callinan and Heydon JJ that there was an inadequate service connection in the present case.[26]

Callinan and Heydon JJ suggested the proper focus should be less on service connection, and more on whether the discipline of the ADF would be enhanced by the enforcement of a section of the Act. Telling in this regard is their Honour's assertion that:

> If the test of service connexion is to be applied on the basis that it will be satisfied if the acts alleged constitute an undisciplined application of force, or conduct that would be regarded as abhorrent by other soldiers, then it is difficult to see how any serious crime committed anywhere, including in Australia, under any circumstances would not be susceptible to the military jurisdiction exclusively ... We do not, with respect, therefore subscribe to the view that to ask the question whether the discipline of the military service will be enhanced by a certain measure or course, is to ask the same question as 'Is there a service connexion?' Any measure for the proscription of any form of misconduct has as its end, discipline. If enhancement of discipline is to be effectively the only test, there will be very few offences of any kind, committed anywhere, in any countries, which will escape the all-enveloping net of 'service connexion'.[27]

The upshot is that, although we now have a decided preference for the service connection test over the service status approach, we may have two formulations of the service connection approach. The approach of Callinan and Heydon JJ is quite different from that of Gleeson CJ and McHugh J. The former's view focuses more on the question 'will the discipline of the military service be enhanced by a prosecution?' The approach is much closer to the US Supreme Court's approach in *Relford*.[28]

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[22] Ibid.
[23] Ibid 323.
[24] 401 US 355 (1971).
[25] 395 US 258 (1969).
[26] Ibid 350–351.
[27] Ibid 351–352.
[28] 401 US 355 (1971).

Several other troubling questions remain after *Aird*. In his judgment, Gummow J noted that the issues in *Aird* do not concern the law respecting members of the Reserve.[29] Presumably his Honour did not mean those members of the Reserve undertaking continuous full time service, who should be treated as if they were part of the permanent forces.

What is the service connection test which applies to reservists not undertaking continuous full time service? What if the accused in *Aird* had been a reservist? Defining the scope of the service connection test for reservists may have enormous consequences in defence.

Similarly worrying is the point made by Callinan and Heydon JJ as to what might have happened had the accused in *Aird* been charged by the Thai authorities — and both Australia and Thailand were to assert jurisdiction.[30] What is the approach of the ADF in such circumstances?

The decision in *Aird*, while understandable and supportable, ultimately does little to settle the disquiet in this field. Further clarification is eagerly awaited.

[29] Ibid 323.
[30] Ibid 353–354.