RECONSIDERING SUMMARY DISCIPLINE LAW

BRYAN CAVANAGH[*] AND JOHN DEVEREUX[**]

Commanders use the summary discipline system on a daily basis. The system is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety. It must operate quickly, be as simple as possible and it must be capable of proper, fair and correct application by persons who do not possess legal qualifications.[1]

Military justice should be efficient, speedy and fair.[2]

I INTRODUCTION

The summary discipline system is the primary mechanism for dealing with service offences[3] in the Australian Defence Force (ADF). Despite this, recent law reform efforts have tended to focus on other aspects of the military justice system. This paper argues that the summary discipline system could be updated to more closely align it with the requirements of military discipline. Two proposed changes are put forward as a starting point for reform. Firstly, making summary trials inquisitorial in nature, and secondly reducing the system's reliance on the principles of criminal law for its operation.

Part I of the paper will establish a set of criteria for an effective summary discipline system. Part II goes on to describe the adversarial nature of the current system and explain how the current system relies heavily on principles derived from criminal law. The paper then examines how the current system measures up to the criteria established in part one. Part III is about reforming the system. It identifies the freedom that exists to make fundamental changes to the system, details proposed reforms, and explains how these reforms align with the criteria for an effective summary discipline system.

For the purposes of context, the paper will start by providing a brief outline of the framework of service tribunals established by the *Defence Force Discipline Act 1982* (Cth) (DFDA), and demonstrate empirically why the summary discipline system is integral to the operations of the ADF.

---

* Legal Training Officer, Military Law Centre

** Professor of Law, T.C. Beirne School of Law. The views expressed in this paper are solely those of the authors and do not represent those of the Australian Defence Force or the Government of the Commonwealth of Australia.

1 Explanatory Memorandum Defence Force Legislation Amendment Bill 2008 (Cth) para 3.

2 W.C. Westmoreland *Military Justice – A Commander's Viewpoint* (1971-1972) 10 *American Criminal Law Review* 5, 8.

3 *Defence Force Discipline Act 1982* (Cth) s 3 (definition of 'service offence') provides that service offences are offences against the DFDA or the *Defence Force Discipline Regulations 1985* or an offence that: (i) is an ancillary offence to those offences or is an 'old system' offence. An old system offence as an offence under previous service law that was committed by a member of the Defence Force at any time during the period of 3 years that ended on the day immediately before the proclaimed date. Service offences are different to disciplinary infringements defined in DFDA s 169A which are dealt with under DFDA Part IXA *Special procedures relating to certain minor disciplinary infringements.* This is commonly referred to as the Discipline Officer Scheme. This paper will not focus on the operation of the Discipline Officer Scheme as it is not part of the summary discipline system.

A *The system of service tribunals and why the summary discipline system matters*

Part VII of the DFDA establishes different levels of service tribunals[4] to hear service offences. There are two categories. The first consists of Courts Martial[5] and Defence Force Magistrates (DFM).[6] These superior military tribunals generally deal with serious service offences. A characteristic of these tribunals is the involvement of lawyers.[7] The second consists of Summary Authority Tribunals.[8] Typically, Summary Authority Tribunals sit at the unit level and deal with minor disciplinary offences. There are three classes of Summary Authority; Subordinate Summary Authority[9]; Commanding Officer[10], and Superior Summary Authority.[11] A characteristic of all Summary Authority Tribunals is, by and large, the lack of involvement of lawyers.[12] The operation of Summary Authority Tribunals is often referred to as the summary discipline system, a term adopted by this paper.

The chart below shows the number of trials conducted by these two categories of service tribunals since 2000.[13] Trials by the Australian Military Court (AMC) during its period of operation[14] have been incorporated into the Courts Martial/DFM statistics.[15]

---

4 *Defence Force Discipline Act 1982* (Cth) Part VII – Service Tribunals.

5 Ibid part VII Division 3

6 Ibid part VII Division 4

7 To be eligible to be a Defence Force Magistrate, or a Judge Advocate in the case of a Court Martial, an officer must have been enrolled as a legal practitioner for not less than five years DFDA s 196(3). An accused person is given the opportunity to be represented at a Court Martial or DFM by a legal officer without expense. DFDA ss 137, 138.

8 DFDA Part VII Division 2.

9 DFDA s 108 establishes the jurisdiction of a Subordinate Summary Authority.

10 DFDA s 107 establishes the jurisdiction of a Commanding Officer.

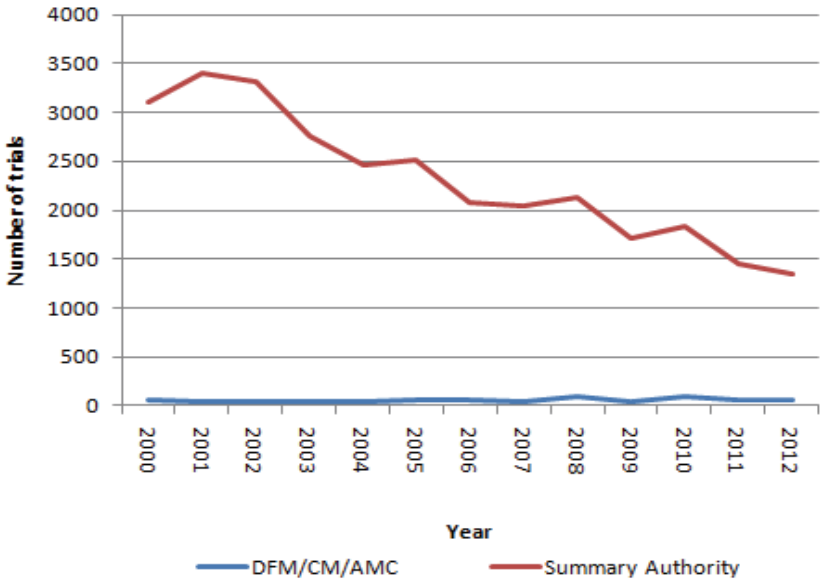
11 DFDA s 106 establishes the jurisdiction of a Superior Summary Authority.

12 There is no requirement for the Summary Authority to be legally qualified. At the lowest level of Summary Authority, the Subordinate Summary Authority there is no ability for the accused to be represented by a legal officer. Before a Commanding Officer or a Superior Summary Authority a legal officer is only able to appear once leave is granted by the Summary Authority*, Summary Authority Rules 2009* (Cth) r 12. Lawyers are involved in the review of all Summary Authority Convictions DFDA s 154.

13 Data sourced from Judge Advocate General Annual Reports 2000-2012 <http://www.defence.gov.au/oscdf/jag/reports/default.htm>, and Australian Military Court Annual reports for 2007, 2008 <http://www.defence.gov.au/header/publications.htm#J>. As with civilian court trials, one trial may deal with more than one charge against an individual. This is often the case with trials conducted by Defence Force Magistrates or Courts Martial.

14 The Australian Military Court (AMC) was created by the *Defence Legislation Amendment Act 2006* (Cth) and replaced the operation of Courts Martial and Defence Force Magistrates during the period of its operation. The AMC commenced sitting on 12 November 2007. On 26 August 2009 the High Court handed down its decision in *Lane v Morrison* (2009) 239 *CLR* 230 which held the AMC to be constitutionally invalid. Following that decision the *Military Justice (Interim Measures) Act (No.1) 2009* (Cth) was enacted to reinstate the system of Courts Martial and DFM.

15 The decrease in the number of Summary trials can be explained in part by the increased use of the Discipline Officer Scheme under Part IXA DFDA.



The statistics reveal that the summary discipline system is the forum at which most ADF members will be heard with when charged with a service offence. ADF commanders, not Defence Force Magistrates, Judge Advocates or members of Courts Martial will make the majority of decisions about the law and facts in military trials. Corporals, sergeants and junior officers will appear far more frequently as prosecuting and defending officers' before a Summary Authority tribunal, than legal officers as advocates before a Superior Military Tribunal.

Much of the focus on law reform and judicial consideration of the operation of the discipline system has focused on the operation of the Superior Military Tribunals. The exception to this was the 2008 amendments to the DFDA[16] which 'simplified' the evidence regime applicable to the summary discipline system by excluding the operation of complex evidence provisions such as those contained in the *Evidence Act 1995* (Cth). It did so because of 'widely held concerns that current summary procedures are overly legalistic and complex'.[17] These amendments were recognition that it was not necessary to apply evidential standards developed for application by civilian courts to tribunals designed to be implemented by non-legally qualified ADF members. Apart from this important change, other reforms to the summary discipline system have been peripheral in nature.[18]

The remainder of this paper will demonstrate why the concerns about the legalistic and complex nature of the summary discipline system that drove the 2008 amendments remain valid, and how, consistent with the thrust of that legislation, Parliament could improve the system.

---

16 *Defence Legislation Amendment Act 2008* (Cth).

17 *Explanatory Memorandum Defence Force Legislation Amendment Bill 2008* (Cth) 7.

18 For example the *Defence Legislation Amendment Act 1995* (Cth) amended s 130 to clarify that a summary authority could refer a matter to a convening authority at any state of a trial. The *Defence Legislation Amendment Act 2008* (Cth) inserted provisions relating to the disqualification of summary authorities if they were involved in the investigation of a service offence. It also introduced a 30 day time limitation between the period of when a member was charged with a service offence and the commencement of summary proceedings.

II PART I

A *Criteria for an effective summary discipline system*

To understand what constitutes an effective summary discipline system it is important to firstly identify appropriate standards against which the system can be measured. The Explanatory Memorandum to the Defence Legislation Amendment Bill 2008 contains three criteria for an effective summary discipline system.[19] Those criteria, along with the additional requirement that the summary discipline system support existing command arrangements, are expanded upon below.

I *The summary discipline system must operate quickly*

Delays in the summary disciplinary system may have an adverse effect on the enforcement and maintenance of discipline, and on the morale of defence members.[20] The requirement to operate quickly applies to both the conduct of the trial, and the time taken to prepare relevant material for trial.

2 *The summary discipline system must be as simple as possible*

Simplicity is important in military operations because it reduces misunderstanding and confusion.[21] The same can be said for a summary discipline system. The requirement that the system must be as simple *as possible* reflects that simplicity should not, and must not, come at the expense of fairness.

Simple systems are suited to application in an operational environment where resources, time, and training opportunities are limited. A simple system can increase transparency in disciplinary processes and decrease concern by command that outcomes will be dictated by the ability of participants to negotiate their way through technicalities, breaches of which could lead to the quashing of an otherwise sound finding.

3 *The summary discipline system must be capable of proper, fair and correct application by persons who do not possess legal qualifications*

The summary discipline system must be able to be used by its target audience. Although screened though the recruiting process and put through a number of training courses throughout their career, there is no general requirement for ADF members to have a tertiary qualification. While general service officers are required to have finished grade 12 with a pass in English and three academic subjects, some general entry positions (non-officers) only require that a person has finished year 10 of high school.[22]

---

19 Above, n 2. Three separate criteria can be drawn from the extract from the Explanatory Memorandum quoted at the beginning of this paper.

20 Above, n 2, 37. This is not an issue unique to military environments. W. E. Gladstone is reputed to have said that 'justice delayed, is justice denied' - *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service* (Library of Congress, 1989). See generally http://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied .

21 The United States Army identifies simplicity as one of the nine principles of war. United States Field Manual 3-0 *Operations* 4-16.

22 Information provided by Defence Force Recruiting. General information about recruiting standards can be found at <http://www.defencejobs.gov.au/> .

Proper, fair and correct application should include the full range of the actions involved in the summary discipline system, including investigation, charging, and the conduct of a guilty plea or a contested hearing. The system should be able to operate without lawyers providing input at every stage.

4 *The summary discipline system should support commanders' roles*

Command is not a passive activity. Commanders are trained to know what is going on in their units or sections. They proactively manage the behaviour of subordinates for the purposes of morale and ensuring that standards are being adhered. This is consistent with ADF doctrine, which states that a characteristic of effective commander and leader is the demonstration of initiative in managing work outcomes.[23] The requirement to remain informed of the conduct of subordinates and to discipline them when they act in an undisciplined or unlawful manner is also at the heart of the law relating to command responsibility for war crimes.[24] An effective summary discipline system should facilitate the proactive exercise of command.

III PART II

At the heart of the summary discipline system is the trial. This part of the paper provides a basic outline of the summary trial process focusing on its adversarial nature and reliance on the criminal law. It then asks how the current system measures up to the criteria established in part I.

A *General outline*

At the commencement of a summary trial an accused pleads guilty or not guilty to each charge.[25] If the accused pleads not guilty, the Summary Authority then hears evidence on the charge. If the Summary Authority, after hearing the evidence of the prosecution, is of the opinion that that evidence is sufficient to support the charge he or she will proceed with the trial.[26] If at the conclusion of the prosecution and defence case the authority finds that the charge is not proved (or finds that the charge is proved, but the defendant has an operable defence), the authority will dismiss the charge. If the authority finds that the charge has been proved, and no defences are operable, the accused will be convicted.[27] In deciding whether or not a charge is proved the Summary Authority may have regard only to matters within his or her general service

---

23 Australian Defence Doctrine 00.6 - Leadership in the Australian Defence Force 3-17.

24 *Rome Statute of the International Criminal Court* article 28 provides that a military commander … 'shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander… either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander… failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

25 DFDA s 131. Prior to a summary trial, a dealing phase establishes whether, or not, the ADF has jurisdiction in the matter, and whether the Summary Authority has jurisdiction in the matter.

26 DFDA s 131 (1)(d).

27 DFDA ss 131(1)(e), 131(f).

knowledge and the evidence produced at trial.[28] Witnesses are generally required to give sworn evidence during trial. Evidence is adduced through the process of examination and cross-examination by prosecuting and defending officers.[29] There is provision, in limited circumstances, for witness statements to be tendered as an exhibit instead of calling the witness to give evidence.[30]

B *The adversarial nature of the current summary discipline system*

The ADF discipline manual states:

> Regardless of the level of service tribunal, trials of service offences are conducted on an adversarial basis, which is the same process used in Australia's civilian criminal justice system. Broadly speaking, the adversarial process relies on the parties, and not the judge, to define the issues, present the evidence and ultimately prove their respective cases.[31]

Like a civilian magistrate, the summary authority does not seek to independently investigate matters. He or she acts as an impartial arbiter considering only facts put before him or her.[32] The adversarial nature of the summary discipline system was entrenched in the DFDA from its inception. Drafters of the DFDA saw the role of a Commanding Officer during summary proceedings as being akin to the role of a civilian magistrate disposing of minor charges and conducting preliminary hearings of charges that are to be brought to trial before a superior court.[33]

A *corollary* of this role is that the Summary Authority must be free from bias. A Summary Authority is prohibited from trying a charge where he or she has been involved in the investigation of the offence, the issuing of a warrant for the arrest of the person, or charging the person with the offence.[34] Although, under s 141(4) DFDA, an accused does not have the right to object to the summary authority on the basis of bias, the DFDA goes on to provide that nothing in s 141 authorises the trial by a summary authority who is, or is likely to be biased, or who is likely to be thought, on reasonable grounds, to be biased.

The prosecuting officer is expected to act like a prosecutor in a civilian criminal trial. The ADF discipline manual describes the duty in the following way:

> Although the prosecuting officer at a summary hearing will usually not be legally qualified, the role is equivalent to the role undertaken by a prosecution lawyer in civilian criminal proceedings. It is also equivalent to the role undertaken by the DMP [Director of Military Prosecutions] in trials before a court martial or DFM. Consequently, the prosecuting officer has a comparable

---

28 Summary Authority Rules 2009 (Cth) r 34.

29 Ibid rr 47-48

30 Ibid r 51

31 Australian Defence Force Publication 06.1.1 Discipline Law Manual Vol 3 Chapter 7 para 7.11.

32 Ibid.

33 Explanatory Memorandum Defence Force Discipline Bill 1982 (Cth) para 2.

34 DFDA s 108A. The Explanatory Memorandum to the Defence Force Discipline Amendment Bill 2008 stated the purpose of this requirement was to 'avoid any conflict of interest situations, it will also reinforce current practices, legal policy requirements and improve impartiality and transparency, by removing doubts for commanders and reducing perceptions about the possible bias of a commander.

> duty to that of a prosecution lawyer and is required to exercise independence of thought, integrity, and judgement in presenting the prosecution case.[35]

Similarly the defending officer is expected to act like defence counsel:

> [A defending officer] acquires a duty to guard the accused person's interests by all honourable and legitimate means known to the law. Although not ordinarily legally qualified, the defending officer's duty to the accused person is comparable with the duty owed by a defence counsel to his or her client.[36]

C *Reliance on the Criminal Law*

Chapter 2 of the *Criminal Code Act 1995* (Cth) (Criminal Code) applies to service offences.[37] Chapter 2 codifies the general principles of criminal responsibility under laws of the Commonwealth. Accordingly, each service offence consists of physical and fault elements.[38] There are three types of physical elements[39] and four types of fault elements.[40] For some service offences the fault element will be specified, for others the prosecuting officer will be required to prove the default fault element.[41] The prosecuting officer must prove beyond a reasonable doubt every element of the service offence and disprove beyond a reasonable doubt any matter in relation to which the accused has discharged an evidential burden of proof imposed on the accused.[42] An accused who wishes to deny criminal responsibility by relying on a *Criminal Code* defence bears an evidential burden in relation to that matter.[43] All of the law in the Criminal Code relating to circumstances in which there is no criminal responsibility (for example intoxication, mistake or ignorance of fact) and extensions of criminal liability (for example attempt, incitement, conspiracy) applies to service offences.

The language throughout the DFDA draws heavily from the language of the criminal law. The harmonisation of the DFDA with the Criminal Code of the Commonwealth saw purely disciplinary concepts that had previously been applied as the basis of service offences such as 'neglect of duty' transformed into concepts of 'criminal negligence'.[44] Basic terms such as 'charge', 'plea', 'guilty', 'not guilty', 'conviction' and 'sentencing' are borrowed from the criminal law. Criminal law concepts such as the privilege against self incrimination[45] have also been incorporated

---

35 Above note 29 para 7.283.

36 Ibid 7.315.

37 DFDA s 10. Noting that it does not apply to 'old system offences' which are defined as an offence under previous service law that was committed by a member of the Defence Force at any time during the period of 3 years that ended on the day immediately before the proclaimed date.

38 *Criminal Code Act 1995* (Cth) s 3.1 There are a limited number of offences in the DFDA which have elements which are strict or absolute liability elements. This means that in respect of those elements, no fault element need be proved. See for example s. s.23 Absence from Duty, s 24 Absence Without Leave, s 26 Insubordinate Conduct, s 29 Failing to Comply with a General Order.

39 Ibid s 4.1

40 Ibid s 5.1

41 Ibid s 5.6 provides that law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

42 Ibid.

43 Ibid 13.3. Evidential burden is defined as the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

44 Above note 31 at 91.

45 DFDA s 146(3).

into the summary discipline system.

The complexity of concepts of criminal responsibility "borrowed" from Chapter 2 of the Criminal Code should not be under estimated.[46] A criminal offence at common law, or under the Griffith Codes in operation in various states in Australia, would typically require the prosecution to prove two, or perhaps three intents before a conviction can be obtained. Criminal responsibility under the Criminal Code involving as it does the proof of an intent ("a fault element") for every physical element of an offence, can mean that the prosecutor in a summary discipline matter having to prove a bewildering number of intents. This matter will be further explored in part III of the paper, below.

D *Part III Application of criteria*

The following section examines how the current summary proceedings measures up against the criteria established in part I.

1 *The summary discipline system must operate quickly*

In the case of a guilty plea for a simple disciplinary offence in front of an experienced Summary Authority, with experienced prosecuting and defending officers, the current system *can* operate quickly. It is possible that an ADF member who is absent without leave, can be charged on the same day as the offence and for the charge to be heard the following day. However delays arise where there is a change to any of the above variables.

Inexperienced summary authorities, prosecuting and defending officers need significant amounts of training to properly understand their obligations and roles during the process. While there may be a number of ADF members who have experience in dealing with guilty pleas, there is not a ready pool of members with experience in conducting contested trials. This training burden creates delays.

Proper preparation for a trial involving multiple witnesses where facts are disputed will take considerable time. For a novice prosecuting or defending officer the obligations with respect to witness preparation are unlikely to be completed within days of the alleged offence. Developing an understanding of the nature of witness examination and cross examination, which according to the ADF discipline law manual, includes having basic understanding of the rule in *Browne v Dunn*[47] is a time consuming exercise.

As the summary authority does not control the presentation of the prosecution or defence case there are no mechanisms to ensure that trials are conducted in a timely and succinct fashion.

2 *The summary discipline system must be as simple as possible*

Although the DFDA states that a Summary Authority must act with as little legal formality or legal technicality as possible, while ensuring fairness[48], the adversarial nature and application of criminal law makes it challenging to comply in practice.

Some of the complexities of the system have been highlighted in the previous section. Chapter 2 of the Criminal Code is not simple. It can not be made so without

---

46 The difficulties have recently been highlighted in the High Court's decision in *Li v Chief of Army* [2013] HCA 49.

47 (1893) 6 R 67. Discipline Law Manual Volume 3, para 9.305.

48 DFDA s 147(2)(iii).

being oversimplified. Having a proper understanding of the roles of the summary authority, prosecutor and defending officer in an adversarial system is not simple.

3 *The summary discipline system must be capable of proper, fair and correct application by persons who do not possess legal qualifications*

In his text *Principle of Federal Criminal Law* Stephen Odgers S.C. notes that for the most part, the meaning of the provisions of the Chapter 2 of the Criminal Code are relatively clear, at least '*for someone with legal training'*.[49]The number of fault elements (intents) which need to be proved to make out a charge has already been the subject of comment. The complexities of Chapter 2 of the Criminal Code are compounded when faced with ambiguities in its language. In these circumstances it is proper to turn to relevant case law.[50] Clearly case law research or statutory interpretation is beyond the scope of what should be expected of a person without legal qualifications.

A proper understanding of the nature of adversarial trials is developed in lawyers through years of education. It is not a form of adjudication that lends itself to a natural understanding by lay persons. An understanding of what it means that for a prosecutor to 'not obtain a conviction at all costs'[51] or 'exercise independence of through, integrity, and judgement in the presentation of the prosecution case'[52] requires a good understanding of the ethics that underpin the legal profession. The same can be said for the role of the summary authority and defending officer.

4 *The summary discipline system should support commander's roles*

As noted by Justice Peter Heerey, writing as the President of the Australian Defence Force Discipline Appeal Tribunal '[a]part from the specific functions conferred on commanding officers, the doctrine "those who command shall punish" does not find a place in the Australian system'.[53] The current system asks commanders to act outside of their 'normal' role in two critical aspects.

Firstly, an ADF commander must distance him or herself from knowing the detail about allegations of breaches of discipline for fear of falling foul of the rule against bias. On one hand a commanding officer has an inherent interest in the maintenance of discipline within his or her unit while on the other he or she is required to remain, and be seen to remain, able to act as an independent arbiter when it comes to alleged disciplinary breaches. The inherent tension that exists in this arrangement is reflected in the amendments that were made to the DFDA in 2005 which inserted the following sub-sections into s 141:

> (4A) For the purposes of this section, a summary authority is not to be regarded: (a) as biased; or (b) as likely to be biased; in relation to the trial of an accused person merely because the summary authority is the commanding officer of the accused person.
>
> (4B) For the purposes of this section, the circumstance that a summary authority is the commanding officer of an accused person is not, without more,

---

49 S. Odgers *Principles of Federal Criminal Law (*Thomson Reuters, 2nd ed, 2010) 3.
50 Per Gummow, Hayne, Crennan, Keifel and Bell JJ in *R v LK; R v RK* [2010] HCA 17.
51 Above, n 29 Vol 3 para 7.282.
52 Ibid 7.283.
53 P. Heerey *The Role of the Commander in Military Criminal Procedure,* Presentation to the 6th Budapest International Military Law Conference on 14-17 June 2003 <http://www.defenceappeals.gov.au/papersheerey.html>.

> a reasonable ground for thinking that, in relation to the trial of the accused person, the summary authority is biased.

The Explanatory Memorandum to the amendment recognised that it would not be workable for the rule against bias to operate simply because the summary authority is the Commanding Officer of the accused. It noted that 'it is important for discipline to be seen to be administered in the accused member's unit'. The 'normal command relationship' between the summary authority and the accused will not, of itself, be sufficient to constitute disqualification on the ground of bias.[54] Despite this amendment the 'normal command relationship' between the summary authority and the accused remains a difficult one.

Secondly the commander is required to adopt a passive role during the trial itself, allowing the issues to be defined, and evidence led, by the prosecuting and defending officer. This is inconsistent with the pro-active role that a commander normally exercises in commanding and leading his or her unit or section. Arguably it is the commander who is best placed to make an assessment as to what is the most relevant evidence for the purposes of deciding whether there has been a breach of discipline. It is the commander who is best placed to determine what mitigating facts are relevant in the particular circumstances.

IV PART III

A *The ability to change*

It is open to Parliament to fundamentally change the summary discipline system provided that it continues to operate for the purpose of applying service discipline and complies with the requirements of procedural fairness.

The criminal responsibility provisions of the Criminal Code are not constitutionally entrenched and can be overridden by Parliament amending offence creating legislation.[55] The purpose of Chapter 2 of the Criminal Code is to 'codify the general principles of *criminal responsibility* under law of the Commonwealth'.[56] As discussed below, many disciplinary offences are not criminal in nature and there is an argument that it is not proper to talk about 'criminal responsibility' when referring to such offences.

The High Court has held that it is valid to incorporate civilian criminal offences into the DFDA.[57] It does not follow that *all* service offences are themselves criminal offences. Some may be purely disciplinary in nature. In Australia, the judicial power of the Commonwealth can only be exercised by Chapter III courts.[58] Military Tribunals are not Chapter III courts. They are constitutionally permissible as an exercise of

---

54 Explanatory Memorandum to the Defence Legislation Amendment Bill 2005 (Cth) 15.

55 Above, n 47, 10.

56 *Criminal Code Act 1995* (Cth) s 2.1.

57 Per Mason C.J., Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518, para 24**: '**It follows that, if offences against military law can extend no further than is thought necessary for the regularity and discipline of the defence forces … this limitation would not preclude Parliament from making it an offence against military law for a defence member to engage in conduct which amounts to a civil offence. 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.'

58 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1: 110 ALR 97.

command and control consistent with the Defence Power – section 51(vi) of the Constitution.

The function of a separate system of military discipline law is the promotion of the efficiency, good order and discipline of the defence force and no more.[59] In exercising this function Courts Martials and Defence Force Magistrates have been held to be exercising judicial power.[60] There would seem to be no authority for the proposition that the summary discipline system must exercise judicial power in order to be a valid mechanism for the promotion of military discipline.[61] Further, there is no authority for the proposition that the summary disciplinary system must adopt an adversarial model for its operation.

The outcomes of summary disciplinary proceedings have the potential to affect the rights, interests and legitimate expectations of persons accused of a service offence. As such, the accused must be afforded procedural fairness by the system.[62]

Procedural fairness along with the requirement to promote efficiency, good order and discipline of the defence force are the touchstones for the legitimacy of any future summary disciplinary system.

B *Proposed changes*

The following section of the paper will firstly put forward the proposed changes to the summary disciplinary system and then assess those changes in accordance with the criteria established in part I to them.

1 *Making the summary discipline trials inquisitorial*

In an inquisitorial system the adjudicator is empowered to take the initiate in eliciting evidence and controlling the way in which matters are presented.[63] The United States[64], Canada[65] and the United Kingdom have summary discipline systems that

---

59 Per Mason C.J., Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* [1989] HCA 12; (1989) 166 CLR 518, para 13.

60 Ibid para 13-16. There is some debate as to whether Courts martial are exercising judicial power of the Commonwealth, judicial power or making non judicial determinations – see Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40(2) *Federal Law Review* 161.

61 An obvious example being the Discipline Officer Scheme, see *Defence Force Discipline Act 1985* s 169A.

62 *Kioa v West* (1985) 159 CLR 550.

63 G. Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective' (1982) 13 *Federal Law Review* 150.

64 The United States uses a 'Nonjudicial' punishment procedure based on article 15 of the Uniform Code of Military Justice. This procedure is not a trial. During the procedure the member is informed of the information against them relating to he offences alleged and allowed to examine documents or physical objects against the member which the nonjudicial punishment authority has examined in connection with the case and on which the nonjudical punishment authority intends to rely in deciding whether and how much nonjudicial punishment to impose. There is no prosecuting or defending officer. The military rules of evidence, other than with respect to privileges, do not apply. See generally Part V Manual for Courts Martial United States (2008 Edition) available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

65 Canada conducts summary trials that are inquisitorial in nature. There are no prosecuting or defending officers. During the trial the commander, termed the 'presiding officer', hears evidence against the accused. During the presentation of the evidence the accused and the

apply inquisitorial characteristics. The United Kingdom's approach is considered to provide a good model for future reforms to the Australian system. The key inquisitorial characteristics of the United Kingdom's summary discipline system are captured in the following passages from that country's military manual on discipline law:

> A summary hearing is an inquisitorial process and differs in this respect from adversarial proceedings in, for example, the Court Martial and civilian criminal courts. There is no prosecutor and in a contested summary hearing the role of the officer hearing the charge is to determine the facts of the case, based on the evidence heard from the accused and any witness.[66]

> The summary hearing is not a court. It is an inquisitorial process in which the CO endeavours to discover facts by actively searching for evidence and questioning the witnesses. No rules of evidence apply as such, but the principles ensure both best practice and fairness to the accused.[67]

The burden lies upon the officer hearing the charge to call sufficient evidence to establish that there is a charge to answer and, if evidence is called to refute the charge, to rebut any defence.[68] There is no defending officer, however an officer is appointed to assist the accused.

2 *Reducing the summary discipline system's reliance on criminal law for its operation*

The summary discipline should only use criminal law concepts to the extent necessary for the application of service discipline. As a starting point it is suggested Chapter 2 of the Criminal Code should not apply to the summary discipline system. This first step is not the complete answer as it leaves a void in relation to what principles apply for the interpretation of service offences and to what standard matters are required to be proved.

It is suggested that this void is filled by a plain English reading of offences, the overriding obligation of the summary authority to ensure fairness, and the explicit application of selected criminal law concepts. For example, there would be no legal burden for the defendant to discharge when raising a defence. The obligation would be on the summary authority, exercising inquisitorial powers, to determine whether a defence exists based on his or her own investigation of the facts, or facts brought to his or her attention by the person charged. This would require a re-drafting of service offences intended to be applied at the summary level to ensure that they are clear as to the conduct being regulated and how an ADF member becomes responsible for a breach of that conduct. It would also include removal of criminal law terminology from those service offences and may involve a narrowing of the focus of individual offences for the purposes of clarity.

An example of how this might work is outlined below.

In the left hand column is the current service offence of assault on a superior (with relevant prosecution proofs)

In the right column is the re-drafted offence and relevant proofs.

---

presiding officer may question each witness. Queens Regulations and Orders for the Canadian Forces art 108.20.

66 Joint Service Publication 830 Military Service Law Version 2.0, 1-9-4.

67 Ibid 1-11-2.

68 Ibid 1-11-4.

Current Offence	Proposed Summary Discipline Offence
Assault on a Superior (1) A person who is a defence member or a defence civilian is guilty of an offence if: (a) That member assaults a person (b) That person is a superior officer (2) Strict liability applies to element (1) (b) (3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, that the person against whom the offence is alleged to have been committed was a superior officer.	**Assault on a Superior** (1) A person who is a defence member or a defence civilian is guilty of an offence if: (a) That person, without authorisation, strikes another, or (b) That person, without authorisation, threatens, by gesture, to strike another (2) That other person is superior in rank
Prosecution Proofs In relation to "defence member" A. That the defendant was a defence member (physical element of circumstance) B. That the defendant was reckless as to the fact that he or she was a Defence member (default fault element of recklessness), noting that recklessness can be established by proving intention, knowledge or recklessness. In relation to" assault" C. That the defendant did a specified act to a person (physical element of conduct) D. That the defendant's conduct in (C) was intentional (default fault element of intention) E. That the defendant's conduct in (C) either resulted in infliction of force on the person or engendered in the person in (C) fear that force was about to be inflicted on him or her (physical element of result of conduct) F. That the person in (C) did not consent to the result in (E) (physical element of circumstance) G. That the result in (E) was	Proofs A. The defendant was a defence member or defence civilian (proved by access to service record) B. That the defendant struck another; Or C. Gestured as if to strike another D. That the other is superior in rank (proved by access to service record) E. That the action in b or c was not authorised.

unlawful (physical element of circumstance) H. That the defendant was reckless as to the result in (E) (infliction of force or engendering of fear), the circumstance in (F) (lack of consent) and the circumstance in (G) (unlawfulness of the result) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness) And In relation to "superior officer" I. The person is (c) was the superior officer of the defendant (physical element of circumstance)	

Selected criminal law concepts may continue to have a place in a reformed system. For example the standard of 'beyond reasonable doubt' may remain as the standard of proof for determining whether an offence has been committed. However, even this fundamental concept could be replaced by a plain English description of the required standard, such as 'the authority must be certain that the accused committed the summary discipline offence'.[69] No criminal concept should be held as being above review, and should be discarded if it does not align with the requirements of discipline at the summary level.

C *Application of Criteria*

1 *The summary discipline system must operate quickly*

The inquisitorial model addresses three of the causes of delay in summary proceedings. Firstly it decreases the training burden of participants. While in the United Kingdom the accused has the benefit of an 'accused assisting officer to advise and represent them[70], this is a less complex task than that of a defending officer in an adversarial system. Secondly, it reduces the time involved in case preparation. The commander, backed by the weight of the chain of command is made responsible for investigating the offence and preparing the case. Thirdly, it can reduce the time to

---

[69] Above, n 63, the UK Military Service Law Manual describes the standard of proof in the following way 'An officer hearing a charge must, having considered all of the evidence, be sure (sometimes expressed as being satisfied beyond reasonable doubt) that the charge is proved', 1-12-3.

[70] Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 r 10.

conduct the actual trial itself. Because the summary authority has control of the trial he or she can focus on issues of merit and avoid being misguided arguments or irrelevant material presented by lay prosecuting or defending officers. Removing the obligation to understand the operation of complex criminal concepts will also reduce delay.

2 *The summary discipline system must be as simple as possible*

A simpler system is achieved through the removal of the difficulties associated with the understanding and applying the duties akin to that of a civilian prosecutor and defence counsel. The removal of the application of complex criminal concepts and aligning offences dealt with at the summary level with a plain English understanding of terms further simplifies the process. As stated in part I, simplicity must not come at the expense of fairness. Two comments are relevant in relation to this point. Firstly, it is not proposed to remove the ability of an accused to elect to be dealt with by a Superior Military Tribunal. In fact, it may be necessary to expand the ability to elect trial by Court Martial or DFM[71] to ensure that any accused can appear before a tribunal that has all the hallmarks of the independence of a civilian court. Secondly, while it could be argued that the proposed changes reduce members' rights by taking away the gold standard protections afforded by the criminal law, the changes could, in practice, operate more fairly. This is because the participants would be free to be able to focus on the merits of the matter rather than getting entangled in technicalities.

3 *The summary discipline system must be capable of proper, fair and correct application by persons who do not possess legal qualifications*

For the reasons stated above under the proposed changes deliver a system that is much more likely to be capable of proper, fair and correct application by non-lawyers.

4 *The summary discipline system should support commanders' roles*

The inquisitorial system aligns much more closely with the pro-active nature of command. Commanders will not be forced into the awkward position of remaining apart from the details of allegations of disciplinary infractions in their units or sections for fear of losing the ability to deal with the matter in the future due to being disqualified for bias. Commanders will remain in control of the conduct of trials and be able to actively seek out information that is relevant.

---

[71] DFDA s 111B establishes the ability for a member to elect to be tried by Court Martial or DFM. This election does not apply to certain minor disciplinary offences in respect of members of or below the rank of Lieutenant Commander, Major or Squadron Leader. It is acknowledged that careful thought will need to be given to how the election process would operate in the event of a simplified summary discipline system. One option might be that purely disciplinary matters in the DFDA could be heard in a summary disciplinary hearing. More serious offences in the DFDA could be heard by Court Martial or DFM. In the event that the same facts gave rise to both a disciplinary offence and a serious offence, the defendant could be given the election as to which offence he will face trial. This process is similar to the process known in some civilian court systems, and not dissimilar to the Discipline Officer system in the DFDA where a person may elect to accept an infringement notice and be heard by a Discipline Officer, or not be heard by the Discipline Officer and, instead, face trial under the DFDA.

V CONCLUSION

Law reform of the summary discipline system is legally possible. The changes proposed in this paper would promote efficiency, good order and discipline. Reforms would bring Australia's summary disciplinary system "back into step" with the summary discipline systems operating in the United Kingdom, Canada and the United States.