Case Note
The use of Criminal Law Principles in Military Discipline *Chief of General Staff* v *Stuart* (1995) 133 ALR 513

MATTHEW GROVES*

INTRODUCTION

The recent decision of the Full Court of the Federal Court in *Stuart* v *Chief of General Staff*[1] provides a rare insight into the principles by which military offences are tried. The case was an appeal from a decision of the Defence Force Discipline Appeal Tribunal. The tribunal had overturned the disciplinary convictions of an officer, holding that the magistrate who heard the charges had incorrectly interpreted the mental element required for the charges. The Federal Court upheld the tribunal's decision to overturn the convictions, but did so for substantially different reasons.

The Federal Court undertook a detailed examination of the mental element required for two offences under the *Defence Force Discipline Act* 1982 (Cth) [the '*Discipline Act*']. The decision indicates that the Federal Court will interpret statutory provisions which create military disciplinary offences as though they were ordinary criminal offences as far as this is practicable. This commentary will argue that the Federal Court's interpretation of those offences was cumbersome and artificial. The court's decision does not provide any clear guidance in determining the required mental element of other defence force disciplinary offences. Nor was the process by which the court examined the two offences in issue helpful to the interpretation of other military offences.

BACKGROUND

(a) The Facts

Lieutenant Colonel Stuart was a member of the Australian defence force contingent which was part of a UN peacekeeping mission attempting to restore a civilian government in Cambodia. On the evening of 24 January 1993 Lieutenant Colonel Stuart was on duty at the mission's Phnom Penh headquarters. This station had no catering facilities, so he decided to have a meal at a nearby restaurant. All personnel had been advised not to go beyond military premises at night alone, so Lieutenant Colonel Stuart asked another

* BA, LLB (Hons), Barrister and Solicitor of the Supreme Court of Victoria, Associate, Commonwealth AAT (Melbourne). I am grateful for Professor Enid Campbell for her helpful editorial comments.

[1] (1994) 122 ALR 486 [Defence Force Discipline Appeal Tribunal] (1995) 133 ALR 513 [Full Court of the Federal Court].

Australian soldier, Sergeant Hayes, to accompany him. The soldiers travelled by jeep, which was normal practice for night time travel. They drove to a nearby restaurant well known to UN soldiers, and generally regarded to be secure. The jeep was parked on the median strip outside the restaurant. Lieutenant Colonel Stuart's commanding officer had issued a directive which provided that 'weapons are not to be taken into bars, nightclubs or other entertainment venues, unless the individual's duty requires it.' The directive also stated that 'the security of weapons remains the individual soldier's responsibility.' Lieutenant Colonel Stuart ordered Sergeant Hayes to secure the weapons in the jeep. The soldiers initially sat at an outside table, in order to observe the jeep. They moved inside when it began to rain, but positioned themselves so that they could still see the jeep. While Sergeant Hayes left this second table to pay the bill, the jeep was stolen.

Lieutenant Colonel Stuart was charged with two offences under ss 44 and 60 of the *Discipline Act*. Those sections are in the following terms:

> 44 (1) A person, being a defence member or a defence civilian, who loses any property that is, or forms part of, service property issued for his use, or entrusted to his care, in connection with his duties is guilty of an offence for which the maximum punishment is imprisonment for 6 months.
>
> (2) It is a defence if a person charged with an offence under this section took reasonable steps for the safe-keeping of the property to which the charge relates.
>
> 60 A defence member who, by act or omission, behaves in a manner likely to prejudice the discipline of, or bring discredit upon, the Defence Force is guilty of an offence for which the maximum punishment is imprisonment for 3 months.

The first charge, under s 44, simply stated that Lieutenant Colonel Stuart had lost his hand gun and associated property, such as the holster and cartridge, all of which was property entrusted to him according to the terms of the section. The second charge, under s 60, was founded upon Lieutenant Colonel Stuart's direction to Sergeant Hayes to secure the pistol in the jeep. The charge alleged that this direction constituted behaviour which fell within the proscription of the section.

Stuart pleaded not guilty to both charges. The charges were heard by a defence force magistrate sitting in Cambodia. The magistrate found that the language of s 60 did not displace or otherwise affect the presumption in favour of the requirement of mens rea. In respect of s 44, however, the magistrate held that the language created a presumption that mens rea was present. The magistrate held that this presumption would prevail unless and until the defence advanced evidence of the existence of an honest and reasonable belief that the conduct in question was not criminal. If such evidence was led, the prosecution was obliged to negative evidence of the accused's state of mind.[2] The effect of this finding was to shift the emphasis of submissions made in the

[2] The magistrate's ruling on this issue is quoted in detail by the tribunal in *Re Stuart & Chief of General Staff* (1994) 122 ALR 486, 489.

trial, and the reasoning of the magistrate, away from any possible defence under s 44(2). Accordingly, Sergeant Hayes was not called as witness in aid of that potential defence, and there was insufficient evidence to establish the statutory defence. The magistrate found Lieutenant Colonel Stuart guilty of both offences and recorded convictions for both offences. The magistrate did not impose specific penalties for either conviction, but he ordered Lieutenant Colonel Stuart to pay reparation of $2000 to the Commonwealth.

(b) The Decision of the Defence Force Discipline Appeal Tribunal

Stuart appealed to the Defence Discipline Appeal Tribunal (the tribunal). The tribunal constituted by Northrop J (President), Gallop and Badgery Parker JJ (Members) allowed the appeal, quashed the convictions and ordered a new trial on both offences. In a unanimous decision the tribunal held that the language of s 44 did not require the prosecution to prove mens rea on the part of the defendant. Proof of guilt could be established by no more than proof of the objective elements of the offence. This finding left open to a defendant the possibility, if he or she could do so on the facts, of establishing the statutory defence provided by s 44(2).[3] In respect of the charge laid under s 60, the tribunal held that the common law presumption in favour of the requirement of mens rea had not been displaced in that provision. The tribunal regarded mens rea as too vague and imprecise to describe the mental element required under the section and, therefore adopted 'blameworthiness' as a more appropriate expression of the necessary mental element. The magistrate, however, had found evidence of blameworthiness from his misdirection in relation to the first offence. Hence the second conviction had been fatally infected by the erroneous reasoning adopted in respect of the first offence.[4]

(c) The Decision of the Full Federal Court

The Chief of the General Staff appealed to the Full Federal Court in respect of the findings of the Appeal Tribunal on both charges. The main issue on appeal was whether the tribunal was correct in finding that proof of guilt under s 44(1) required no more than proof of the objective elements of the offence, subject to possibility that a defendant might establish the statutory defence under s 44(2). The Full Federal Court, constituted by five judges, upheld the decision of the tribunal to overturn the convictions, but did so for different reasons. The leading judgment of Lockhart J held that the presumption in favour of the requirement of mens rea in s 44(1) had been displaced only in relation to the element of 'loss', which was the principle element of the offence. It remained for the prosecution to establish mens rea for all other elements of the offence. The '*Proudman* v *Dayman*[5] defence', under which a defence of honest and reasonable mistake of fact was available to the accused, even though positive knowledge on the part of the accused may be

[3] Id 491.
[4] Id 492–3.
[5] (1941) 67 CLR 536.

unnecessary to establish guilt, was applicable to these elements of the offence.[6] Davies, Lee and Heerey JJ agreed with Lockhart J.[7] Black CJ delivered a separate judgment to substantially the same effect.[8]

The court unanimously held that the presumption in favour of the requirement of mens rea had not been displaced by the language of s 60. Lockhart J did not accept the tribunal's finding that blameworthiness was a completely accurate description of the mental element required for an offence under the section. His Honour felt that the term instead served merely as a convenient expression for the type of conduct that would be committed by a person who was charged under the section. In regard to the seemingly open ended wording of the provision, Lockhart J held that the correct scope of the section could be determined by reference to the clear wording of the provision.[9]

THE MILITARY DISCIPLINE SYSTEM

(a) The Judicial Structure of the Current Military Discipline System

The *Discipline Act* is a complex statute that forms the foundation of the current military disciplinary system.[10] For present purposes that scheme may be summarised as follows. The *Discipline Act* creates a set of disciplinary offences which govern the conduct of all members of Australia's defence forces, and a system for the investigation, hearing and sentencing of breaches of those rules.[11] The system for the hearing of charges is supervised the Judge Advocate General. The Advocate General must be a judge, of either the Federal Court or a State Supreme Court. The Advocate General appoints a panel of senior, legally qualified, military officers to assist in the discharge of his or her functions.[12]

A court martial, which hears and determines serious disciplinary charges, may only be composed of members of the panel and the Advocate General.[13] Membership of the panel is also an essential qualification for the appointment of an officer as a defence force magistrate. Defence force magistrates possess summary jurisdiction over a wide range of disciplinary charges.[14] The

[6] *Chief of General Staff* v *Stuart* (1995) 133 ALR 530–3.

[7] Lee J delivered further remarks about the construction of s 44. Most notable was his Honour's reasoning that the defence of honest and reasonable but mistaken belief of fact was available in respect of both the offence under s 44(1) and the statutory defence of s 44(2): id 543.

[8] Id 517–18.

[9] Id 536–7.

[10] The *Defence Force Act* 1903 (Cth) ss 73–90 creates many other disciplinary offences which are stated to be offences within the meaning of the *Discipline Act*. For a short history of the development of a single disciplinary code for all branches of the armed forces see W D Rolfe, 'The Defence Force Discipline Act; Disciplinary Dream or Administrative Nightmare?' [1994] *AIAL Forum* 45, 47–8.

[11] The Act also covers reserve members of the defence force while they are on duty and 'defence civilians' (non-military personnel who perform specified duties with members of the force and consent to the jurisdiction of the Act): *Discipline Act* s 3.

[12] *Discipline Act* ss 179–80.

[13] *Discipline Act* s 114. On courts martial generally see Part VII Div 3 of the Act.

[14] *Discipline Act* s 127.

Discipline Act also allows certain minor offences to be heard by officers acting in a summary capacity which may take two forms. The Chief of Staff is vested with a power to appoint officers to the more important summary duties (superior summary authorities), while commanding officers may appoint officers to act, as 'subordinate summary authorities', in less important matters.[15] Defence force magistrates, courts martial and summary authorities are, together, referred to as service tribunals. Service tribunals form the judicial aspect of military discipline. Recent amendments to the *Discipline Act* have increased the provision for the summary resolution of minor offences. The Act now provides that a service member may elect to have certain minor disciplinary infringements heard by officers appointed to hear and resolve minor charges. Membership of the panel is not required for appointment as a minor disciplinary officer.[16]

The *Discipline Act* provides for automatic administrative review of all convictions imposed under the Act. Reviews are conducted by officers appointed by the Chief of Staff.[17] Penalties are subject to a similar form of administrative review.[18] The tribunal is invested with jurisdiction to hear appeals from a service member who has been convicted by a defence force magistrate or a court martial.[19] The tribunal does not possess jurisdiction to entertain appeals against sentence.[20] The two principal avenues of review for Commonwealth administrative decisions, statutory judicial review and appeals to the Administrative Appeals Tribunal, are also not available in respect of decisions made under the *Discipline Act*.[21]

[15] *Discipline Act* ss 104–113. The procedure is subject to many complexities, none of which are presently relevant.

[16] *Discipline Act* Part IXA. This procedure was incorporated by the *Defence Legislation Amendment Act* 1995 (Cth).

[17] *Discipline Act* Part IX (ss 150–169).

[18] *Discipline Act* s 162. Furthermore, many punishments may not be executed until the sentencing order has been approved by a higher authority. This process constitutes a de-facto form of administrative review: Part X.

[19] Leave of the tribunal is necessary to proceed with an appeal that does not involve a question of law: *Defence Force Discipline Appeals Act* 1955 (Cth) s 20(1). Any application to the tribunal suspends all avenues of administrative review: *Discipline Act* s 156.

[20] The tribunal has pointed out that both the *Discipline Act* and the *Defence Force Discipline Appeals Act* 1955 (Cth) make a clear distinction between the review of convictions and sentences. The latter is not included within the tribunal's review jurisdiction: *Hembury* (1994) 73 A Crim R 1, 16–17.

[21] Decisions under the *Discipline Act* are excluded from review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), see schedule 1 (o). However preliminary inquiries into a potential disciplinary offence, which are conducted under the *Defence (Inquiry) Regulations* 1985 (Cth) are amenable to that Act. See eg, *X* v *McDermott* (1994) 51 FCR 1; *C* v *T* (1995) 58 FCR 1. The *Discipline Act* does not contain a provision which confers jurisdiction upon the AAT to review decision taken under the Act. The Ombudsman cannot inquire into decisions taken under the *Discipline Act*: *Ombudsman Act* 1976 (Cth) s 19C(5)(d).

(b) Constitutional Implications of the Current System

The High Court has considered the constitutional validity of defence force tribunals on several occasions.[22] The most important issue that has confronted the Court in each of these cases is the extent to which the defence power may support the vesting of judicial power in defence force magistrates in defiance of the requirements of Chapter III of the *Constitution*.[23] Although the High Court has been unable to reach any discernible level of agreement upon this issue, the cases nonetheless provide important instruction on the standing of military discipline in relation to the general criminal law.

In *Re Tracey; ex parte Ryan*[24] all members of the High Court accepted that the defence power impliedly empowers the Commonwealth to create and administer a system of discipline for members of the defence forces. The Court also accepted that although service tribunals exercise judicial power they do not exercise such power under Chapter III of the *Constitution*. The judicial power to hear and resolve matters relating to the maintenance of discipline in the armed forces emanates directly from the defence power and is, therefore, independent from the requirements of Chapter III. This 'military judicial' power must nonetheless be exercised in a judicial manner, though not necessarily by a court in the strict sense.[25] Accordingly, a military tribunal need not meet the requirements of Chapter III of the *Constitution* so long as the relevant charge falls within the range of offences that are necessary for a defence force disciplinary scheme.

Disagreement has, however, arisen in the development of a formula to determine the type and range of offences which may be validly heard by military tribunals. Mason CJ, Wilson and Dawson JJ have taken the view that the defence power enables military tribunals to hear any charge so long as the nature of the charge is sufficiently connected to the regulation of the armed forces through the maintenance of discipline and good order.[26] Brennan and Toohey JJ have favoured a slightly different formula. They believe that the defence power will permit service tribunals to hear and resolve offences 'if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline'.[27] The

[22] *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.

[23] The application of s 80 of the *Constitution* to military disciplinary hearings has proven less problematic. The High Court has held that trials conducted under the *Discipline Act* are not trials on indictment for the purposes of s 80: *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 548–9 per Mason CJ, Wilson & Dawson JJ, 578–9 per Brennan & Toohey JJ, 591–2 per Deane J, 596 per Gaudron J. It has long been established that while s 80 requires matters tried on indictment to be heard by a jury, it does not require that any prosecution for an offence against a law of the Commonwealth proceed by way of indictment: see *Kingswell* v *R* (1985) 159 CLR 264, 277 per Gibbs CJ, Wilson & Dawson JJ and the cases cited therein.

[24] (1989) 166 CLR 518.

[25] Id 518, 540–1 per Mason CJ, Wilson & Dawson JJ, 572 per Brennan & Toohey JJ, 582–5 per Deane J, 598–600 per Gaudron J.

[26] Id 545. Mason CJ and Dawson J continue to adhere to this position: *Re Nolan; ex parte Young* (1991) 172 CLR 460, 474–5; *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 25–6.

[27] Id 570. See also *Re Nolan; ex parte Young* (1991) 172 CLR 460, 477; *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 28–9.

divergence of opinion seems largely due to the differing views held by the Justices as to what is the appropriate test to determine whether an offence has a sufficient relationship to the discipline of military forces so that it may be heard and resolved by a body that is not constituted according to Chapter III. The approach of Mason CJ, Wilson and Dawson JJ allows the Commonwealth a measure of latitude to decide what conduct should constitute a service offence, even where that conduct also constitutes an offence against the general criminal law.[28] Brennan and Toohey JJ, in contrast, appear to accept that their test of 'substantially serving a disciplinary purpose' requires the Court to assess the quality of the offence in question.[29] The two positions have not been fully reconciled, despite their obvious similarities.[30]

Deane J has favoured a narrower interpretation of the judicial element of the defence power. His Honour has held that unless a defence tribunal meets the requirements of Chapter III, under which a tribunal could be empowered to hear truly criminal charges, it may only deal with offences that are either exclusively disciplinary in character or concerned with only the disciplinary aspects of conduct which constitutes an offence under the general criminal law.[31] McHugh J, who was not a member of the High Court when the first of these cases was heard, has subsequently supported the view of Deane J.[32] McHugh J, however, has acknowledged that this view has been rejected by a majority of the court on more than one occasion.[33] Gaudron J adheres to a position which is broadly similar to that of Deane J.[34] Her Honour has consistently held that members of the armed forces cannot be made 'immune from the operation of the general law ... or deprived of [its] protection' through the operation of a system of military discipline.[35] Gaudron J has applied this view strictly. Accordingly, she has held that the *Discipline Act* is invalid to the extent to which it seeks to confer jurisdiction upon service tribunals to hear and determine service offences that are the same, or substantially the same, as offences under the general criminal law.[36]

[28] Id 543–5; *Re Nolan; ex parte Young* (1991) 172 CLR 460, 474–5.

[29] *Re Nolan; ex parte Young* (1991) 172 CLR 460, 477–8. Brennan & Toohey JJ engaged in such an exercise in *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 27–31.

[30] *Re Tyler; ex parte Foley* (1994) 181 CLR 18 illustrates why the Justices cannot bridge the apparently small gap between their views. Mason CJ & Dawson J drew upon US cases which illustrated the futility of any attempt to draw a clear and satisfactory line between offences committed by defence members which are of a military character. Accordingly, they accepted that this line could be drawn by Parliament: id 26. Brennan & Toohey JJ drew that line themselves: id 27–31. Some of the subtle differences between the two positions are discussed in S Gageler, 'Gnawing at a File: An Analysis of *Re Tracey; ex parte Ryan*' (1990) 20 WALR 47, 51–4.

[31] *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 586–7; *Re Nolan: ex parte Young* (1991) 172 CLR 460, 490–2

[32] *Re Nolan; ex parte Young* (1991) 172 CLR 460, 499.

[33] *Re Tyler; ex parte Foley* (1993) 181 CLR 18, 38–9.

[34] Gaudron J has changed the basis upon which her view may be supported. She has not, however, altered the substance of her position: *Re Nolan; ex parte Young* (1991) 172 CLR 460, 494–5.

[35] *Re Nolan; ex parte Young* (1991) 172 CLR 460, 496–7; *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 35.

[36] *Re Nolan; ex parte Young* (1991) 172 CLR 460, 494–9; *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 34–5.

In *McWaters* v *Day*[37] the Court delivered a unanimous judgment which explained that, despite the disagreement over the conferral of judicial power upon military tribunals, it was in general agreement on the purpose of military discipline and the relationship between the *Discipline Act* and the ordinary criminal law. The Court held that there was general agreement in *Re Tracey* that the purpose of the *Discipline Act* was to 'create a disciplinary code for the promotion of the efficiency, good order and discipline of the defence forces and no more'.[38] This view was derived in part from the longstanding principle that military law has a restricted range of operation and that it serves as a supplementary set of rights and duties for service members.[39] Accordingly, the High Court held that the *Discipline Act* was to be interpreted 'so as to ensure that the military disciplinary code it enacted was cumulative upon and not exclusive of the ordinary criminal law'.[40] The following examination demonstrates that the Federal Court and the tribunal have analysed and applied the *Discipline Act* as an extension of the criminal law.

(c) The Quasi-Criminal Law Aspects of Military Discipline

Criminal offences and military service offences possess many similarities. Each are resolved through a process of accusation, inquiry, adjudication and, possibly, conviction, sentence and the execution of punishment. Many military offences are punishable by imprisonment, which is widely regarded as the hallmark of criminal offences.[41] As noted above, however, there is longstanding authority to the effect that military law remains separate from civilian criminal law.

An investigation of many offences created by the *Discipline Act* demonstrates that they may not be easily be equated with criminal offences. Many offences are wholly disciplinary in character. Offences such as desertion (s 22), leaving a post whilst on duty (s 17), or refusing to obey orders (s 27), necessarily require that the subject of any charges be a member of the defence forces. Other military offences may also constitute offences under the general criminal law, but nonetheless constitute disciplinary offences because, when

[37] (1989) 168 CLR 289. Day was a service member who was found drunk whilst driving a service vehicle on service property. He was charged with a drink driving offence under the *Traffic Act* 1949 (Qld) s 161(1)(a). Day sought prohibition against the charge being heard, on the basis that the equivalent offence of the *Discipline Act* 1982 (Cth) s 40(2) was a more appropriate charge. It was also submitted that the service offence evinced an intention to 'cover the field' in respect of such traffic offences by service personnel and, therefore, the state offence was inconsistent to the extent to which it might otherwise apply to Day's conduct. The High Court rejected the submission, holding that once it was understood that service offences were intended as supplementary to, rather than exclusive of, the criminal law, it followed that the service offence did not deal with the same subject-matter nor serve the same purpose as the criminal offence. Accordingly, an issue of inconsistency between the two offences did not arise: (1989) 181 CLR 289, 298. On the issue of inconsistency and service offences see Gageler, op cit (fn 30) 57–9.

[38] Id 297.

[39] *Groves* v *Commonwealth* (1982) 150 CLR 113, 125–6 per Stephen, Mason, Aicken & Wilson JJ; *McWaters* v *Day* (1989) 168 CLR 289, 297 per curiam.

[40] *McWaters* v *Day* (1989) 168 CLR 289, 297.

[41] A service tribunal may impose penalties of imprisonment up to a maximum of life imprisonment: *Discipline Act* s 68(1)(a)(b).

committed by a service member, they present special problems to the working of defence forces. Any assault on a superior, fellow or subordinate officer (ss 25, 33 and 34) would clearly constitute an offence against the person under the criminal law of any State or territory. In a military setting such behaviour presents an additional danger to the chain of command and respect upon which a military organisation is based. Such offences possess both criminal and disciplinary aspects which, it is submitted, means they may never be directly equated with criminal offences.

In respect of criminal liability, however, the *Discipline Act* expressly adopts several important principles of criminal law. Section 10 of the Act provides that 'the principles of the common law with respect to criminal liability apply in relation to service offences . . .'[42] The Act also provides that the burden of proof for charges heard by service tribunals falls on the prosecution. The standard of proof is beyond reasonable doubt. The Act also provides that the defendant bears the onus of proving any defence, the standard of which is on the balance of probabilities.[43]

Many other principles of criminal law, which are adopted by the *Discipline Act*, are subject to important modification.[44] In relation to service offences which arise out of activities that the service member was engaged in as a part of their duties, where those charges involve negligence or recklessness, the Act requires the tribunal to have regard to the requirements of the Defence Force in deciding whether either of those particular mental states has been established. The common law principles of recklessness and negligence that otherwise apply to service offences, through the operation of s 10, are modified only as far as is necessary to accommodate this requirement.[45] The *Discipline Act* adopts a mixture of civil law and military factors in respect of sentencing. Service tribunals are directed to have regard to both the principles of sentencing applied by civil courts and the need to maintain discipline in the armed forces.[46] The Act also provides for a variety of sanctions that are commonly used in the criminal law, such as fines (s 73), restitution orders (s 83), and good behaviour bonds (s 75).

In a previous decision, the facts of which are not presently relevant, the tribunal concluded that the Act 'in many respects constitutes a code of the law

[42] *Discipline Act* s 10. The presumption does not extend to 'old service offences', which are defined as offences under the disciplinary system which preceded the *Discipline Act*, committed at any time during the 3 years before it was proclaimed: s 3.

[43] *Discipline Act* s 12. The defence of diminished responsibility is also expressly adopted in relation to a charge of murder: s 13.

[44] The Act also contains a detailed system for the investigation of service offences, similar to those normally found in criminal law statutes: *Discipline Act* Part IV. These provisions were substantially amended by the *Defence Legislation Amendment Act* 1995 (Cth).

[45] *Discipline Act* s 11. For an illuminating analysis of the application of the concept of criminal negligence to offences involving the performance of military duties, see the decision of the Court Martial Appeal Court of Canada in *R* v *Brocklebank* (1996) 134 DLR (4th) 377.

[46] *Discipline Act* s 70(1).

relating to criminal offences by members of the Australian Defence Force.'[47] The tribunal further stated that:

> The *Discipline Act* appears to equate service offences with criminal offences tried in the civil courts. Thus the jurisprudence of criminal law in its application to trials in civil courts may now have more relevance in the consideration of service offences than it did when service offences were considered within the jurisprudence applicable to military law.[48]

The offence under consideration in that case did not require the tribunal to undertake a detailed consideration of the applicability of any principle of criminal law. In the *Stuart* case, however, this issue was of prime importance. The Federal Court was required to consider the extent to which the common law rules regarding mens rea, particularly the presumption in favour of the requirement of mens rea, were relevant to service offences. The decision of the Federal Court suggests that the jurisprudence of the criminal law will be of great importance to any future questions about the construction of service offences.

APPLYING CRIMINAL LAW CONCEPTS TO MILITARY DISCIPLINE

(a) Mens Rea and the *Defence Force Discipline Act* 1982 (Cth)

The application of common law principles of criminal liability to services offences, by s 10 of the *Discipline Act*, means that an examination of the mental element required in a service offence must begin with the common law presumption in favour of the requirement of mens rea. This rule was stated in *Sherras* v *De Rutzen*[49] to be:

> A presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.

This statement has been approved by the High Court on several occasions, and clearly represents the starting point of any inquiry to determine the mental element of a criminal offence. Lockhart J, however, was also mindful of the two cautions given by Gibbs CJ in *He Kaw Teh*[50] on the application of the principle in *Sherras* v *De Rutzen*. The first was deciding whether the legislature intended that the conduct in question should be punished even in the absence of some blameworthy state of mind. This question is decided

[47] *Victor* v *Chief of Naval Staff* (1992) 115 ALR 716, 726. The case involved a charge, under s 39(3) of the *Discipline Act*, of negligently causing or allowing a ship to be lost, stranded or hazarded.

[48] Id 727.

[49] [1895] 1 QB 918, 921.

[50] (1985) 157 CLR 523, 528 per Gibbs CJ, Mason J agreeing, 549 per Wilson J, 566 per Brennan J, 591 per Dawson J. See also *Cameron* v *Holt* (1980) 142 CLR 342.

largely by reference to the language of the provision in question.[51] The object and subject matter of the statute are also important considerations.[52] Another relevant factor is what effect, if any, the imposition of strict liability on the defendant will have on any potential enforcement of the offence. If the defendant cannot alter his or her behaviour to avoid criminal liability, the imposition of strict liability would serve little purpose.[53] The second difficulty in the application of the principle from *Sherras* v *De Rutzen*, which arose when the offence was held to be one which required mens rea, lay in deciding the precise state of mind required by such a 'vague expression'.[54] It will be seen that the decision of the tribunal was occupied by the first of these difficulties, while the Federal Court was affected by the second.

(i) The Approach of the Tribunal

In deciding whether s 44 required any mental element on the part of an accused person the tribunal examined the requirement of mens rea in relation to many of the offences created by the *Discipline Act*. The tribunal stated that:

> The Act universally adopts a similar form of drafting whereby an offence is created in terms silent as to any mental element but subject to the right of the accused person to be exonerated by proving a specified matter of defence, either an absence of knowledge (for example ss 25, 26, 27, 29, 31, 41, 45, 46, 49, 58) or a reasonable excuse sometimes provided for in those words sometimes by a similar expression such as used in s44; cf ss 15, 16, 17, 23, 24, 28, 32, 40, 43, 44, 47, 48, 50 . . . In the case of major offences such as aiding or communicating with the enemy (ss 15, 16, 17, 39, 41, 43) the provision creating the offence clearly specifies the relevant mens rea while at the same time providing for a matter of defence which goes beyond the absence of that defined mens rea. In many other instances mens rea (usually knowledge) is clearly implied: ss 17, 19, 20, 21, 22, 30, 34. However, so often . . . one is driven to conclude that the best construction of the Act is that . . . no mens rea being prescribed or inescapably implied, proof of guilt requires no more than proof of the objective elements of the offence, leaving it to the accused defence member to establish, if he or she can do so, the prescribed statutory defence.[55]

It appears from this statement that the tribunal sought to provide general guidance to service tribunals on the position of mens rea in military disciplinary offences. As the tribunal pointed out, only a minority of offences in the Act provide express indication as to the particular state of mind required, such as intention, recklessness or negligence. Most offences under the

[51] The importance of this point was recently affirmed by Brennan CJ: *Leask* v *Commonwealth* (1996) 70 ALJR 995, 999.

[52] On this issue, it may often be useful to draw upon the legislative history of the provision in question. In respect of the *Discipline Act*, however, there is a paucity of instructive official pronouncements. See, eg, the second reading speech on the statute by the Hon J Killen (Minister for Defence), *Parliamentary Debates*, House of Representatives (Cth), 29 April 1982, 2082–5.

[53] *Lim Chin Aik* [1963] AC 160.

[54] *He Kaw Teh* v *R* (1985) 157 CLR 523, 529–30.

[55] *Re Stuart & Chief of General Staff* (1994) 122 ALR 486, 491.

Discipline Act do not require, in express terms, any particular state of mind. The tribunal's approach, quoted above, led it to conclude that Stuart would be prima facie guilty of the charge under s 44(1) once the objective elements of the offence had been proven. The tribunal felt that the purpose of the section was to 'protect and preserve service property by placing a heavy obligation on each member to take reasonable care of property entrusted to him or her'.[56] An interpretation that the offence could be established without recourse to any mental element was consistent with the 'heavy obligation' created by the section.

In s 44 the commonly used statutory defence of 'reasonable excuse' is slightly altered so that the defence is available to an accused who may prove that he or she 'took reasonable steps for the safe-keeping of the property to which the charge relates.' The tribunal felt that Stuart would have been entitled to an acquittal if he had been able to establish, on the balance of probabilities, that he had taken reasonable steps for the safe-keeping of the property.[57]

(ii) The Approach of the Federal Court

Black CJ, Lockhart and Lee JJ all placed great emphasis on the subject matter of s 44. The Chief Justice felt that there was 'an exceptionally high public interest that [service] property should not be lost',[58] and went on to identify several factors of concern in the protection of service property: notably the large monetary value of many items, the obvious danger if armaments fell into the wrong hands and the difficulty of controlling the great number of items of property in a large and complex defence force.[59] Unlike the tribunal, however, the Federal Court did not accept that these considerations provided a sufficient reason to conclude that the entire section was intended to impose strict liability upon service members.

The tribunal had concluded that s 44 imposed strict liability after an examination of the section as a whole. The Federal Court, by contrast, analysed individual elements of the offence and considered what, if any mental element had to be established by the prosecution in respect of each element. The main analysis of the court centred on the element of loss. Black CJ held that, as a matter of ordinary usage, no mental element could comfortably be required or implied by the notion of 'loss'.[60] Lockhart J did not accept that the notion of 'loss' was necessarily incompatible with some kind of mental element. He pointed out that property may be lost through accident, theft or negligence, the latter of which implies some type of mental element. He held, nevertheless, that in s 44 the term was used to indicate that a service member simply no longer had possession or custody of a piece of property entrusted to him or her, and did know the whereabouts of the item. That usage of the word

[56] Ibid.
[57] Id 491–2.
[58] *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 516.
[59] Id 516–7 per Black CJ, 532 per Lockhart J, 542 per Lee J.
[60] *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 517–18.

did not import any type of knowledge, intention or other such mental element.[61] Lee J, by contrast, held that the term 'loss' could be interpreted to import some level of fault on the part of an accused, so the charge would be resolved by a consideration of whether the behaviour of the accused demonstrated 'culpability of a sufficient degree to warrant application of the criminal law.'[62] His Honour was clearly troubled by the possibility that criminal liability could attach to the loss of property. Accordingly, proof of loss of the property, per se, would not be sufficient to demonstrate the required level of fault. Lee J felt, however, that these considerations carried less force in a service context. He held that the need to safeguard military property against loss, particularly sensitive equipment such as that entrusted to Stuart, was of paramount importance. Lee J thought that the correct construction of the offence was that no mental element was required in respect of the 'loss' of service property. He held that any apparent harshness associated with strict liability under the provision was ameliorated by the presence of the statutory defence.

The Federal Court concluded that the requirement of mens rea had not been displaced in respect of the remaining elements of the offence, such as whether the property was 'service property' or whether Stuart was in fact a 'service member'. An accused service member would therefore be entitled to an acquittal if either of these elements were not proven beyond reasonable doubt by the prosecution. This point was not subject to detailed discussion because Stuart had admitted all other elements of the offence, but some conclusions may be drawn from the approach adopted by the court. It is submitted that the court's dissection of s 44(1) into several elements, each of which was then subjected to analysis of the required mental element, if any, to be proven, indicates that a strict attitude will be adopted in respect of any submission that an offence under the *Discipline Act* imports strict liability. It is also submitted that, although no member of the court invoked s 10 in support of the 'element by element' analysis of s 44(1), the presumption of the common law against strict liability lies at the heart of the court's approach.

No member of the court expressly disapproved the tribunal's analysis of mens rea in relation to many other offences in the *Discipline Act*, but it is clear from the above discussion that the rejection by the Federal Court of the tribunal's approach in relation to s 44 necessitates a rejection of its conclusions about other offences. The Federal Court, though, was circumspect on this point. Lockhart J expressly declined to consider the position of mens rea in the many other provisions in the *Discipline Act* which created offences but provided no guidance on the mental element of those offences.[63] Black CJ similarly refused to undertake any consideration of the mental element required for other offences under the *Discipline Act*. His Honour concluded that 'the question whether, to what extent, and in respect of what elements,

[61] Id 531–2.
[62] Id 541.
[63] Id 533.

proof of mens rea is required should be examined separately for each section when the occasion arises'.[64] Lee J stated that the *Discipline Act* 'is concerned with instilling and maintaining discipline in the defence force and, historically, it has been perceived that the imposition upon service personnel of measures of strict liability assists that achievement of that purpose.'[65] But Lee J's interpretation of s 44 indicates that his Honour does not subscribe to that approach.

(b) The Defence of Honest and Reasonable Mistake of Fact

The tribunal held that the offence created by s 44 required no more than proof of the objective elements of the offence, subject to an accused establishing the defence under s 44(2), which precluded any application of a defence based upon an honest but mistaken belief of fact. The defence assumed great importance in the Federal Court.

A frequently cited statement of Dixon J in *Proudman* v *Dayman*[66] explains the defence. His Honour held that 'as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.'[67] This defence has often been referred to as a 'half way house'[68] between offences which require some type of mens rea or knowledge of wrongfulness of the act on the part of an accused, and offences of strict liability, where the prosecution need prove only that the accused voluntarily committed the objective elements of the offence. The defence applies to criminal offences which do not require proof of any particular mental element on the part of the accused. The defence entitles an accused to an acquittal if he or she acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made the act innocent.

The Federal Court held that the defence was clearly not available in respect of the element of 'loss'. Lockhart J explained that the defence sat as uncomfortably with the notion of loss as did mens rea. He pointed out that the mistake, upon which the defence was based, had to be based upon some type of mental element. In *He Kaw Teh*[69] for instance, the High Court held that a charge which prohibited the 'possession' of certain narcotics implied some level of mental element. If a person was mistaken as to whether their suitcase contained a particular package, or what the contents of that package might be, this mistaken belief could form the basis of the *Proudman* defence. Lockhart J held that there was no analogous mental element of any kind in the notion of loss.[70]

[64] Id 518.
[65] Id 541–2.
[66] (1941) 67 CLR 536.
[67] Id 540. There are many Australian authorities on the defence which predate this decision, see P Gillies, *Criminal Law* (3rd ed, 1993) 93–4.
[68] See *He Kaw Teh* v *R* (1985) 157 CLR 523, 591 per Dawson J cited by Lockhart J in *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 529.
[69] (1985) 157 CLR 523.
[70] *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 531–2.

All members of the Court held that the defence was available in respect of all other facts required to be proved for the offence under s 44(1). As Lockhart J explained, a finding that no mens rea attaches to one element of an offence does not mean that it does not attach to others. Whether property is 'service property' or has been 'issued for his use' or 'entrusted to his care' are ingredients of the offence under s 44(1) for which mens rea has not been held to be displaced. Just as the prosecution is obliged to prove these elements, a defendant may seek to rely upon the *Proudman* defence.[71]

In my opinion, it may be argued that culpability for military offences should not be approached in this manner. If an offence is broken into individual elements, and the application of the *Proudman* defence is considered in respect of each element, a broader consideration of the conduct in issue may not occur. In my view, the kind of issues that may be raised in the *Proudman* defence can be best examined within the scope of specific statutory defences in the *Discipline Act*. The most common defence included in the Act is one of reasonable excuse.[72] Such provisions state that 'it is a defence if a person charged with an offence under this section had a reasonable excuse for engaging in the behaviour to which the charge relates.' In *Taikato* v *R*,[73] a majority of the High Court explained that the scope of a 'reasonable excuse' provision depends largely on the circumstances of the case, and the purpose of the provision to which the defence applies.[74] Accordingly, judicial decisions on the meaning of the defence, drawn from other statutes, are of limited assistance at best.[75] In the opinion of Brennan CJ, Toohey, McHugh and Gummow JJ:

> when legislatures enact defences such as 'reasonable excuse' they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence. That being so, the courts must give effect to the will of Parliament and give effect to their own ideas of what is a 'reasonable excuse'.[76]

Although the High Court's decision was delivered after that of the Federal Court in *Stuart*, a similar view is evident in many earlier decisions.[77]

[71] Id 532–3. See also 517–8 per Black CJ, Davies and Heerey JJ agreeing, 542–3 per Lee J.

[72] The defence is provided for respect of many offences. *Discipline Act* ss 15(2), 16(2), 17(2), 23(2), 28(2), 32(4), 40(10), 43(4), 45(1)(c), 46(2)(c), 48(3), 50(3).

[73] (1996) 70 ALJR 960.

[74] *Taikato* v *R* (1996) 70 ALJR 960, 965–6 per Brennan CJ, Toohey, McHugh & Gummow JJ.

[75] See, eg, *Connors* v *Craigie* (1994) 76 A Crim R 501, 503 (NSW SC). Dunford J considered whether the defence should succeed for an aboriginal man who had sworn several times, in graphic terms, at some nearby white people. Counsel for both parties presented his Honour with several leading authorities on reasonable excuse. Dunford J stated that decisions on the meaning of reasonable excuse in other contexts were not at all helpful.

[76] *Taikato* v *R* (1996) 70 ALJR 960, 967.

[77] See *Connors* v *Craigie* (1994) 76 A Crim R 501, supra (fn 75).

It is submitted that, in the arena of military discipline, it may be argued that such provisions should be interpreted as evidence of an intention to leave little room, if any, for the *Proudman* defence.[78] None of the many offences of the *Discipline Act* which provide for this defence states the basis upon which the reasonable excuse may be formed. It is submitted that the defence may be founded upon an honest and reasonable but mistaken belief as to a state of facts which, if correct, would render the defendant's behaviour innocent. If the *Proudman* defence is accepted to be encompassed by statutory provisions which provide for a 'reasonable excuse', such provisions would be almost purposeless if the *Proudman* defence was also available in relation to the elements of the offence creating provision. Section 23 may be used to illustrate this point. The section states that 'a defence member who does not attend duty or ceases performance of duty before he is permitted to do so is guilty of an offence . . .'. This offence could be broken down into various elements, along the lines of the analysis made in the *Stuart* case, such as 'duty', 'ceases performance' and 'permission'. If a service member charged with an offence under s 23 sought to create a defence based on a submission of honest and reasonable but mistaken belief of fact, in relation to one of those elements, then the service tribunal would effectively be deprived of the opportunity to judge the reasonableness of their behaviour as a whole.

If, contrary to this view, it is accepted that the *Proudman* defence should apply to individual elements of service offences, what scope remains for statutory defences of reasonable excuse? There are a number of situations to which the defence does not extend, but which may constitute a reasonable excuse. First, the *Proudman* defence applies only to mistakes of fact, but there is clear authority that a defence of reasonable excuse may extend to a mistake of law.[79] Secondly, the *Proudman* defence is most likely limited to mistakes, rather than ignorance.[80] A defence of reasonable excuse may be supported by either a mistake or ignorance. Thirdly, the *Proudman* defence will extend only to innocent conduct. At present it is not clear whether such a limitation attaches to a defence of reasonable excuse.[81] Finally, the weight of authority

[78] Cf Gibbs CJ in *He Kaw Teh* v *R* (1985) 157 CLR 523, 541–2. His Honour disapproved of several decisions in which courts had held that the phrase 'reasonable excuse' was sufficiently wide to include defences such as duress, mistake and absence of mens rea. He felt that the proper question was whether the words of the offence in issue, the possession of narcotics, made knowledge an element of the offence. If the matter was examined in the context of the 'reasonableness' of any excuse, the question of whether any mental element was required would be either assumed or blurred with other issues.

[79] See *R* v *Bacon* [1977] 2 NSWLR 507. In *Featherstone* v *Fraser* (1983) 6 Petty SR 2962, Yeldham J held that a bona fide mistake of fact or law could amount to a reasonable excuse, if based upon reasonable grounds.

[80] On this limitation in the *Proudman* defence, see D O'Connor and P A Fairall, *Criminal Defences* (3rd ed, 1996) 45–9.

[81] Although a similar requirement might develop in respect of reasonable excuse. In *Taikato* v *R* (1996) 70 ALJR 960, 965–6, Brennan CJ, Toohey, McHugh & Gummow JJ held that the definition of reasonable excuse depended on the circumstances of the case at hand, and the purpose of the provision to which the defence applied. Their Honours were of the opinion that the task of determining whether the facts of any given case constituted a reasonable excuse required a court to make a value judgment. It is difficult to accept that conduct which is not innocent may fall within the scope of the value judgments envisaged by their Honours. Dawson, who dissented, remarked that 'it is

suggests that the *Proudman* defence does not extend to instances of due diligence, whereby a defendant acts with a total absence of fault, while a defence of reasonable excuse may do so.[82] Given the narrower scope of the *Proudman* defence, it must be acknowledged that, even if the *Proudman* defence applies to all individual elements of service offences, it will not extend to these situations. Accordingly, a defence of reasonable excuse will retain some scope.

If, however, it is accepted that the *Proudman* defence does not apply to service offences, or their individual elements, it is clear that the wider scope of the defence of reasonable excuse will enable an accused person to avail him or herself of all matters that could have been attempted under the *Proudman* defence. In my opinion, such issues are more appropriately considered within the broader scope of the defence of reasonable excuse. A purposive construction of the statutory defence of reasonable excuse must take account of the opportunity that such clauses provide to a service tribunal to judge the reasonableness of the defendant's actions as a whole. The *Proudman* defence, by contrast, may be applied to individual elements of the offence and, if successful against an individual element of a charge under which the defence of reasonable excuse was available, a defendant would not need to utilise the statutory defence. It is submitted that the inclusion of a general statutory defence of reasonableness, which may accommodate an honest and reasonable but mistaken belief of facts, provides some evidence that the *Proudman* defence is not intended to apply to the individual elements of that offence.

Black CJ and Lee J also saw no reason to hold that the defence had been excluded in respect of the operation of s 44(2). Lee J held that if a person charged under s 44(1) sought to establish the defence under s 44(2), the reasonableness of any steps taken to protect the property would need to be assessed according to the facts of the case before a conclusion could be made on what a reasonable person would do in the circumstances. Likewise, if the accused held an honest and reasonable but mistaken belief about some fact which could support a defence under s 44(2), such a belief would be relevant to determining whether the conduct was reasonable.[83] It is submitted that this position must also give way where a general defence of reasonable excuse is available.

difficult to conceive of an unlawful purpose which would constitute a reasonable excuse': id 969. However Kirby J, who also dissented, was of the opinion that, whilst a lawful purpose would normally also constitute a reasonable excuse, the latter phrase would clearly invite 'consideration of a much wider range of pertinent facts': id 981.

82 *He Kaw Teh* v *R* (1985) 157 CLR 523, 592 per Dawson J; *Australian Iron & Steel Pty Ltd* v *Environment Protection Agency* (1992) 29 NSWLR 497, 511, per Abadee J. Cf *Allen* v *United Carpet Mills* [1989] VR 323. Ironically, the Canadian authorities, which are widely regarded to have invigorated debate on the due diligence defence, draw heavily upon the *Proudman* decision. See K Amirthalingam, 'Mistake of Law: A Criminal Offence or a Reasonable Defence?' (1994) 18 *Crim LJ* 271, 279–80.

83 *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 543.

(c) Criminal Law Concepts and Offences of a Purely Disciplinary Nature — s 60

The offence created by s 60 is unusually wide and imprecise. The section provides no guidance to defence force members as to the kind of behaviour that is likely to 'prejudice the discipline of, or bring discredit upon the Defence Force . . .'. A service member may, therefore, be unable to determine whether his or her conduct falls within or outside the section. Such imprecision makes a mockery of the certainty inherent in the criminal law principle of *nulla poena sine lege*, that a person should not be punished except in accordance with the law.[84] How may the need for certainty be reconciled with the offence created by s 60?

It is submitted that the section may only be properly understood by reference to its disciplinary function. A disciplinary system is, in essence, a set of rules which attempts to regulate the behaviour of a defined class of persons. Disciplinary schemes are based on the premise that the proper administration of an organisation or group of persons requires the observance by its members of certain standards of behaviour. These standards are promulgated and applied by those who oversee the organisation. An act in contravention of those standards may operate to prejudice the good order and proper working of the relevant organisation. Public confidence and respect for the organisation may also be adversely affected by breaches of appropriate standards. It is, therefore, in the interests of both the relevant organisation and the wider community that unacceptable behaviour by members of the relevant group is properly dealt with.[85] Disciplinary offences cast in broad language, such as s 60 of the *Discipline Act*, work towards this goal by requiring members of the relevant group to *generally* behave themselves. These offences, often called 'good order' offences, are a common feature of many disciplinary schemes. An English report into prison discipline, which considered whether the good order offence should be deleted from the list of prison offences, decided that,

[84] The value of certainty in criminal offences is well explained in *Brett, Waller and Williams — Criminal Law Text and Cases* PL Waller and CR Williams [eds], (8th ed, 1997) 18. The authors state 'If one wishes to deter people from engaging in various activities by holding out to them a threat of punishment, it seems essential to state quite clearly and precisely what the forbidden activity is. For, it would seem, the threat cannot have any effect on the mind of the prospective criminal unless he can associate it easily with a particular proposed activity on his or her part.' See also J Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195, 198–9. Cf *Kennedy* v *Lowe; ex parte Kennedy* [1985] 1 Qd R 48, 50. In that case a prisoner had been charged with taking part in an act of '. . .opposition to lawful authority'. The prisoner argued that the phrase was broad as to be meaningless. Accordingly, it was not possible to determine whether any particular act fell within the terms of the offence. The Queensland Court of Criminal Appeal stated that 'the concept of opposition to lawful authority is no more vague than the concept "conduct to the prejudice of good order and military discipline", a phrase which has enabled fighting forces . . . to function without undue chaos', per Thomas J, Connolly & Derrington JJ agreeing.

[85] This passage is adapted from remarks by Brennan & Toohey JJ in *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 563. Similar remarks have been made with respect to other disciplinary codes: *Maynard* v *Racing Penalties Appeals Tribunal of WA* (1994) 11 WAR 1, 6 per Seaman J (rules of racing); *Hardcastle* v *Commissioner of Police* (1984) 53 ALR 593, 597 (police disciplinary regulations); *MacMillan* v *Pharmaceutical Council of WA* [1983] WAR 166, 174 (pharmacists code of professional conduct).

on balance, the offence should be maintained.[86] In a defence of good order offences, not dissimilar to that given by Lockhart J, the Report concluded:

> Ultimately all disciplinary systems rely on the concept of punishing conduct which undermines proper authority or threatens orderly community living; and in reality it is not possible to identify in advance and legislate for every action which is appropriately punishable. In closed institutions there is a particular risk that certain offences may become fashionable unless they can be dealt with swiftly. Given time the behaviour may need to be properly recognised as an offence either by amendment of the main Rules or house rules, but the immediate maintenance of discipline requires an ability to respond at once.[87]

There are further arguments that may be put in favour of the wide language in which good order offences are drafted. The most important is that a generally phrased charge allows for the punishment of conduct which may not fall under any other, more narrowly expressed, offence but which still warrants punishment in the interests of service discipline. The need to maintain discipline, particularly due respect for the hierarchy of authority upon which the conduct of service affairs is based, has been consistently emphasised in service discipline cases.[88] Service tribunals have recognised that service discipline may be threatened by many forms of conduct other than overt insubordination. For instance, a soldier may challenge or question the ability of his superior officer in a manner which does not fall within the specific offences dealing with insubordination but nevertheless merits some sort of disciplinary action.[89] The tribunal has elsewhere indicated that need to respect the hierarchy also casts an obligation upon superior officers to behave with due respect towards their inferior officers.[90]

Good order offences also serve an important procedural function in the prosecution of service offences. Where there is some doubt whether a service member's conduct may fall within the scope of a more serious offence the member may also be charged, in the alternative, with a good order offence.[91]

[86] The relevant offence is contained in *Prison Rules* 1964 (Eng) r 47(21). All Australian correctional statutes contain a disciplinary offence which prohibits prisoners from doing "... any act of omission of insubordination or misconduct subversive of the order and good government of the prison ...", see eg *Prisons Act* 1981 (WA) s 69(i).

[87] [UK, Home Office], *Report of the Committee on the Prison Disciplinary System*, Cmnd 9641 (HMSO, 1985) para 7.90.

[88] *In re Nickols' Appeal* (1966) 9 FLR 120, 126. See also *In re Anning's Appeal* (unreported, Defence Force Appeal Tribunal, No 5 of 1989, 11 May 1990) 19–20.

[89] See *Heddon* v *Evans* (1919) 35 TLR 642 which was referred to by the Federal Court. In that case a soldier had made serious complaints about his superior officer. The soldier had a clear legal right to make complaints but had overstepped this right by making very strong allegations which could not be sustained. The court noted that the remarks did not fall within the scope of serious offences, such as sedition, but still presented a threat to the good order and discipline of the force: id 647.

[90] *In re Anning* (unreported, Defence Force Appeal Tribunal, No 5 of 1989, 11 May 1990) 21.

[91] On the use of s 60 as an alternative charge, see [Department of Defence, Joint Services], *Discipline Law Manual* Vol 1, para 424. The manual points out that s 60 may often appear to be the most useful of several possible alternative charges, it is not intended to serve as a general 'catch-all' alternative charge. The manual notes that any decision to use s 60 as an alternative charge should be after a consideration of s 142 of the *Discipline Act*. That section provides alternative charges to many specific offences.

The good order offence may present service tribunals with a less serious charge upon which to convict a service member whose conduct deserves some form of punishment but for whom a conviction on a more serious charge might be too severe.[92] Nonetheless significant doubts remain about the precise scope of the broad language of such offences.

In the *Stuart* case the tribunal appeared to assume that the scope of s 60 would be clarified by an explanation of the mental element required by the section. The tribunal accepted the submission of both parties that mens rea had not been displaced by the language of s 60 and that the nature of mens rea required under the section was best described as blameworthiness. Rather than enter a discussion on the ambiguous meanings that may be attributed to the phrase mens rea, the tribunal cited the explanation of Gibbs CJ in *He Kaw Teh*[93] which describes the concept to mean 'evil intention or a knowledge of the wrongfulness of the act'. The tribunal expanded upon this phrase through the adoption of a further passage which emphasised the need for the prosecution to establish that a defendant 'knew that he was doing the criminal act . . . charged . . . that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing.'[94] With respect, that statement does not provide guidance as to the meaning of blameworthiness, nor does it indicate the nature of the mental element (if any) contained in the term.

These difficulties were largely resolved in the judgment of Lockhart J. His Honour explained that, while mens rea had not been displaced by the words of s 60, the language of the section did not require the prosecution to prove that the accused knew that what he or she was doing was wrong. Lockhart J held that the broad language of the section indicated the type of conduct envisaged by the nature of the charge. Therefore, Lockhart J concluded, the inquiry of a tribunal hearing a charge under s 60 should not go to the actual or imputed knowledge of a defendant.[95] He favoured the approach taken in *Re*

[92] See *Hembury* (1994) 73 A Crim R 1. In that case a soldier had been charged with several disciplinary offences arising from alleged incidents of sexual harassment of another service member. The soldier was charged with several assault related offences and, in the alternative in two instances, with offences against s 60. This procedure does not allow the use of s 60 to frame duplicitous charges. The tribunal has previously held that the criminal law prohibition of duplicitous charges applies to the *Discipline Act*. Thus, s 60 may be used as an alternative, rather than additional, charge: *Victor* v *Chief of Naval Staff* (1992) 115 ALR 716

[93] (1985) 157 CLR 523, 530. The case is incorrectly cited at this point as *Ke Haw Teh*.

[94] The passage comes from *R* v *Turnbull* (1943) 44 SR(NSW) 108, 109 per Jordan CJ, which was subsequently approved by Windeyer J in *Ianella* v *French* (1968) 119 CLR 84, 108–9. See also *He Kaw Teh* v *R* (1985) 157 CLR 523, 530–1 per Gibbs CJ.

[95] Lockhart J did not exclude the possibility that a charge laid under s 60 might, in some circumstances, require the prosecution to prove some knowledge of wrongfulness on the part of the accused. His Honour did not provide any examples where this might occur: *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 536. Knowledge of wrongfulness may be defined, to some extent, in the negative. Dawson J has recently pointed out that the classic passage in *Sherras*, supra (fn 49), from which the concept of knowledge of wrongfulness is drawn, does not refer knowledge of illegality on the part of the accused: *Leask* v *Commonwealth* (1996) 70 ALJR 995, 1003.

Cottingham's Appeal,[96] an unreported decision of the Court Martial Appeals Tribunal, which was the predecessor of the tribunal. In determining an appeal from a conviction under an earlier version of s 60, the tribunal held that the proper method to determine the presence of blameworthiness was to examine the whole of the circumstances surrounding the offence.[97] The tribunal would be able to apply its own service knowledge to determine whether the circumstances of offence were correctly described as blameworthy. Lockhart J indicated that this inquiry should be guided by a common sense application of the term. He stated that

> Provided the word 'blameworthy' is simply used as a convenient expression to characterise the conduct as charged against a defence member, it perhaps does no harm, but for my part I do not like it. 'Blameworthy' is a word of imprecise and uncertain meaning with emotive connotations. The appropriate test to be applied in considering the application of s 60 is simply to have regard to the words of the section: simple ordinary, English words which will be applied by military personnel having the benefit of their own knowledge and experience as members of the Defence Force and by courts accustomed to construing statutes.[98]

Black CJ and Lee J also emphasised the plain meaning of the words of s 60. Lee J explained that because the words of s 60 were 'notoriously imprecise' the value of a concept such as blameworthiness was that it enabled service members to 'understand the type of conduct the section renders a criminal offence liable to punishment by imprisonment.'[99] The Chief Justice pointed out that 'blameworthy' was not actually mentioned in s 60, therefore any attempt to use the term to explain the section would become counterproductive if it diverted attention from the simple language of the provision.[100]

The approach adopted by Lockhart J does not, however, overcome the previously mentioned difficulties that arise from the uncertain scope of s 60. If service tribunal members use their own military experience to determine charges under the section, it does not follow that service personnel will be better able to understand the scope of the section. The personal experience of the members of service tribunals will necessarily differ from that of

[96] (Court Martial Appeal Tribunal, No 1 of 1972, 8 June 1972). That decision considered a charge under the *Army Act* 1881 (UK) (44 & 45 Vict c58) s 40 as it then applied to Australia. The offence was expressed to cover 'any act, conduct, disorder, or neglect to the prejudice of good order and military discipline': *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 536–7.

[97] Black CJ considered, but did not accept, that the different wording of the earlier version of s 60 might affect the relevance of the Cottingham decision: *Chief of General Staff* v *Stuart* (1995) 133 ALR 513, 521.

[98] Id 537. Black CJ, at 520, cited *Halsbury's Laws of England* [4th ed], vol 41 para 430, which states that the scope of the equivalent English provision was determined by the settled custom and practice of the armed services. This custom was doubtless influenced by the experience of the members of service tribunals. Black CJ pointed out that each of the several authors of that commentary had held the English position of Judge Advocate General or Assistant Judge Advocate General.

[99] Id 544.

[100] Id 521–2. See also *In re Nickols' Appeal* (1966) 9 FLR 120, 126 where the predecessor to the tribunal also expressly declined to expand on the meaning of the words of a good order offence which was a forerunner to s 60.

subordinate service members, who will most commonly be the subject of charges under s 60.

Lockhart J and Black CJ provided further guidance on the scope of s 60. Lockhart J held that the words were naturally limited to conduct or acts which had 'a reasonably direct or proximate and clearly perceived effect upon the discipline and credit of the Defence Force'.[101] Black CJ also thought that the section was not intended to render liable to punishment trivial matters and actions which might have only a remote effect of discipline.[102] This view of s 60 requires prosecuting authorities to demonstrate some type of connection between the conduct upon a charge under s 60 is based and the credit or discipline of the defence forces. It is submitted that the test can function as an appropriate guide, albeit in an *ex post facto* sense, to service members on the scope of s 60. Prosecuting authorities must satisfy a service tribunal that there is a connection between the conduct of an accused service member and the discipline of the service. A service tribunal will consider the submission according to the plain meaning of the section and the concept of blameworthiness. When the tribunal explains its verdict that statement should help explain the scope and meaning of s 60 to service members. This view, of course, assumes that service authorities will bring decisions of the tribunal to the notice of service members.

CONCLUSION

The adoption of the principles of criminal law liability by s 10 of the *Discipline Act* provisions in the Act provides statutory recognition of the similarity between service and criminal law offences. Despite continuing disagreement over the precise range of offences which may be tried under the military judicial power of the Commonwealth, the High Court has unanimously endorsed the view that military offences are an additional code of criminal offences to govern the conduct of service members. These points indicate that, as a matter of principle, service offences should be interpreted and tried as far as possible like criminal offences.

The decision in *Chief of General Staff* v *Stuart*[103] demonstrates how difficult the application of that principle can be. The Federal Court approached the offences under appeal as it would any other criminal offence. Commencing with a presumption of mens rea, the court broke the offence into specific elements, and analysed the mental state (if any) required by each element. Accordingly, the court was able to isolate the consequences of holding that the element of loss was one of strict liability by examining the other elements of

[101] Id 536 quoting Art 134 of the *United States Uniform Code of Military Justice*. For an explanation of the code see D. Zillman, 'Military Criminal Jurisdiction in the United States' (1990) 20 WALR 6.

[102] Id 521. The Chief Justice felt that this limit upon the scope of the section arose from the application of the 'blameworthiness' concept. Lee J was also mindful that the section should not be used oppressively: 544.

[103] (1995) 133 ALR 513.

the offence separately. This approach may represent the orthodox analysis of criminal offences, but its suitability for service offences is questionable. It is submitted that the correct approach must place more weight upon the military and disciplinary aspects of service offences, which may not be achieved through the segmentation and analysis of individual elements of service offences. If service offences are examined as a whole, rather than phrase by phrase, or even word by word, the reasoning of the court is more likely to be attuned to the purpose that underlies the offences. That type of analysis also sits comfortably with the statutory defences that are located in the *Discipline Act*. These defences, based invariably on the reasonableness of the service member's conduct, require service tribunals to examine the behaviour of an accused person as a whole. It is submitted that the same analysis should be adopted for the criminality required to be established by offences.

The Federal Court's adoption of this approach in respect of s 60 is the main reason why the analysis of that section was less problematic. The court was prepared to adopt 'blameworthiness' as an appropriate term to describe the mental element required by that section. The court did not pursue the obvious difficulty of seeking to, in turn, explain this term. It was instead content to allow the members of service tribunals to decide according to their own service experience whether the conduct of an accused person fell within the scope of the term.

A final comment should be made on the refusal of the Federal Court to provide any guidance upon the mental element required under other offences in the *Discipline Act*. It is, of course, entirely proper for an appellate court to restrict its decision to the particular statutory provisions under appeal. On the other hand, there are obvious benefits in the court providing instruction upon other offences. An appeal heard by five justices of the Federal Court provided an ideal occasion to do so. The firm refusal of the Federal Court to consider the position of other offences, and the cumbersome and artificial analysis used in respect of s 44, may serve only to invite further appeals over offences under the *Discipline Act*.