THE CONCURRENCY OF DISCIPLINE AND ADMINISTRATIVE ACTIONS IN THE AUSTRALIAN MILITARY. WHAT IT MEANS FOR ADF MEMBERS' RIGHTS.

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There was no telling what people might find out once they felt free to ask whatever questions they wanted to.
Joseph Heller, *Catch-22*, 43.

This article aims to explore and identify whether the Australian Defence Force's (ADF) use of its discipline and administrative systems accords with legal principles such as double jeopardy and/or double punishment. Additionally, this article questions the nature, role and interaction of the Defence Force Discipline Act 1982 (Cth) *and the Defence Regulation 2016* (Cth). *The article explores the consequences of the ADF chain of command's use of both discipline and administrative systems on its members. The question arises whether the current practices in the ADF amount to an abuse of process when successive or concurrent processes are used, causing oppressive outcomes for those involved.*

I INTRODUCTION

The Australian Defence Force (ADF) labels its discipline as a 'military justice system.'[1] This phrase is said to encompass both discipline under the *Defence Force Discipline Act 1982* (Cth) (DFDA) and administrative sanctions under the *Defence Act 1903* (Cth) and *Defence Regulation 2016* (Cth) (*Defence Regulation*).[2] Just how the discipline and administrative systems work under the umbrella of the one organisation is the focus of this article. The term military discipline, rather than military justice, is used here as it captures the principal justification for a system outside the

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[1] 'Military Justice System', *Australian Government Defence* (Web Page, 8 August 2023) <https://defence.gov.au/mjs/mjs.asp >.

[2] See Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System*, (Senate Committee Report No 134, June 2005) ('Senate Enquiry 2005') footnote 93 citing then General Cosgrove, Committee Hansard, 1 March 2004, 4–5.

civilian domain, which uses the threat of punishment and sanctions to ensure discipline. This differs from criminal or civilian justice administered under the *Constitution* Ch III independent courts and tribunals. The discipline system in the ADF sits under the *Constitution's* defence power in s 51 (vi) and is administered internally by the ADF. It has two main branches for action: the disciplinary and the administrative, operating different processes, but both for the overriding purpose of ensuring a strong, disciplined fighting force.

The discipline system is administered under the DFDA principally by courts-martial[3] or Defence Force Magistrates (DFM).[4] They operate on an *ad hoc* basis to decide serious service offences as to guilt and sentence.[5] A DFM or Restricted Court Martial (RCM) differs from a general court-martial by having limited punishment options, such as six months maximum imprisonment compared to life imprisonment. The DFM must give reasons for their decision, while a court-martial panel does not.

The DFDA discipline system also provides for Summary Authorities (SA). These are appointed through the chain of command and operate across two levels of Commanding Officer (CO) and Superior Summary Authority (SSA), which can impose limited lesser punishments.[6] In 2022, the Subordinate Summary Authority level was repealed[7] and replaced with an expanded Discipline Officer scheme, which has been divided between Discipline Officers (DO), Senior Discipline Officers (SDO) and Infringement Officers (IO).[8]

Power to enforce discipline under the DFDA can arise by virtue of a member's position (for example, the CDF, Service Chiefs, COs, and the Director of Military Prosecutions (DMP)) or by appointment by the CDF

[3] Courts-martial consist of a President and panel of not less than 4 members for a General Court-Martial, or President and not less than 2 members for a Restricted Court-Martial.

[4] DFMs are senior legal military officers, often reservists, providing an alternative to a court-martial and having the same power and jurisdiction as a restricted court-martial; *Defence Force Discipline Act 1982* (Cth) s 127 ('DFDA'); See Senate Inquiry 2005, (n 2) 11.

[5] DFDA (n 4) s 114.

[6] Ibid pt VII div 2.

[7] *Defence Legislation Amendment* (*Discipline Reform) Act 2021* ('(*Discipline Reform) Act'*); DFDA (n 4) pt IA.

[8] DFDA (n 4) pt IA div 7 s9H–Discipline Officers and Senior Officers, 9HA–Infringement Officers.

or a Service Chief as an authorised officer in writing; or a member's appointment or authorisation by a CO[9] or an authorised officer (for example, appointment as a DO or authorisation as an 'authorised member' to charge persons under DFDA s 87).[10]

The processes, which were primarily adversarial for even minor discipline offences requiring proof beyond reasonable doubt, have gone through modifications in 2008 and again in 2021 to reduce the burden on non-legal officers who are authorised at the SA and DO level to impose punishments.[11] DOs[12] provide the lowest level of control and deal with DFDA infringements by prescribed members such as non-commissioned ranks and officer cadets,[13] where there is no factual dispute, the member so elects[14] and the member admits to the misconduct.[15] The 2022 amendment enables IOs[16] to issue an infringement notice.[17] A matter dealt with in this manner cannot be subsequently tried before a service tribunal.[18] The member, whilst not entitled to legal representation, may nevertheless adduce evidence and call witnesses to support a claim of reasonable excuse.[19] If an accused does not admit the infringement or the DO considers the infringement too severe, the DO may refer the matter to an authorised member to decide whether to deal with the allegation as a service offence.[20]

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[9] A CO is a summary authority conferred power by DFDA (n 4) s 3(11).

[10] DFDA (n 4) s 87(6) provides an 'authorised member of the Defence Force' permitted to bring charges is:

(a) the DMP; or

(b) a member of the Defence Force, or a member of the Defence Force included in a class of members of the Defence Force, authorised, in writing, by a CO for the purposes of this section.

[11] *Defence Legislation Amendment Act 2008*; (*Discipline Reform*) *Act* (n 7); See Department of Defence, *Defence Annual Report 2007-2008 Volume One*, (Report, 2008) 119-120.

[12] DFDA (n 4) pt IA div 7 s 9H; Infringement officers s 9HA.

[13] Ibid div 2 s 9CA.

[14] Ibid s 9C(1).

[15] Ibid div 4 s 9EB - Infringement notice and div 5 s 9F Disciplinary Infringement.

[16] Ibid div 4 s 9E.

[17] Ibid s 9FB (2). The member can choose to admit the breach of discipline and be dealt with by a DO, who may impose punishments, such as a fine, reprimand or extra duties over short periods.

[18] Ibid div 2 s 9C(2).

[19] Ibid s 9FA(4).

[20] Ibid ss 9EC, 9FB(1)(d).

The administrative system operates under the *Defence Act 1903* (Cth). ADF members can be subject to administrative sanctions under the *Defence Regulation* 2016 made pursuant to the *Defence Act 1903* (Cth). Section 24 of the *Defence Regulation* designates the Chief of the Defence Force (CDF) (or their delegate)[21] as the person entrusted with the power to terminate a member's service early. This includes for five reasons, most notably where retention of the member's service is *not in the interests of the Defence Force*.[22] *Defence Regulation* s 6(2) assists in elaborating the reasons for something being, or not being, in the *interests of the Defence Force* as relating to one or more of the following:

> (a) a member's *performance*;
> (b) a member's *behaviour* (including *any convictions for criminal or service offences*);
> (c) a member's *suitability to serve*:
> (i) in the Defence Force; or
> (ii) in a particular role or rank;
> (d) workforce planning in the Defence Force;
> (e) the effectiveness and efficiency of the Defence Force;
> (f) the *morale, welfare and discipline* of the Defence Force;
> (g) the *reputation and community standing* of the Defence Force.[23]

All levels of both the discipline and administrative systems in the ADF are subject to various reviews or complaint options. Success in having a matter overturned on review or complaint is generally unlikely.[24] Regardless of which system is utilised, the administrative or DFDA branch –the CDF is exercising ultimate power within a total institution.[25] The *Defence Act 1903* s 10 vests the general administration of the ADF jointly in the Secretary of the Department of Defence and the CDF. The Minister for Defence oversees the Secretary and the CDF and is responsible for the

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[21] See *Defence Regulation 2016* (Cth) s 84 ('*Defence Regulation*').
[22] Ibid s 24 (emphasis added).
[23] Ibid s 6(2) (emphasis added).
[24] Justice John Logan, 'Administrative Discharge in Lieu of Military Disciplinary Proceedings – Supportive or Subversive of a Military Justice System?' (Seminar Paper, Queensland Tri-service Reserve Legal Officers' Panel Training Day, 16 November 2018). <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-logan/logan-j-20181116>.
[25] See Jacoba Brasch, 'More Martial Than Court: From Exceptionalism to Fair Trial Convergence in Australian Courts Martial' (Thesis, University of New South Wales, 2011).

general control and administration of the ADF.[26] However, command of the Defence Force is solely vested in the CDF under the *Defence Act 1903* s 9. Even allowing for the CDF's ability to delegate power under the *Defence Act 1903,* the delegate is by virtue of the common law, or in the case of the appointment of 'authorised officers,' or by the *Acts Interpretation Act 1901* (Cth) s 34AB (1)(c), deemed to exercise the power of the authority, the CDF, who may also still exercise the power directly.[27] Command power derives from the CDF, which is entitled to give authority to others within the hierarchal oligarchy to command obedience and enforce discipline, including through offences such as disobeying a lawful command and failing to comply with a general order.[28]

A military member is under military discipline and can be charged with a service offence up to six months after they leave Defence.[29] Additionally, regulatory power is given to the CDF to unilaterally extend a member's period of service for the purposes of maintaining and enhancing the discipline of the Defence Force.[30] This is significant when considering the intersection of the DFDA service tribunals addressing 'service offences'[31] including territory offences (s 61) and subsequent or concurrent use of the administrative procedures for sanctioning workplace conduct under the *Defence Regulation*. Whether to exercise military discipline is a matter for command under the authorisation of the CDF. Discipline is also a matter for the statutory office of the DMP to consider when deciding to charge a member in relation to an incident.[32]

The DMP is a statutory office established in 2006 by amendment to the DFDA, Part XIA, in response to the Burchett Report, 2001, to encourage

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[26] *Defence Act 1903* (Cth) s 8 ('*Defence Act*'); See further *Private R v Chief of Army* [2022] ADFDAT 1 [21] ('*Private R No 2*').
[27] *Acts Interpretation Act* 1901 (Cth) s 34AB(1)(d).
[28] *Defence Act* (n 26) s 9–Command power.
[29] DFDA (n 4) s 96(6); See also The Explanatory Statement for the *Defence Regulation* (n 21) [68].
[30] *Defence Regulation* (n 21) s 20. 'Section 20 provides that the CDF may extend a member's period of service to ensure that a process under the DFDA relating to the member is completed before their period of service ends.' [67].
[31] DFDA (n 4) s 3A.
[32] Director of Military Law, *DFDA Discipline Law Manual*, (Department of Defence, 9 March 2020) ch 2, 2.3 available Defence FOI 563/22/23 ('LM'); Note subsequent Law Manual's available on Defence Protected Network; Director of Military Prosecutions, *Prosecution Policy* (Department of Defence, 23 December 2021) [7], [8] ('Prosecution Policy').

both a perception of and actual independence.[33] The DMP is appointed by the Minister for Defence.[34] DFDA Part VII, Division I provides for the role of the DMP in laying charges.[35] While independent from the chain of command, the DMP performs functions on behalf of command, addressing serious alleged service offences. It is the CDF that prosecutes an accused person before a superior service tribunal (DFM or courts-martial), represented by the DMP or their appointed prosecutor.[36]

Discipline within the ADF is achieved by utilising the options outlined within the single institution.[37] As such, defence policy recognises that the selection of DFDA discipline or administrative sanction is a disciplinary measure activated by a command judgement call.[38] The continuum, however, across the levels and between the two branches of discipline in the military workplace is blurred. This attracts a disincentive for the use of discipline at the higher service offending end. The lowest level of control of both DFDA discipline officers and administrative sanctions has proved popular as both are seen as quick and efficient. This is supported by the increasing use of these more informal processes over other options,[39] although this may risk bringing public backlash and recruiting difficulties.[40] This is most unlike the options and choices before a civilian

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[33] See DFDA (n 4) pt XIA; J.C.S. Burchett QC, *Report of an Inquiry into Military Justice in the Australian Defence Force* (Department of Defence, 12 July 2001); In June 2003 an interim DMP was appointed, the position was not statutory until DMP McDade in 2006; See Department of Defence, *Director of Military Prosecutions Annual Report* (Report, 2007) 1–5.

[34] DFDA (n 4) s 188GF.

[35] Ibid s 103.

[36] Ibid [29]–[32] noting those acting in this role as Reserve legal officers leads to the reduction in permanent ADF legal officers' knowledge of the disciplinary area.

[37] Ibid [1.4].

[38] Senate Inquiry (n 2) [2.1] 'The military justice system has two distinct but interrelated elements: the discipline system and the administrative system'; See also Bronwyn Worswick, 'War-Fighting and Administrative Law: Developing a Risk-Based Approach to Process in Command Decision-Making.' (2015) *AIAL FORUM* 79, 58.

[39] See *Judge Advocate General DFDA Report* (Department of Defence, 2021) Annexures ('JAG DFDA 2021'); *Judge Advocate General DFDA Report* (Department of Defence, 2022) Annexures ('JAG DFDA 2022').

[40] Andrew Greene 'New perks on offer as Defence sounds alarm on military staff recruitment and retention' *ABC News* (Web Page, 22 October 2022) <abc.net.au/news/new-workplace-perks-on-offer-as-defence-sounds-alarm-on-mili/101565214>; See Logan (n 24) 'One reason, perhaps, for resort to

Director of Public Prosecutions (DPP), who is not required to take into account administrative sanctions when deciding to implement a criminal prosecution. The difference in purpose from the civilian DPPs' duty to uphold the states' enforcement of a standard of conduct recognised as criminal is significant.

The Senate Inquiry 2005, into *The Effectiveness of Australia's Military Justice System*[41] stated that 'all "non-military" offences should be removed from the military justice system' and that the 'civilian authorities, police and courts should deal with offences that have a civilian equivalent or involve civilian criminal elements, in addition to all offences caught by s 61 of the *DFDA*.'[42] The DFDA s 61 absorbs all of the criminal law of the Jervis Bay Territory into the discipline of military members under the DFDA. The Senate Inquiry recommendation was not followed by the government of the day. However, such a position would not prevent the administrative disciplining of military personnel for disciplinary breaches of their code of conduct in the same manner as in the civilian domain.

The arguments put to the High Court across the years for the need for a separate disciplinary system outside the Ch III courts maintain that it is vital for discipline purposes.[43] Based on this argument, the High Court has accepted the system is required to provide a disciplined force to defend the nation[44] and, as such, the DFDA provides for a discipline system alongside the administrative system, both of which are not criminal jurisdictions in nature.[45] The High Court maintains this historical exceptionalism of

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administrative discharge may have been an apprehension as to the delay that would attend a DFDA prosecutorial process, relative to the swiftness with which administrative discharge might be affected. Another might be the retention of greater control over events by the CDF offered by administrative discharge, relative to prosecution under the DFDA.' [46].

[41] See Senate Inquiry 2005 (n 2) 98 [5.83].

[42] Ibid.

[43] See, eg, *Private R v Cowen* (2020) 383 ALR 1 39 [108] (Gageler J) ('*Private R*').

[44] Ibid [95] (Gageler J).

[45] *Defence Regulation* (n 21) ss 6, 24. This has been vindicated in the High Court in *White v Director of Military Prosecutions* (2007) 231 CLR 570 [12]–[14] ('*White*'). See *Lane v Morrison* (2009) 239 CLR 230 'on the ground that the system is to serve the purpose of discipline and is supported by the defence power s 51 (vi) of the *Constitution* which states:

> The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with

military discipline and, in *Private R v Cowen,*[46] supports a broad reading of the defence power enabling the legislature considerable freedom in addressing military discipline. Kiefel CJ, Bell and Keane JJ observed in *Private R* the 'system of military justice pursues the specific purpose of securing and maintaining discipline within the armed forces rather than the general purpose of punishing those guilty of criminal conduct.'[47] *Private R* put this difference beyond doubt by reinforcing that DFDA discipline did not conflict with the civilian criminal jurisdiction and that the two could run concurrently as they operate for different purposes.[48] The High Court referred to the Defence Force Discipline Appeal Tribunal (DFDAT) decision of *Williams v Chief of Army*[49] in which the distinction between an organisation disciplining its members and the criminal law was clearly set out

> …if a defence member be convicted of a service offence under the DFDA and subsequently prosecuted under civilian criminal law in respect of the same conduct, he or she does not face double jeopardy, but would be convicted of an offence against the criminal law and be guilty of a breach of the disciplinary code constituted by the DFDA.[50]

Should further confirmation be required, the High Court in *Private R* made it clear military discipline is something other than the criminal law when adopting *McWaters v Day* [51] which held that as the DFDA 'is supplementary to, and not exclusive of, the ordinary criminal law, it follows that it does not deal with the same subject-matter or serve the same purpose as laws forming part of the ordinary criminal law.'[52] And again in *Haskins v The Commonwealth*[53] where their Honours state:

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respect to: (vi) the naval and military defence of the Commonwealth and of the several States, and *the control of the forces* to execute and maintain the laws of the Commonwealth. *Australian Constitution, 1901*, s 51(vi)' (emphasis added).

[46] *Private R* (n 43).

[47] Ibid [54] (Kiefel CJ, Bell and Keane JJ); [95] (Gageler J).

[48] Ibid [59], [72] (Kiefel CJ, Bell and Keane JJ); [135] (Gordon J).

[49] *Williams v Chief of Army* [2016] ADFDAT 3 ('*Williams*').

[50] Ibid [48]–[49] (Tracey and Hiley JJ).

[51] *McWaters v Day* (1989) 168 CLR 289.

[52] Ibid [16] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[53] *Haskins v The Commonwealth* (2011) 244 CLR 22.

> Because the decisions made by courts martial and other service tribunals are amenable to intervention from within the chain of command, the steps that are taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline … the punishment is imposed by the (legislatively regulated) exercise of the power of command.[54]

Defence argues the concurrent or subsequent use of the administrative and discipline systems escapes a double jeopardy issue.[55] Double jeopardy is an ancient principle recognised by the common law as preventing an individual from facing multiple processes arising out of the same set of facts.[56] Defence claims it avoids the double jeopardy principle by asserting, on the one hand, that it is addressing criminal offending (although this is internal discipline). On the other hand, administrative sanctions are a separate protective matter, just as in the civilian domain, where the two independent civil and criminal processes do not activate the double jeopardy principle.[57] Thus, they claim administrative discharge (i.e. termination of service) can be imposed while a disciplinary action is underway and/or concluded, irrespective of whether the person has been exonerated regarding the DFDA matters.[58] Legal principles, other than double jeopardy, are raised and discussed further below. They include the privilege against self-incrimination, double punishment, and issue estoppel.

It is, therefore, contended that there exists a serious concern that the ADF may have lost sight of the intended operation of the two branches of military discipline, leading to the possibility of an abuse of process or metaphorically 'wanting to have its cake and eat it too'. On the one hand, Defence cannot claim, as is established and accepted by the courts, that service tribunals are purely a discipline-only system not enforcing the criminal law, but on the other hand, for the purposes of separating the discipline branch from the administrative branch Defence aligns DFDA

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[54] Ibid [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[55] LM (n 32) ch 4 [4.9] footnote 75 referring to Military Personnel Policy Manual ('MILPERSMAN') pt 9 ch 1 1.15 and [4.70] footnote 92 relying on *Hardcastle v Commissioner of Police* (1984) 53 ALR 593 ('*Hardcastle*').
[56] See, eg, *Broome v Chenoweth* 1946 73 CLR 583, 599 (Dixon J).
[57] MILPERSMAN (n 55) ch 2 [2.15].
[58] See, eg, Head of Defence Legal Minute HDL/OUT/2015/158 – Concurrent Administrative and Disciplinary/Criminal Action – Guidance for Commanders, Defence FOI 171/22/23 Redacted, [9], [20].

discipline with a criminal function. If it is accepted that there are two branches of military discipline, one under the DFDA and one under the *Defence Regulation* and that both pursue the overarching purposes of discipline, be it punitive or protective, then an incident that attracts discipline at one level cannot from the same set of facts attract administrative sanction at the other level without raising the question of double jeopardy, issue estoppel or double punishment in the workforce.[59] This has been the subject of criticism by President Logan of the DFDAT, both in extra-judicial writing[60] and in matters before the DFDAT. President Logan in *McCleave v Chief of Navy*[61] in dissent said:

> With its revelation of the initiation of administrative discipline-related proceedings (the notice to show cause) prior to the making of a definitive decision by the DMP as to whether to institute service offence proceedings, it may also be that the case highlights a systemic disjunct between administrative and prosecutorial disciplinary process within the ADF. This, disjunct, too, may be indicative of a high level failure of command within the ADF.[62]

This article first sets out the issues for the concurrent operation of DFDA punishment and administrative sanctions. It then describes key legal principles that are raised. Finally, several case examples demonstrate the potential for abuse when ignoring the legal principles concerned before drawing a conclusion.

II THE ISSUES

The DFDA's long title states it is 'an Act relating to the discipline of the Defence Force and for related purposes.' Defence maintains that the need for a *sui generis* system, which is unique and independent of the general law, ensures a functional, disciplined fighting force that can defend Australia's interests. The DFDA Law Manual 2020 (LM) explains command control while acknowledging that 'if people are subject to procedures that lack transparency and timeliness, their confidence in

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[59] Joshua Kulawiec, 'Double Jeopardy in the Regulatory State' *Australian Law Reform Commission Reform Journal* 78 (2001) 62-74; See *Hammond v Commonwealth* (1982) 152 CLR 188 ('*Hammond*').
[60] Logan (n 24).
[61] *McCleave v Chief of Navy* [2019] ADFDAT 1 ('*McCleave*').
[62] Ibid [31], [153]–[162] (Hiley and Garde Members).

commanders and the military discipline system will be undermined.'[63] The options for the command to address an incident are described in the LM:

> (1) taking no formal action;
> (2) taking disciplinary action, or referring the matter for investigation by the civilian authorities with a view to criminal action; and
> (3) initiating administrative action.[64]

The LM indicates three categories of obligations arising, with no particular hierarchy, in the event of an 'allegation, occurrence or incident.'[65] These are:

> a. safety, health and welfare — of members, and other persons affected by ADO activities or present in ADO workplaces;
> b. security — of personnel and information; and
> c. discipline of ADF members.[66]

Both a and b address protection concerns, and c addresses disciplinary punishment. These obligations interact on one dimension along a line of punishment or sanctions, entailing a range of similar options across DFDA punishment and administrative sanctions, such as rank reduction, monetary forfeiture and extra duties, reinforcing that there is just one discipline system with two branches.[67] As noted in *Williams*

> [t]he objects of disciplinary proceedings conventionally include protecting the public, maintaining proper standards of professional conduct by members of the relevant profession (here, the ADF), and protecting the profession's reputation. Thus, conduct extraneous to professional practice attracts professional discipline because it can inform questions of 'fitness' of the individual, and the reputation of the profession as a whole.[68]

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[63] See LM (n 32) [4.2].
[64] Ibid [4.4].
[65] Ibid [4.6].
[66] Ibid.
[67] See MILPERSMAN (n 55) ch 2, in particular [2.8]; DFDA s 68, Schedule 2; See Logan (n 24) [7] dismissal is the second most severe penalty. It is available as both a discipline penalty and an administrative sanction.
[68] *Williams* (n 49) [47] (Tracey P and Hiley Member).

The High Court in *Private R* supported the earlier High Court decision in *Re Tracey*[69] by confirming the parallel operation of the civilian criminal jurisdiction and disciplinary proceedings under the DFDA and that this does not preclude criminal prosecution by the civilian courts. In *Re Tracey*,[70] the Court held that the sections of the DFDA attempting to deal with a perceived double jeopardy were invalid because they created an impermissible ouster of the civilian court's jurisdiction to try offences.[71] The double jeopardy sections of the DFDA s190(3) and (5) were repealed due to the decision.[72] The remaining sections dealing with the operation of the two jurisdictions affirm the obvious. DFDA s 190 (1) states that civil courts don't have jurisdiction over service offences as these are purely disciplinary offences under the DFDA. Section 190 (2) confirms that civilian courts' jurisdiction is unaffected by the DFDA except for subsection (4), which limits the jurisdiction of civilian courts by excluding their addressing any offences by a defence member or defence civilian in relation to an ancillary offence under the DFDA or *Defence Regulation*, except in relation to s 61 offences. The civilian courts will never accept the ouster of their civilian criminal jurisdiction. As *Private R* reinforces, the civilian courts can prosecute a matter arising out of the same set of facts, and there is no double jeopardy prohibition as the matter being addressed under military discipline is purely disciplinary. The only problem the High Court could see with concurrent dealings was simply the difficulty of a person unable to 'be physically in two places at the same time.'[73]

DFDA s 63 provides for conferral with civilian DPPs in the case of incidents involving serious criminal offences that are alleged to have occurred in Australia.[74] The Memorandum of Understanding 2007 between the DMP and civilian DPP covers the (Commonwealth) DPPs' consent for

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[69] *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518.
[70] Ibid.
[71] See *McWaters v Day* [1989] 168 CLR 289 [14].
[72] *Defence Legislation Amendment Act 2003* (Cth) commenced 17 June 2004. See also, David Letts and Rob McLaughlin, 'Intersection of Military Law and Civil Law' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 106, 107-08.
[73] *Private R* (n 43) [102] (Gageler J).
[74] DFDA (n 4) s 63; Prosecution Policy (n 32) [2.10]. Under the Memorandum of Understanding 2007: When an ADF member commits in Australia the offences of treason, murder, manslaughter or bigamy, sexual assault and any offence requiring consent of a Director of Public Prosecution or a Minister to prosecute, consent must be sought from the CDPP in order to bring the matter before a service tribunal; See also Letts and McLaughlin (n 72) 108–09.

a matter to proceed as a service matter. The Memorandum has not been updated or reviewed since 2007. It appears DPPs are infrequently consulted, despite the High Court referencing this possibility in *Private R*.[75] The DMP makes the ultimate decision on matters that could be prosecuted as s 63 offences, with very few matters reaching the civilian criminal courts.[76] DFDA s 63 would appear to be the legislature's intent to ensure the operation of the criminal law is protected in the case of serious military offending.[77] There is room for further education in the ADF on the need to refer serious criminal offending, particularly within Australia, to the civilian courts. Equally, the civilian DPP must ensure the state can uphold the criminal law standards. As the Crime and Corruption Commission, Queensland (CCC) has indicated in relation to serious breaches by public servants, discipline should never preclude the operation of criminal prosecution [78] and criminal prosecution should take priority over discipline.[79] While this may cause challenges for the military claim to require quick and effective discipline, against this is the reality that the discipline system, particularly at the service offence level, cannot be said to be quick.[80]

The unique *sui generis* system can activate several options crossing the spectrum, starting with DO infringements and escalating to service offences to be dealt with either by summary authorities or by superior tribunals in the discipline branch of the system and administrative sanctions in the second branch of control. All levels have a review process. In relation to the DFDA matters, internal review is addressed as prescribed by Part VIIIA of the DFDA. This goes through several internal reviews and the possibility of an appeal to the DFDAT, with an appeal from that body

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[75] *Private R* (n 43) [4] (Kiefel CJ, Bell and Keane JJ).
[76] LM (n 32) [2.74].
[77] See Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth), [589]–[594].
[78] 'Prevention in Focus: Corruption in the public sector- prosecution and disciplinary action in the public interest' *Crime and Corruption Commission Queensland* (Web Page, 26 October 1922) <https://www.ccc.qld.gov.au/publications/prevention-focus-case-studies> 'Where there is evidence of criminal offences, public sector employees may also face disciplinary action for the same conduct. However, this may be in addition to, and not instead of, prosecution for serious improper conduct.'
[79] See further, JM Gordon 'Double Jeopardy and Discipline Proceedings' (June 1991) *Criminal Justice Commission*, 12 [14].
[80] *Private R* (n 43) is an example of the alleged conduct occurring in 2015 being bought before a DFM in 2019.

available on a point of law to the Federal Court.[81] For administrative discipline, a member can, within 14 days of receiving an administrative sanction, seek redress of grievance in relation to the decision by making a complaint under Part 7 of the *Defence Regulation*.[82] The processes utilised at the administrative level adopt a 'show cause' infringement requirement for a member under the *Defence Regulation*.[83] Alternative methods to improve discipline also exist, such as corrective training and complaints.[84]

The DFDA system is primarily adversarial at the service offence level, requiring proof beyond reasonable doubt despite these matters being effectively workplace discipline. Service tribunals act much like civilian criminal courts but are nevertheless significantly different. Then Justice Kirby of the High Court described the differences in *White*:

> … [t]he lack of the necessity (or actuality) of universal legal training; the *ad hoc* constitution of the tribunal; the lack of tenure of members; and the requirement to select persons who must be associated with the Force (and therefore necessarily interested in the conduct of the accused), all represent very serious departures from the normal features of Ch III courts.[85]

Recent changes outlined in Part I above to discipline officer infringements and summary authority proceedings have sought to eliminate more protective legal rights requirements seen as onerous on commanders and those managing these matters.[86]

Understanding that DFDA proceedings (DO, summary authorities or superior tribunals) do not uphold criminal law but rather the discipline of the Profession of Arms is necessary to ensure the importance of fairness and justice in applying discipline. The burden of proof of the higher criminal standard of beyond reasonable doubt and the civilianising

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[81] DFDA (n 4) ss 150–156. See *Howieson v Chief of Army* [2021] ADFAT 1 [61] (Logan P, Brereton and Perry Members).
[82] *Defence Regulation* (n 21) s 41(2).
[83] Ibid s 24(2).
[84] See MILPERSMAN (n 55) pt 9 ch 3, Corrective training 3.7 (d) not punishment (e) separate from discipline and administrative; *Defence Regulation* (n 21) pt 7, Redress of Grievances; *Complaints and Alternative Resolutions Manual*, ch 6 available DPN.
[85] *White* (n 45) (Kirby J).
[86] *(Discipline Reform) Act* (n 7).

trappings[87] adopted from criminal proceedings in service tribunals may well confuse that what is occurring is effectively a supplementary criminal trial but with the differences noticed by Kirby J. This factor, together with the alleged need to address criminal activity in foreign domains[88] along with the historical *sui generis* nature of the service tribunals may account for the adoption of the criminal trappings. As Mason CJ, Wilson, and Dawson JJ stated in *Re Tracey,* 'the power to make laws concerning the defence of the Commonwealth contains the power to enact *a disciplinary code standing outside Ch III and to impose upon those administering it a duty to act judicially*.'[89]

The importing of civilianising criminal standards and processes at the superior service tribunal level is as Dixon J said in *R v Cox; Ex parte Smith* (1945), 'to ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or navy or air force. But they do not form part of the judicial system administering the law of the land.'[90] This factor may make service tribunals one of the few disciplinary bodies that mimic aspects of the criminal court's processes, causing a misreading of their activity as effectively achieving the same as a civilian criminal prosecution when their purpose has no such goal. As Members Tracey and Hiley delineate in *Williams*, service tribunals sit as part of the executive function:

> Command of the Defence Force is an aspect of the executive power. The discipline of the force is an aspect of its command. Service tribunals may act judicially, but they operate within the chain of command to 'inform the conscience of the commanding officer'… Ultimately, they operate as part of the command (executive) function, albeit that they act judicially; the presence of the 'trappings' of a trial is a necessary and appropriate concomitant of any formal process of adjudication of alleged violations of a

[87] See Matthew Groves. 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364–95.
[88] Defence Legislation (Enhancement of Military Justice) Bill 2015 (Bills Digest no. 115, 2014–15), 5. 'The incorporation of civilian criminal offences into the military discipline system enables these offences to be dealt with should they occur when ADF members are overseas…where an adequate criminal law framework is absent… or if the…host country law is undesirable.'
[89] *Re Tracey Ex parte Ryan* (1988) 166 CLR 518 [1989] [540]–[541] (emphasis added).
[90] *R v Cox; Ex parte Smith* (1945) 71 CLR 1, 23 (Dixon J).

> disciplinary code in order to afford procedural fairness, but it does not transform the essentially executive nature of the function of maintaining a disciplined and effective defence force into a judicial one…[91]

The blurring of the two branches, DFDA discipline and *Defence Regulation* sanctions, is witnessed by the fact that despite the DMP's powers being under the DFDA, the DMP prosecution policy states the DMP may make recommendations relating to administrative sanctions when deciding to charge under the DFDA.[92] This supports the proposition that all actions across the two branches of discipline work to address the discipline of members. When an allegation or a charge is referred to the DMP, they are responsible for deciding whether to initiate or continue with the charge and at what level within the superior system.[93] While the DMP is a statutory role, perceptions of bias, favouritism or influence will always exist when all power devolves back to the CDF.[94] As the sole commander of the defence force, the CDF authorises command of the three services and has ultimate authority for disciplining defence members and defence civilians under the DFDA and under the *Defence Regulation*.[95]

A further aspect of the issues raised is that the lowest level of discipline under the DFDA, the DO,[96] or adopting the second branch, namely administrative sanctions, has proved popular. There has been an increasing use of less formal processes instead of service tribunals. The 2022 JAG Report indicates for the period January to December 2022, there was one General Court-Martial, five Restricted Court-Martials, 29 DFM hearings, nine Superior Summary Authority hearings, 189 CO dealings, 348

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[91] *Williams* (n 49) [46] (Tracey P and Hiley Member) (footnotes removed).
[92] Prosecution Policy (n 32) [7], [8], [18]. While the DMP may make recommendations concerning administrative action, decisions to take action is a commanders.
[93] Ibid [18].
[94] See Department of Defence, *Director of Military Prosecutions Annual Report* (Report, 2020) [66] ('DMP Annual Report') 'I am cognisant that, while my office and the execution of my duties under the DFDA are statutorily independent, the prosecution function is exercised on behalf of command and for the vital purpose of maintaining and enforcing service discipline'; See further, Senate Inquiry (n 2) 'lack of independence in the review process; lack of impartiality in the review process—'Caesar reviewing Caesar'' xxxix.
[95] Explanatory Memorandum, Defence Legislation Amendment (First Principles) Bill 2015, 20(d).
[96] DFDA (n 4) pt IA.

Subordinate Summary Authority hearings, and 2897 Discipline Officer Infringements.[97]

These processes all occur under one institution's remit. That institution is hierarchically structured, with the CDF sitting at its apex and the sole person with ultimate authority to direct the activation of both discipline and administrative processes. Quite simply, the DFDA and *Defence Regulation* operate in tandem to address workplace discipline that involves enforcement of service offences, which include the subsumed civilian criminal law of the Jervis Bay Territory (but not for the civilian criminal system and more minor breaches of acceptable standards of behaviour).[98] This puts it outside the ordinary understanding as it occurs in the civilian realm where the application of the principle of double jeopardy applies between criminal offending and breaches of workplace conduct. Double jeopardy does not apply in the crossover from workplace discipline to the criminal law. However, double jeopardy does apply within the one workplace discipline system. The following section describes the import of these legal principles in the context of military discipline.

III Legal Principles

This section addresses some of the fundamental legal principles that the current operation of the DFDA and *Defence Regulation* may impinge. This concurrent operation of the discipline and administrative systems raises questions around fairness, such as the privilege against self-incrimination and concerns for the mental health of military members when they feel they have been unjustly treated.[99] Reports have described the ADF's discontent with the *modus operandi* of the discipline and administrative systems.[100] For instance, the DMP has argued that reliance on an adversarial criminal

[97] JAG DFDA 2022 (n 39) Annexures; See further, JAG DFDA 2021 (n 39) Annexures indicates for the period January to December 2021 there were 0 General Courts-Martial; 2 Restricted Courts-Martial; 51 Defence Force Magistrate hearings; 9 Superior Summary Authority hearings; 227 CO dealings; 543 Subordinate Summary Authority hearings; and 3646 Discipline Officer Infringements.
[98] DFDA (n 4) s 61.
[99] See, eg, *Royal Commission into Defence and Veteran Suicide* (Interim Report, 2022).
[100] See, eg, Senate Inquiry 2005 (n 2) ch 3.

justice model is inappropriate for a discipline system.[101] Experience of the DMP has indicated an almost subversive intent by command to maintain control despite all the legislative reform to present an independent process for discipline to assuage concerns of fairness.[102] Judicial review of Defence decisions relating to termination and redress of grievance decisions made under the *Defence Regulation* Part 3 Div 5 and Part 7, respectively, have been brought to the Federal Court or Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act* 1977 (ADJR), generally on matters of procedural fairness.[103] Abuse of process or unfairness can encompass a failure to observe any of the following critical legal precepts.

A *Privilege against self-incrimination and the right to silence*

The ancient protections, such as the privilege against self-incrimination, aim to prevent a person from being made to incriminate themselves, such as requiring information to be given in administrative processes that may be used in other civil, disciplinary or criminal proceedings.[104] The courts have established that the privilege against self-incrimination is an essential substantive common law and human right.[105] However, this right may be modified by clear legislative intent, for instance, where public interest considerations override. This includes assessing the need to achieve regulatory compliance and effective prosecution. The legislature must decide when public interest considerations prevail over human and common law rights such that the law can apply differently.[106] Whether or not the information may be incriminatory, the right to silence protects the individual from being required to provide information that could be used

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[101] Michael Inman, 'Defence Criminal Investigations Hamstrung by Discipline Laws: Prosecutor,' *The Sydney Morning Herald*, (Web Page, 6 January 2018) 'The military's top prosecutor DMP 2018 used her annual report to argue the Australian Defence Force should consider abandoning the current military discipline system – based on the largely adversarial civil criminal justice model.' <https://www.smh.com.au/national/defence-criminal-investigations-hamstrung-by-discipline-laws-prosecutor-20180105-h0dyiq.html>.

[102] Senate Inquiry 2005 (n 2). See DMP Annual Report 2020 (n 94) [28]–[40].

[103] See Judith Bannister, 'Military Administrative Law', in Creyke et al (n 72) 87, 100–01 for a discussion of some of the cases.

[104] See *Evidence Act 1995* (Cth) s 128.

[105] See *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1.

[106] Australian Law Reform Commission, *Federal Civil and Administrative Penalties in Australia* (Report No 9, 5 December 2002) [18.21] ('ALRC Report').

against the individual's interests. This common law right applies beyond criminal proceedings to include civil and disciplinary workplace matters.[107] For instance, in the civilian realm, an employee charged with criminal offences, such as bribery, when asked to answer questions by their employer or risk termination, claimed denial of procedural fairness and was supported by the court 'as he was not given an opportunity to respond … at an appropriate time.'[108]

The privilege against self-incrimination is potentially being jeopardised in the ADF by the administrative 'show cause' requirement.[109] This was the subject of scrutiny by the DFDAT in *McCleave v Chief of Navy*.[110] President Logan, in dissent in that matter, made strong statements regarding administrative action that required the accused to respond to a notice to 'show cause' statement. President Logan indicated this was a breach of the right to silence and gave a forensic advantage to any further proceedings in the military domain such that these would be an abuse of process.[111] Logan J has indicated in extra-judicial writing that the claim a defence member has a benefit in the opportunity to respond to the show cause notice 'may be more apparent than real' when considering a right to silence.[112] Just how the right to silence is impinged is demonstrated further in the cases discussed below. Other criminal procedure protections raised include double jeopardy.

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[107] It is recognised in the DFDA (n 4) s 101B(2) and LM (n 32) [12.24]. See also *Reid v Howard* (1995) 184 CLR 1, [15]; *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141; *Griffin v Pantzer* (2004) 137 FCR 209, [44]. Cf *Deputy Commissioner of Taxation v Gould* [2020] FCA 337.

[108] See, eg, *Murray Irrigation Ltd v Balsdon* [2006] NSWCA 253, [26]; '…the failure to observe the privilege against self-incrimination meant that the termination of employment was harsh, unjust or unreasonable' [39]–[40]; *Baker v Commissioner of the Australian Federal Police* [2000] FCA 1339.

[109] *Randall v Chief of Army* [2018] ADFDAT 3 ('*Randall No 1*'); *Kearns v Chief of Army* [2022] ADFDAT 3 ('*Kearns*'); See also LM (n 32) ch 4.

[110] *McCleave* (n 61).

[111] Ibid [3], [7] (Logan P).

[112] Ibid [186] (Hiley and Garde Members); See further, Logan (n 24) [19].

B *Double jeopardy*

The principle of double jeopardy establishes that a person should not be dealt with twice for the same action.[113] Double jeopardy is inapplicable across the boundary between criminal and civil or discipline proceedings as they operate for different purposes.[114] Members Tracey and Hiley confirmed this in *Williams,* stating: '[t]he notion that disciplinary tribunals can impose disciplinary sanctions for conduct that is also a criminal offence, without offending the rule against double jeopardy, is well established.'[115] However, double jeopardy applies internally within criminal law and workplace discipline.[116] Further, civil, administrative, and disciplinary proceedings observe doctrines such as abuse of process and issue estoppel to uphold the public interest in fairness and finality when addressing the concerns of double jeopardy. The quandary for the military discipline system is that while a range of processes exist, from administrative action under *Defence Regulation* to the options under the DFDA applying different procedures, they are all equally operative under a hierarchical chain of command and claimed to be to discipline and maintain defence standards. This claim is what makes the DFDA military discipline system constitutional.[117] If this is so, then the question arises: is it possible to consider the same set of facts in a range of processes within this one institution as not subjecting an individual to the issue of double jeopardy in the workplace?[118]

The Senate Inquiry 2005 addressed the issue of gathering evidence that could be used in the divergent discipline and administrative pathways in relation to the same conduct. The Inquiry noted, '[t]he principle behind

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[113] See, eg, *Criminal Code* (Qld) s 16 'a person cannot be twice punished either under the provisions of the Code or under the provisions of any other law for the same act or omission…'

[114] *Hammond* (n 59) 206 (Deane J); See further Kulawiec (n 59).

[115] *Williams* (n 49) [47] citing *Hardcastle* (n 55) 596–97.

[116] *Wee v Law Society of Singapore* [1985] 1 WLR 362 at 368; *(R (on the application of Coke- Wallis) v Institute of Chartered Accountants of England & Wales* [2011] UKSC 1 'double jeopardy' prevents successive proceedings before a regulatory or disciplinary tribunal; See further, Calvin Gnech, 'Twice punished? Are criminal plus disciplinary proceedings fair?' *Proctor* (Web Page, 4 November 2021) <https://www.qlsproctor.com.au/2021/11/twice-punished-are-criminal-plus-disciplinary-proceedings-fair/>.

[117] See *Lane v Morrison* (2009) 239 CLR 230.

[118] LM (n 32) ch 4, [4.69]–[4.73]; See DFDA (n 4) s144; Cf *Howieson v Chief of Army* [2021] ADFAT 1 [62] (Logan P, Brereton and Perry Members).

double jeopardy is that a person should not be punished twice for what is substantially the same act and should not be unfairly subject to the two procedures because of vexatious motives.'[119] What is significant for this protection is that the CDF is the ultimate decision maker in both pathways, effectively enabling 'repeated attempts to punish an individual for substantially the same offence putting the accused through unnecessary ordeal …' [120] Despite the recommendation made by the Senate Inquiry[121] examples still exist, and some are discussed in the next section. These provide evidence that service personnel charged with a service offence may face adverse administrative action before, during, or after hearing and acquittal by the superior tribunal or the overturning of the superior tribunal's decision on appeal to the DFDAT. In *Kearns v Chief of Army*,[122] the accused, a Lieutenant Colonel, was subjected to administrative dealing prior to the outcome of his appeal to DFDAT. This was the subject of intense criticism by the three Tribunal members and is discussed below in Part IV in Section E.[123]

The ADF maintains that the DFDA discipline and *Defence Regulation* sanctions attract a distinction as administrative sanctions differ from discipline actions based on the claim; they do not provide punishment but instead protect the public from public officials or servants' negligent or errant behaviour such as fraud. According to the ADF's Military Personnel Policy Manual, the ADF's policy on the interaction of administrative and disciplinary proceedings relies on the distinction made in the civilian domain between criminal 'punishment' and administrative 'protective' sanctions:

> Regardless of the outcome of Defence Force Disciplinary Act proceedings or a civilian criminal trial, an administrative sanction can still be imposed on the member out of the same set of facts that led to the disciplinary and/or criminal proceedings…Disciplinary and administrative proceedings are essentially different in character, purpose and result**.** A punishment is a penalty that is imposed by statute on a member for a breach of a disciplinary or criminal offence, whereas the imposition of an administrative sanction such

[119] Senate Inquiry 2005 (n 2) [13.22].
[120] Ibid [13.23].
[121] Ibid Recommendation 36 [13.27].
[122] *Kearns* (n 109).
[123] Ibid [119]–[132]. Cf Head of Defence Legal Minute (n 58).

> as a formal warning or censure has a whole of organisation protective purpose and is designed to reinforce the need for and to encourage members to maintain high standards of conduct and performance.[124]

This statement, however, wrongly aligns criminal prosecution with disciplinary punishment. If it were dealing only with criminal offences, it would be accurate. By contrast, discipline in the civilian workplace generally attracts the civil burden of proof on the 'balance of probabilities.' However, the *Briginshaw* principle in the civilian system recognises where severe consequences follow, such as potential loss of profession, the burden is at a heightened level:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal… in such matters 'reasonable satisfaction' *should not be produced by inexact proofs, indefinite testimony, or indirect inferences*.[125]

Formal warnings and censure as sanctions are different terms but not dissimilar in outcome to severe reprimand and reprimand under the DFDA,[126] blurring the distinction between sanction and punishment.[127] Given that many administrative 'sanctions' result in a member leaving the ADF, the stated purpose of reinforcing and encouraging members' high standards and performance 1) seems no different in purpose than the stated goal of discipline, and 2) would appear to be redundant given the effective end goal of removal from the ADF. The claim made above is also contradicted by the current Prosecution Policy of the DMP, explaining the administrative system is also part of the discipline process:

> Laying charges under the DFDA is only one tool that is available to establish and maintain discipline. In some circumstances,

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[124] LM (n 32) 4.49; MILPERSMAN (n 55) ch 2 2.15. See also *Kearns* (n 109) [125].

[125] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–62 (Dixon J) (emphasis added); See further *G v H* (1994) 181 CLR 387.

[126] DFDA (n 4) ss 68(j) and (p).

[127] MILPERSMAN (n 55) pt 9, ch 2 *Formal Warnings and Censures in the ADF* 2.5 The authority to impose a formal warning or censure comes from the inherent power of command, whereas the authority to impose administrative sanctions such as termination or reduction in rank stem from either *Defence Regulation* or *Part VIIIA* of the *Defence Act 1903*.

> maintenance of discipline will best be achieved by taking administrative action against members, as an alternative to or in conjunction with disciplinary proceedings.[128]

The UK Supreme Court has held that successive proceedings before a regulatory or disciplinary tribunal raise 'double jeopardy.'[129] The Supreme Court (UK) adopted the principle, *nemo debet bis vexari pro una et eadem causa*, which states that nobody should be vexed twice regarding one and the same cause. *Public Service Board of New South Wales v Etherton*[130] stated disciplinary hearings are 'neither a civil proceeding nor a criminal proceeding.'[131] *Hardcastle v Commissioner of Police*[132] established that discipline is concerned with protecting the public, maintaining standards of members of an organisation and protecting the organisation's reputation. This is not described as punishment in the same way as a criminal penalty. Disciplinary bodies can impose fines, but they are generally not considered penalties. Detention and imprisonment are possible punishments under the DFDA for limited periods, except for General Courts-Martial having the power to impose imprisonment for life.[133] These aspects can lead to a blurred understanding, contributing to confusion regarding a potential abuse of process. It is therefore arguable that DFDA discipline and *Defence Regulation* sanctions exist as two parts of the one disciplinary system, and so double jeopardy applies. However, even if the ADF contention that there is no double jeopardy persists, the issues with the following legal principles remain.

C *Double punishment*

If double jeopardy does not operate across the two branches, the DFDA and *Defence Regulation,* the question of double punishment may arise. The principle that a person should be protected against multiple punishments for one act has almost universal support. The ADF would benefit from considering the concerns of the Australian Law Reform Commission (ALRC) and address the need for clear guidelines to avoid issues of double

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[128] DMP Annual Report 2020 (n 94) [1.4].
[129] *R (on the application of Coke- Wallis) v Institute of Chartered Accountants of England & Wales* [2011] UKSC 1.
[130] *Public Service Board of New South Wales v Etherton* [1983] 3 NSWLR 297.
[131] Ibid [9] (Street CJ).
[132] *Hardcastle* (n 55) 597. Cf *Duhbihur v Transport Appeal Board* [2005] NSWSC 811, [106]–[107].
[133] DFDA (n 4) s 68 and schedule 2.

punishment when the discipline and administrative systems overlap.[134] This would provide greater certainty and clarity for those facing alleged breaches of military discipline together with administrative action.

The ALRC 'Principled Regulation Report, Federal Civil and Administrative Penalties in Australia,' 2003 stated double punishment is an important principle addressing unfairness 'in some contexts to overly divide up conduct or subject a person to multiple civil penalties for the same conduct.'[135] The ALRC was focused on the civilian system, not the separate military discipline processes and placed some trust in an independent centralised DPP to obviate criminal double punishment concerns.[136] The Commonwealth DPP has federal criminal law breaches referred from regulators and makes an independent decision as to whether criminal charges should be laid based on the Commonwealth Prosecution Policy.[137] The ALRC were concerned that

> … where multiple civil penalties can attach to the same conduct, some protection against double punishment is required otherwise, the subject of the penalties could receive disproportionate punishment for the wrongdoing.[138]

The ALRC stated that at minimum, guidelines should be developed where legislation provides for a choice between criminal liability and civil and administrative penalties.[139] The ALRC suggests that such guidelines would 'notify the regulated community as to how they will be dealt with when multiple liability arises.' [140] The Senate Inquiry 2005 made the recommendation that the ADF utilise the expertise of the ALRC to help the ADF 'better delineate between the two systems, improve its administrative

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[134] ALRC Report (n 106) ch11.
[135] Ibid [11.104].
[136] Ibid [11.128].
[137] Ibid [11.128]; *Private R No 2* (n 26) [109] 'The occasion for the delay in the issuing of the summons to the ADFIS was … an understanding that, given the gravity of the alleged offence, it must have been reported to the Queensland Police Service. Only when it became clear that it had neither been so reported nor even referred by ADFIS to the Queensland Police did an apprehended need for the ADFIS investigation file emerge.'
[138] ALRC Report (n 106) [11.99].
[139] Ibid [11.133].
[140] Ibid

procedures and review and change where appropriate the penalties for administrative contraventions.'[141]

Currently, the ADF seems content, despite growing criticism, to rely on a claim that the discipline system is akin to the civilian criminal system when it comes to double punishment and, therefore, something different from an administrative sanction. This does not sit well with the constant claim that the ADF operates a purely discipline system when it suits its desired outcome in the High Court.

The DFDA ss 98 and 99(2) address suspension from duty on suspicion of an offence and post-conviction, respectively, pending consideration of termination of service because of a conviction under the DFDA. This potentially allows for double punishment if the sentencing authority in DFDA proceedings (DFM/court-martial panel) and the s 152 DFDA Reviewing Authority, after considering the sentencing principles, view the punishment imposed as appropriate. It raises double punishment and human rights concerns that the member can still have their service terminated in addition to the punishment already imposed. This is also considering that dismissal from the Defence Force is available to a DFM/court-martial panel as a punishment.[142] Justice Logan has noted in his writing that the British Army 'is firm in relation to the pre-eminence of disciplinary action over administrative action.'[143] Further protection could be achieved simply by clarifying the legislation as regards the choice and circumstances in which to commence the coexisting processes.[144] A further legal principle, namely issue estoppel, arises for ADF personnel subjected to both branches of discipline.

D *Issue Estoppel*

Issue estoppel is a principle based in equity that stops a person from having an issue of fact or law already determined to be considered again. It also prohibits something that would otherwise be lawful. The purpose is to provide finality for the individual and avoid conflicting decisions by different decision-makers. It raises concerns where ADF personnel can be dealt with under the two branches, the discipline and the administrative, within the one overarching body under the superintendence of one person

[141] Senate Inquiry 2005 (n 2) ch13 [3.20].
[142] DFDA (n 4) s 68(1)(c). See further *Kearns* (n 109) [128].
[143] Logan (n 24) [54].
[144] Cf *Defence Regulation* (n 21) s 6(2)(b) 'states after conviction'.

- the CDF. Where an ADF member can be subject to the two branches concurrently and/ or subsequently on the same facts with the same parties, this legal principle demands consideration. Issue estoppel arises irrespective of different aims or purposes for the decision-making, such as punishment or sanction. It is not to be confused with *res judicata,* which is the finality of a cause of action.[145] Three criteria must be met before issue estoppel can apply. These are that the decision: 1) is made by a final decision body; 2) must be between the same parties or parties with the same legal interest; and 3) must decide the same question or issue.[146] Issue estoppel does not operate based on criteria 3) across the criminal and civil boundary due to the differing burdens of proof. The summary authorities under the DFDA now operate where a member admits a matter, and so there is no burden of proof different from administrative sanctions when punishment is applied by SAs under the DFDA.[147] Whether the body is administrative or judicial is irrelevant, what is important is the decision is final.[148] This could be contestable under the DFDA as all processes are open to review. However, the High Court has ruled that a decision open to appeal does not preclude issue estoppel applying.[149]

This substantive rule was raised in the matter of *Randall*.[150] As the respondent, the CDF had sought to rely on the *Evidence Act* s 91 to preclude evidence of judgments and convictions as proof of a fact, although s 93 of the *Evidence Act* indicates s 91 does not prevent issue estoppel. Defence argued the DFDAT decision to quash Randall's conviction by the RCM could not be used as proof of innocence in the administrative process. In the judicial review before the Federal Court Justice Collier stated

> the only basis in the application before this Court on which the applicant relies on the RCM material is to demonstrate that the grounds of the termination decision were the same or substantially

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[145] See *Blair v Curran* (1939) 62 CLR 464, 531–32 (Dixon J).
[146] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967]1 AC 853; *Brisbane City Council & Myers Shopping Centres Pty Ltd v Attorney General for Qld* [1979] AC 411.
[147] DFDA (n 4) div 4 s 9FB(2).
[148] *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 355, 453.
[149] *Kuligowski v Metrobus* (2004) 220 CLR 363, 375; *Somoza v Australian Iron and Steel Ltd* (1963) 109 CLR 285; *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647; Distinguished in *Withyman v New South Wales* [2013] NSWCA 10, [2013] Aust Torts Reports 82-124.
[150] *Randall v Chief of the Defence Force* [2020] FCA 1327 ('*Randall No 2*').

> the same as the DFDA charges of which he was acquitted. Such reliance is not prevented by the terms of s 91 of the *Evidence Act.* [151]

These legal principles offer protections which the following cases show are required. The cases demonstrate the consequences of the flawed application of the ADF discipline system through the lived experience for those finding themselves subject to the discipline system.

IV Cases that Demonstrate the Concerns

A *McCleave*

The decision in *McCleave v Chief of Navy*[152] discussed the inter-operation of the discipline and administrative branches of the ADF system. President Logan, in dissent, noted that military persons are entitled to the same rights and protections as ordinary citizens.[153] One such right is the protective right to silence. The accused contended there was an abuse of process when he had agreed to a plea deal in which he conceded to the allegations in certain charges, relying on an assurance from an officer in the chain of command that he would be dealt with by administrative action rather than DFDA proceedings.[154] Based on his understanding, McCleave responded to a notice to show cause detailing his actions. This, President Logan considered, would confer 'on any prosecuting authority a considerable and enduring forensic advantage.'[155] Subsequently, however, the DMP decided that the alleged offending involving dishonesty should proceed to a DFM process.

Outlining the chain of command through to the pinnacle in the Governor-General acting on the advice of the Executive Council, President Logan stated

> … nothing could be more subversive of a military justice system than to countenance its use to try a member of the ADF who has

[151] Ibid [39] (Collier J).
[152] *McCleave* (n 61).
[153] Ibid [2] (Logan P).
[154] Ibid [68]–[69] (Hiley and Garde Members).
[155] Ibid [32] (Logan P) relying on civilian cases - *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1.

> been assured within his chain of command that no proceedings under the DFDA will be taken against him and, on the strength of that, has waived a right to silence and made admissions. The proceedings instituted and continued against LEUT McCleave were, for this reason, an abuse of the service tribunal process ... The DFM's failure to appreciate this constituted an error of law.[156]

The majority, Members Hiley and Garde concluded, however, that McCleave could not, based on the facts, rely on an abuse of process as the alleged assurance he was given did not extend to a claim he would not be dealt with under the DFDA. Relying on the exact wording of the answer given to McCleave, the two Tribunal members dismissed the appeal.[157]

The decision drew not only dissent from the President but strong remarks on the operation of the disciplinary process and command failings.[158] The majority made comment that the way McCleave was dealt with was regrettable given 'his … early action … to perform the service, apologise for his conduct, receive counselling from his superiors, and provide a detailed explanation for his conduct' with 'a need to harmonise the advice to be given to an ADF member where, at unit or equivalent level, a commander is of the view that administrative action is appropriate and sufficient, with the DMP's independent power to proceed with disciplinary action under the DFDA.'[159]

This case points to the role of command having authorisation from the CDF to discipline members and to instil trust and respect in command and the question of the independence of the DMP from the chain of command. The DMP holds independence, to a degree, in the decision to prosecute, but in undertaking a prosecution, they act on behalf of the CDF.[160] If the decision by the DMP is in contradiction to a command decision to deal with a matter administratively, potentially an internal conflict can arise for the CDF, whom is ultimately accountable and sits at the pinnacle of both the DFDA and administrative systems. This, in turn, challenges the alleged independence of the DMP. Surely, a DMP, in exercising a decision to

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[156] Ibid [35] (Logan P).
[157] Ibid [183] (Hiley and Garde Members).
[158] Ibid [31] (Logan P).
[159] Ibid [186] (Hiley and Garde Members).
[160] DMP Annual Report 2020 (n 94) [11] '… as prosecutors, we must never lose sight of the fact that it is the defence community and the chain of command that we serve.'

prosecute, should consider closely an assurance given by the CDF delegate that no further action will be taken, particularly where, as in this case, administrative action had been formally taken and recorded on the member's record, and the matter had been considered closed by the member and his command.[161]

Members Hiley and Garde discuss at length[162] the concerns in having administrative action operating alongside disciplinary matters, stating

> [i]n the ideal world, disciplinary action under the DFDA would precede, and inform subsequent administrative action. However, as counsel for the respondent submitted, the real world is very different… There is no simple solution to the difficulties that may arise because of the concurrent conduct of disciplinary and administrative action. One consequence is that the need to respond to administrative action may well affect the right of an accused to silence.[163]

McCleave demonstrates that acknowledging that both branches operate as one disciplinary system conducted under the authority of the one CDF at the helm of a hierarchical institution, and that double jeopardy, double punishment, or issue estoppel are designed to avoid such circumstances, would present a simpler solution. If protection risks are of concern, the DFDA provides the appropriate process for interim suspension until the outcome of discipline is known.

B *Hite*

Hite was exposed to administrative sanctions before DFM disciplinary proceedings were heard.[164] This meant she was no longer a member of the ADF, having been administratively dismissed, when she appeared before the DFM to plead guilty. Hite was charged with an act of indecency without consent under DFDA s 61(3) and assaulting another person in public, DFDA s 33(a). This matter demonstrates the internal conflicts arising when an individual is subjected to both branches of essentially the one discipline system.

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[161] *McCleave* (n 61) [53] (Hiley and Garde Members).
[162] Ibid [91]–[109].
[163] Ibid [91]–[92].
[164] Office of the Judge Advocate General, *Hite* (Case Summary, 13 April 2021).

Challenges raised by the administrative show cause process being taken before the DFDA proceedings included the right against self-incrimination and the right to test the evidence. Significantly, it meant the DFM no longer had sentencing options that would have otherwise been possible.[165] The DFM had little choice but to record convictions without imposing any punishment in respect of any charges.

C *Randall*

Randall, Warrant Officer Class 2 and a member of the Royal Australian Corps of Signals, was convicted by a Restricted Court-Martial (RCM) of unauthorised access to (or modification of) restricted data and also of prejudicial conduct. He appealed to the DFDAT, and his convictions were quashed, given the ambiguous language of relevant duty statements, orders and instructions, it could not be proved beyond reasonable doubt that he lacked access authority.[166] The DFDAT overturned the interpretation and understanding held by the relevant service chief within the ADF as to the meaning and effect of the complex multilayered instructions, orders and duty statements on which the offence was dependent. Further, the DFDAT noted that the reviewing officers under the DFDA had not picked up on the issue.[167] The matter highlighted the incorporation by the legislature of criminal principles in a kind of hybridised version of justice in which the discipline system borrows from the civilian criminal law. The *Criminal Code* Chapter 2 sets out the general principles of criminal responsibility and DFDA s 10 requires these apply to all service discipline offences under the DFDA.[168]

Despite the DFDAT overturning the RCM decision on appeal, the ADF commenced and executed Randall's discharge from service administratively after the DFDAT decision.[169] This raises the issue that if convictions are overturned on appeal, what happens to any administrative

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[165] DFDA (n 4) Schedule 2 limits the DFM to imposing the punishments of imprisonment, a fine not exceeding 15 penalty units or convicting and not further punishing the defendant who was no longer a member of the Defence Force.

[166] *Randall No 1* (n 109) [120].

[167] Ibid [122] (Tracy P, Logan and Hiley Members).

[168] See Ibid [3]–[5] (Tracy P, Logan and Hiley Members); DFDA (n 4) s 10. See also DFDA (n 4) s 61(6).

[169] *Randall No 2* (n 150) [19]–[40] (Collier J). A termination notice was issue on 23 April 2018 prior to the DFDAT hearing and then a second identical termination notice was issued [after] on 20 July 2018 [7], [9] (Collier J).

discharge process. Justice Logan, writing separately, has stated, '[i]t is only to be expected that these "in-house" views would have informed any administrative discharge action taken by the CDF (or his delegate) as an alternative to prosecution under the DFDA.'[170] Randall claimed he had been administratively terminated on the same facts on which he was acquitted for the service offence. This raises both double punishment and issue estoppel. As such, he appealed to the Federal Court to address his administrative dismissal. The matter, however, was withdrawn.[171] While the matter was settled outside of court, Justice Collier decided that the decision maker in the administrative termination process should have considered the evidence presented by Randall in response to his show-cause notice. This included the RCM material. Collier J found this could be relied on to demonstrate that the grounds for the termination decision were the same or substantially the same as the DFDA charges of which he was acquitted, thus raising issue estoppel or double punishment.[172]

Certainly, a workplace has a right to suspend a person while they are subject to investigation and/or serious charges, as occurs in the civilian domain. This is provided for in the DFDA sections 98 and 99. Instead, *Randall* provides an example of an accused being exonerated of charges in the DFDA system but nevertheless having his membership administratively terminated on the same facts.

D *Howieson*

Captain Howieson had several charges heard by General Court Martial and was found guilty on only one charge of prejudicial conduct under the DFDA s 60 (1). The DFDAT overturned this conviction and remitted the matter for a new trial. Of significance in this case, for the purpose of this article, is the adverse comment made in relation to the DFDA s 154 reviewing officers' report, which is obtained before the review under s 152.

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[170] Logan (n 24) [34].

[171] *Randall No 2* (n 150), the matter was withdrawn on 17 February 2021 for dispute resolution; See also, administrative dismissal prior to any criminal conviction or discipline has caused consternation for those under allegations in the Inspector General of the Australian Defence Force, *Afghanistan Inquiry Report* (Report, 2020); Christopher Knaus, 'Australian army chief defends defence leadership as 13 'show cause' notices confirmed' *The Guardian*, (Web Page, 27 November 2020) <https://www.theguardian.com/australia-news/2020/nov/27/australian-army-chief-defends-defence-leadership-as-13-show-cause-notices-confirmed>.

[172] *Randall No 2* (n 150) [38]–[39] (Collier J).

In that report, the reviewing officer proffered advice on administrative termination as an option. The DFDAT took the opportunity to note this irregularity in which

> [t]he report made by a reviewing officer or the Judge Advocate General or a Deputy Judge Advocate General under s 154 of the DFDA in respect of a conviction and sentence is intended to be an independent, internal opinion in respect of that conviction and sentence. Unfortunately, the report provided in this case, offered policy advice to the reviewing authority in respect of the taking of administrative action against CAPT Howieson regardless of the outcome of the disciplinary proceedings. The administrative action contemplated was apparently early termination of his service pursuant to reg 24 of the *Defence Regulation* ... This policy advice, with respect, ought not to have been furnished by the reviewing officer.[173]

Howieson demonstrates how the principle of independence is challenged. The Tribunal noted the blurring of lines as the two branches of discipline internally risk merging:

> [u]nder the DFDA, it is no part of the functions of the Judge Advocate General or a s 154 reviewing officer to furnish such policy advice to the Chief of the Defence Force, a service chief or any reviewing authority. Those officers must look to other advisers for such policy advice. The author of a s 154 report must not just be independent but be seen to be independent. Presuming to furnish such policy advice is antithetical to that independence. [174]

This demonstrated the blurring of the two branches of discipline and the apparent loss of understanding of the importance of the legal principles outlined and the independence of officeholders. It indicated the slippery slope and relative ease with which the various processes within the closed institution can be brought to bear without due process and consideration of an accused's rights. These include when information gained in one process is used in another, along with the double jeopardy, estoppel and abuse of process issues, which were also raised in *Randall*.

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[173] *Howeison v Chief of Army* [2021] ADFDAT 1 [60] (Logan P, Brereton and Perry Members).
[174] Ibid [61].

Of even greater significance, this case demonstrated the subversiveness that President Logan had previously described and again reiterated regarding the undermining of the DFDA processes by the administrative process

> [i]n a case where a court martial panel has deliberately chosen not to impose a sentence of dismissal … on a defendant and, instead, imposed a sentence in which an opportunity for rehabilitation is an element, the taking of such administrative action could be regarded as undermining the court martial process.[175]

In the same organisation, it not only undermines the decision-making in one process, but it appears as a double dipping by the institution in taking 'two bites of the same cherry.' The service tribunals have the power to terminate service, but if they choose not to impose that punishment when sentencing, why should another process conducted under the authority of the same CDF be able to go ahead and terminate service? If the service tribunals exercising sentencing authority in DFDA proceedings and the DFDA s 152 Reviewing Authority, after considering the sentencing principles, view the punishment imposed as appropriate, then this undermines a sense of fairness and justice for the convicted member to then have their service terminated by an administrative process. Surely, they have already been made aware their behaviour is unacceptable. The DFDAT has noted that 'the importance of confidence by all ranks in the fairness and integrity of the service discipline system… appears to have been forgotten.'[176] This is a vital factor to consider when the ADF is reported to have difficulty in retaining and recruiting members.[177] The fairness raised in *Howieson* was further discussed in the next matter of *Kearns*.[178]

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[175] Ibid [62].

[176] *Private R No 2* (n 26) [159].

[177] See, eg, Huon. Curtis, 'Algorithms Won't Solve the ADF's Recruitment Crisis' (2022) No 6 (December) *The Strategist*.

[178] *Kearns* (n 109) [130] (Logan, Brereton and Slattery Members). '… the authority of DFDA in specialist superior service tribunals seeking to do justice by balancing rehabilitation against other sentencing factors may also be undermined.' [131]

E *Kearns*

Lt Colonel Kearns was accused by two separate complainants of touching their thighs and hair at a cadet's mess function. The DFDAT dismissed the appeal from the DFM decision by Kearns based on a close consideration of the evidence accepted by the DFM, finding that there had been no error by the DFM.[179] The Tribunal took the opportunity, however, to make additional comment on the administrative show cause which Kearns received 2 months after his conviction and punishment by DFM and prior to his appeal. Kearns had been sentenced by the DFM to a reduction in seniority in rank after careful consideration of his service record, character, and work appraisals, as well as the circumstances of the offending and victim impact statements.[180] He was nevertheless administratively discharged because 'his service was not in the interests of the Defence Force.'[181] He was, therefore, no longer a member of defence by the time of the DFDAT hearing.

Kearns, after being sentenced by the DFM, returned to duty on August 8, 2021, and assisted with the evacuations from Kabul, Afghanistan, while he awaited the result of his petition. Then, on August 9, 2021, before he received the response to his petition or had a chance to appeal to the DFDAT, he received an administrative notice to show cause. He responded on September 9, 2021, arguing against termination.[182]

In sentencing, the DFM obviously considered the rehabilitation of Kearns. The DFDAT noted this, stating

> … in imposing the punishments of forfeiture of seniority on the appellant, the DFM described the offences found proven as, 'too serious to be met by a severe reprimand or a reprimand, even in conjunction with a fine' but he balanced this with a judgment about the appellant's prospects for rehabilitation in future service, saying

[179] Ibid. Kearns was found guilty of assaulting a subordinate DFDA (n 4) s 34, and of conduct prejudicial to the discipline of the Defence Force DFDA (n 4) s 60.
[180] Ibid [120].
[181] Ibid [119].
[182] Ibid [6].

> that the appellant 'still [has] a lot to offer the Army as a lieutenant colonel.'[183]

The Tribunal noted that while they were not charged with deciding the matter, Kearns had raised the fact the administrative termination was based on the same or substantially the same set of facts as dealt with by the DFM.[184] This again raises double punishment and/or issue estoppel. The Tribunal was concerned to note that one of its functions is to maintain public confidence in the administration of the DFDA, which covers events post-conviction.[185] The Tribunal addressed the concerns by reference to DFDA s 162, suggesting that an administrative decision based on similar facts to a service tribunal decision that imposes a more severe outcome is impermissible as there is no power in commanders to increase a punishment:

> Under DFDA, s 68 a commanding officer of a convicted person "may moderate the consequences of" a punishment "imposed" by service tribunal, but has no power to increase the punishment. And upon review of action … a conviction may only be quashed under s 162(1) if it is "excessive" or "wrong in law" and once quashed any substitute punishment imposed under s 162(5), "shall not…be more severe" than the punishment imposed by the service tribunal. No power exists in the reviewing authority to quash a conviction on the grounds of insufficiency of punishment.[186]

While the Tribunal acknowledged the administrative decision maker is not the same as a reviewing authority under the DFDA, they nevertheless 'may have to examine real questions of continuing fidelity … and whether the administrative decision is consistent with the maintenance of good conscience by command.' [187] This is recognised through command appreciating their interaction with the service tribunal proceedings and outcome:

> Recognising that a punishment imposed by a service tribunal in relation to a defence member sets the upper limit of post-conviction

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[183] Ibid [14], [131]; Cf Samuel White 'The Kings Hard Bargain' 2022, 96 *Australian Law Journal,* 666.
[184] *Kearns* (n 109) [121].
[185] Ibid [123].
[186] Ibid [125].
[187] Ibid [126].

> action binding on the conscience of command for that member provides safeguards for the ADF and for the member.[188]

The Tribunal sagely flags the impact when a discipline system loses sight of its true purpose. The statements that military discipline requires justice and fairness carry a bigger purpose, namely, to ensure a functional fighting force. This is undermined by a dysfunctional operation of discipline:

> For command, it promotes military cohesion and defence members' acceptance of discipline decisions by separating command from any perception of personal bias or ill-will in the exercise of discipline. For the member punished, command's fidelity to good conscience in confirming or moderating punishments confers security and stability and promotes loyalty to the service in that member and in all members who see command observing the precepts of good conscience in punishments. [189]

Importantly for the ADF facing recruitment issues, the impact of this practice beyond those immediately affected was also raised by the Tribunal:

> If the obligations of good conscience upon command … are ignored post-conviction, leading to the administrative termination … stigma, loss of morale and confidence in the administration of justice in the ADF may be most acute for those directly affected by the termination *but similar effects are likely to be felt more widely*.[190]

This caution also applies when, as noted in *McCleave,* a DMP decides to prosecute after a matter has been administratively dealt with by command and is considered closed. *Kearns* is the most recent decision by the DFDAT, indicating the concerned voice is becoming louder. The Tribunal's decisions set forth their very valid concerns with the apparent failures in understanding the need for the discipline system to work fairly and appropriately. They also have alluded to the consequences this can have for the morale and overall health of defence members.

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[188] Ibid [128].
[189] Ibid [129].
[190] Ibid [131] (emphasis added).

V Conclusion

This article asserts that both DFDA discipline processes and *Defence Regulation* administrative sanctions should be viewed as part of the one system intended for the purpose of discipline administered ultimately by the one institution under the leadership of the supreme office holder, the CDF. As such, the classic distinction between criminal and workplace matters, as applies in the civilian domain, cannot be relied on when speaking of an absence of the principle of double jeopardy or double punishment.

The CDF and those exercising the power of command are bound to honour the systems currently operating for both discipline and administrative sanction in a manner that avoids offending legal principles designed to avert abuse of process and oppressive outcomes for their members. Failure to understand these principles can only damage the operational effectiveness of the ADF and deter future recruits, noting the existing difficulties being experienced in recruitment.[191]

The independence of the DMP must be observed alongside authorised command actions taken to discipline and protect members. Perhaps commanders think the use of sanctions enables them to regain some control if they are not satisfied with the outcome of DFDA proceedings. However, what is lost here is the understanding that the ADF is the one organisation, and commanders are a part of that organisation acting in relation to the same incident against the same member utilising various processes.

The aims of the Australian Parliament are undermined when the CDF (or their delegate) terminate the service of a defence member based solely on their satisfaction as to misconduct instead of awaiting the outcome of an investigation or fair proceedings in a body subject to a higher burden of proof. The current practice appears to have lost sight of the rights presently afforded by Parliament to an accused person under the DFDA. It is thus upon the legislature to take the initiative and address how the two parts of the discipline system work together. It should not be left for the separate military institution and the CDF. The frustrated voices grow, and the time for a full legislative revision of military discipline, taking account of these concerns, is upon us all.

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[191] Andrew Tillett 'Defence facing a recruitment 'crisis': Marles' (14 November 2022) *Financial Review*.