Constitutional validity of military justice legislation

Haskins v Commonwealth (2011) 279 ALR 434

5RAR personnel parade for a Beat the Retreat ceremony. Photo: LSIS Helen Frank / Commonwealth of Australia, Department of Defence.

In these proceedings Mr Haskins challenged the constitutional validity of remedial legislation following the decision in *Lane v Morrison* (2009) 239 CLR 230 that the provisions of the *Defence Force Discipline Act 1982* establishing the Australian Military Court (AMC) were invalid. In the aftermath of that decision, the *Military Justice (Interim Measures) Act (No 2) 2009* (IM Act) was passed. Item 5 of Sch 1 of the IM Act applied where the AMC had imposed punishment (other than imprisonment) so as to declare the rights and liabilities of all persons to be the same as if the punishment was properly imposed by general courts-martial, which were subject to review within the chain of command under further provisions of the IM Act. The validity of that statutory fiction was upheld by majority, such that by legislative fiat the invalidly imposed punishments were effectively restored.

Mr Haskins, who was an officer of the army, had been convicted of disciplinary offences by the AMC (under provisions held invalid in *Lane*) and punished by way of severe reprimand and detention for a period of time. He challenged the relevant provisions of the IM Act on two bases: (1) they were a bill of pains and penalties contrary to Ch III of the Constitution; and (2) they acquired his cause of action for false imprisonment against the Commonwealth resulting in an acquisition of property other than on just terms contrary to s 51(xxxi) of the Constitution. By majority, those challenges were dismissed.

French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

The plurality began by emphasising that the High Court had in numerous previous decisions upheld the validity of legislation providing for the imposition of punishment on a service member for a service offence by service tribunals that are not Ch III courts. This is because the decisions made by such tribunals are amenable to intervention within the chain of command such that the imposition of punishment involves no more than 'the imposition and maintenance of discipline within the defence force' rather than any exercise of Commonwealth judicial power. That recognition was critical to the disposition of the first ground of challenge. Their honours reasoned that Mr Haskins' argument proceeded 'from an unstated premise of exclusivity'; that is, that only a Ch III court could impose the punishment of detention on him. In rejecting that premise, it was held that the declaration of rights and liabilities by the relevant provisions of the IM Act did not usurp judicial power. For the same reason, the IM Act was not a bill of pains and penalties.

Further reasons were given in support of that conclusion. It was thought inappropriate to describe the impugned provisions as having imposed punishment on those with whom the AMC had dealt. Furthermore, that those provisions made no legislative determination of guilt and did not make crimes of past acts. Significant in this regard was that the declaration of rights and liabilities was 'subject to the outcome of any review'

(under further provisions of the IM Act) such that the final decision about punishment was made within the chain of command and not by the IM Act. In respect of the IM Act's operation where a punishment had been fully served prior to the introduction of the relevant provisions, it was described as being in the nature of an 'act of indemnity' to 'confirm irregular acts' and precluding liability for them rather than to void and punish 'what had been lawful when done'. Therefore, to describe the provisions as imposing a punishment was thought not to accurately reflect their complete operation.

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The argument in relation to an acquisition of property was dependent on the plaintiff having an action for false imprisonment. The contemplated action against the Commonwealth rested upon it being vicariously liable for the acts of an officer wrongfully detaining the plaintiff. Thus, it was seen that a necessary step in the plaintiff's case was that the officer in charge of the corrective establishment, acting in obedience to an apparently regular warrant, would be himself liable to the plaintiff for false imprisonment. In this regard, the argument was disposed of on the footing that 'the acts of which the plaintiff complains were acts done by one member of the defence force to another in obedience to what appeared to be a lawful command' which would not be actionable in a civil suit for false imprisonment. Central to this reasoning was that to allow such an action would be destructive of discipline within the defence force as subordinates would be placed in the position of questioning the lawfulness of orders and whether to obey them or risk personal liability in tort. However, their honours declined to state any general rule that no action in tort will lie in respect of any act done for the purposes of military discipline, while offering no clear guidance as to when such an action may lie.

Heydon J

Heydon J delivered a powerful dissent, posing as the question for decision whether retrospective legislation validating the invalid criminal punishment of the plaintiff was valid. His Honour commenced by recognising that there are limits to the ability to enact legislation attaching to invalid Acts consequences which it declares those invalid acts always to have had through the device of 'as if'. In the present context, that depended on whether the impugned provisions offended Ch III. Heydon J considered that they did. They involved legislation directed to a particular group and imposed punishment on them without a judicial trial. The right of review did not alter that conclusion. Such a review, it was thought, would need to assume false hypotheses and work with materials invalidly received as evidence. A right to review a punishment reached on the basis of invalidly received evidence and procedures could not give validity to otherwise invalid provisions of the IM Act. It was not necessary for Heydon J to consider the s 51(xxxi) argument.

By Alan Shearer

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