

CHAPTER 8

COURT MARTIAL

TERM of REFERENCE 1 (g)

This Chapter deals with the appropriateness of the decisions made as part of determining whether sexual assault charges should be laid, and a court martial convened, in reference to an officer aboard HMAS SWAN in 1992.

8.1 Although the court martial of Lieutenant Commander James is not part of the terms of reference of this inquiry, the Committee is required to consider some matters relating to the court martial in the context of the Term of Reference (g).

8.2 The transcript of the proceedings before the court martial was examined as part of the process of seeking information about the decision to convene a court martial.

8.3 The Committee is not empowered to review the outcome of the court martial proceedings¹ nor does it wish to do so. The Committee has no reason to question in any way the outcome of the court martial.

8.4 The fact that a charge has been dealt with by a court martial does not prevent a person making a complaint about the same circumstances to the Human Rights and Equal Opportunity Commission (HREOC), whether the accused has been found guilty or not, and vice versa. Because the criminal standard of proof (beyond reasonable doubt) does not apply in HREOC proceedings, it is possible for a person acquitted by criminal proceedings to be found liable to pay compensation to a complainant in HREOC proceedings.

1 In a letter to Dr Wheat, dated 16 september 1993, the Minister responded to her request that the Senate Committee inquiry review the decision of the Court Martial by explaining to her that: *There are strict constitutional limitations upon the legislature acting as a de facto review body over the conduct of a Court, whether civil or military*. This is also the Committee's view.

8.5 The Committee notes that a court martial conducts itself in almost all respects in the same way as civilian criminal proceedings are conducted. For example, there is:

*"the presumption of innocence, the onus of proof on the prosecution and the standard of proof beyond reasonable doubt. The rules of evidence applying to criminal trials in the ACT apply to court martials. The directions on the law given by the judge advocate are binding on court martials' boards, the same as a judge's direction to a jury."*²

8.6 The accused has the right to challenge the people appointed to the tribunal. The trial before a court martial is a public trial open to any member of the public. The major difference is that a tribunal of military officers, not junior in rank to the accused, replaces a jury drawn from the wider community. There are some differences in appeal rights of the accused.³

8.7 As is the case in comparable civilian proceedings, the complainant, whose status in both is that of a witness for the prosecution, has no right to challenge the membership of the tribunal, nor in the case of civilian proceedings, the membership of the jury. Normally the witnesses in both court martial proceedings and comparable civilian proceedings are not provided with legal counsel. The Attorney-General's Department puts the view that:

*"It would be possible for a witness to be afforded separate legal representation in a criminal trial, in the discretion of the trial judge, but it would be quite extraordinary for this to occur."*⁴

The prosecution may take account of the views of the complainant in their conduct of the case but they do not represent the complainant in a legal capacity.

8.8 Another difference between a court martial trial and a criminal trial is in the proceedings and decision-making process preceding the trial. In civilian proceedings

2 RADM Oxenbould, Committee Hansard, p. 1249-1250. See also submission by Attorney-General's Department.

3 For details see Attorney-General's Department submission, p. 5.

4 *ibid.*

for indictable offences,⁵ a committal hearing is held in public by a magistrate to assess the evidence and to determine whether it justifies a decision to proceed to trial.⁶ The Defence Force Discipline Act (DFDA) provides for a summary hearing to be held, but this is a private process involving the gathering together of all the evidence on which to base an administrative decision whether or not to proceed to court martial:

*"The person running that hearing is not legally qualified... What invariably happens in accordance with the Defence Force Discipline Act is that it is referred on to a higher authority. A higher authority in this case is the Maritime Commander, the convening authority. The convening authority then makes a decision based on all of the material that is available to him to convene a court martial."*⁷

8.9 A summary hearing of the evidence in the case of the alleged sexual assault of Dr Wheat on HMAS SWAN was held at HMAS STIRLING on 18 November 1992⁸ and the documents convening the court martial were signed on 20 November 1992.

8.10 Rear-Admiral Walls gave evidence to the Committee that he received legal advice three times about the convening of the court martial. The first opinion was from Lieutenant Commander Hoyle, a Deputy Senior Crown Prosecutor with the New South Wales Department of Public Prosecution and a member of the RAN Reserves. His advice, given on 25 September 1992, was that there was insufficient evidence to proceed to prosecution of the case. One month later, in October 1992, Dr Wheat forwarded to Navy a statement containing new evidence and she had a lengthy interview with Lieutenant Commander Hoyle on 26 October 1992. On the basis of the

5 Indictable offences are defined in the Commonwealth Crimes Act 1914 as offences for which the penalty is more than twelve months' imprisonment.

6 The Attorney-General's Department submission notes that this *"procedure is a protection for the accused"*. Attorney-General's Department submission, p. 3.

7 CAPT T. Stodulka, *Committee Hansard*, p.1258. The Attorney-General's Department confirms that *"there is no provision for a public hearing by a judicial officer to assess the sufficiency of the evidence"*. See Attorney-General's Department submission, p. 3.

8 This is referred to as a *"de facto committal proceeding"* and is provided for under Section 130 of the DFDA. Attorney-General's Department submission, p. 3.

interview and of the new evidence, Lieutenant Commander Hoyle advised on 26 October 1992, that:

*"Whilst LEUT Wheat's second statement contains sufficient information to technically support a charge, I adhere to my original opinion that a conviction would be most unlikely to result."*⁹

8.11 The Maritime Commander also sought the opinion of Lieutenant Slattery, QC, a barrister and member of the RAN Reserves. On 11 November 1992, Lieutenant Slattery advised that:

"There is a clear prima facie case of all the ingredients for the charging of an offence under s.92D of the Act."

However, he also stated that:

*"This is a matter in which, because of the circumstances that have been outlined above, there is a substantial possibility that a conviction will not be obtained... That, however, is ultimately a matter for the tribunal."*¹⁰

8.12 Both lawyers also advised that Dr Wheat be informed that a conviction was unlikely to ensue. On the same day as Navy received Lieutenant Slattery's advice that a prima facie case existed, it also received a letter dated 10 November 1992, from Dr Wheat to the Fleet Legal Officer :

*"I am writing to let you know that I am still keen to proceed with charges of sexual assault against LCDR James... I fully understand that there is only a small chance that LCDR James will be punished for his actions, but, I feel that a small chance is better than no chance, which would be the case if a trial was not held."*¹¹

9 LCDR T. Hoyle, Investigation HMAS SWAN - LCDR R.D. James, RAN (Letter dated 14 March 1994 from CAPT B. Robertson to Committee Secretary).

10 LEUT M. Slattery, Consideration of possible charges against LCDR R. D. James RAN (Letter dated 14 March 1994 from CAPT B. Robertson to Committee Secretary).

11 Letter, 10 November 1992, from Dr C. Wheat to LCDR V. McConachie.

8.13 Rear-Admiral Walls said in evidence to the Committee that, on the basis of all the information before him:

*"I thought it inappropriate that I should make the judgement that in effect I should close out the matter myself. I thought it more appropriate that the matter should go to trial and should be judged in accordance with due process rather than for me to make an arbitrary decision."*¹²

8.14 In an interview on 26 October 1992, Lieutenant Commander Hoyle had told Dr Wheat:

*"that her claims of sexual assault were largely uncorroborated other than for the admissions by LCDR James that intercourse had occurred ... I explained to her that there was a very high standard of proof required in matters of this kind and that she might wish to discuss with her psychiatrist whether it was in her interests to submit to the rigours of giving evidence in a criminal trial. I reiterated that she should not infer from this that I was expressing an opinion or in any way attempting to influence any decision she might make in the matter...LEUT Wheat expressed the view that if criminal proceedings were not taken against LCDR James for sexual assault it would thus be inferred that the intercourse was therefore consensual. I assured her that this was not necessarily the case."*¹³

8.15 There is no doubt that the complainant was aware that a conviction was by no means guaranteed or even likely. In view of Dr Wheat's express wish that the charges be proceeded with, the Committee is of the opinion that, had Navy decided not to proceed to court martial, it would have been open to charges of ignoring the seriousness of alleged sexual assault within its ranks.

8.16 It is not clear whether Dr Wheat understood that, since the tribunal of the court martial acted as a jury, in the case of an acquittal of the accused, the prosecution would not be able to appeal.¹⁴ Likewise, in the Australian civil legal system, there is

12 RADM Walls, Committee Hansard. p. 1612.

13 LCDR T. Hoyle, op. cit. 26 October 1992. (Letter dated 14 March 1994 from CAPT B. Robertson to Committee Secretary).

14 Division 3 of DFDA makes provision for appeals in relation to convictions only.

no provision for appeal by the prosecution or anyone else against an acquittal in a jury trial.

8.17 The party (i.e. Dr Wheat) making the allegations that led to the charges had an alternative or additional options available. They were:

- to indicate that she did not wish to be a witness before a court martial. A court martial would be unlikely to proceed without the co-operation of the principal witness.
- to pursue her case in a civil action in an Australian civil court. This option has so far not been exercised.
- to take her case to the Human Rights and Equal Opportunity Commission.¹⁵

8.18 Dr Wheat's dissatisfaction with the outcome of the court martial seems to stem from two factors:

- lack of confidence in the investigation on which the decision to proceed to court martial was based; and
- lack of confidence, through suspicion of bias, in a decision arrived at by a jury drawn from within Navy.

8.19 The Committee's review of the preliminary investigation process and of the work of the investigation team is in paragraphs 5.34 - 5.54 of this Report. The Committee's conclusions were that the investigation team had acted with propriety.

8.20 While the Committee is satisfied that due process was followed in the case under consideration, the Committee recognises that the team spirit that is encouraged in the Australian Navy may lead a person who alleges sexual assault to feel that members of the Navy should not form the jury trying a fellow officer on an allegation of sexual assault. It may be more reassuring if the jury were drawn from the general community. Similarly, a person accused may lack confidence in a Navy jury and prefer one drawn from the wider community. This would, of course, be the result if all

15 In February 1994, this step was taken by Dr Wheat.

allegations of sexual assault were dealt with by civilian authorities as recommended below.

8.21 The Committee heard evidence from Navy that in the circumstances of this alleged offence not having taken place in Australia, the only course it could follow to prosecute the alleged offender was to proceed to a court martial.¹⁶ Had the alleged offence occurred within Australia, it could only have been tried by a court martial with the permission of the Director of Public Prosecutions.¹⁷ Navy considered that since the alleged offence occurred on board an Australian vessel outside Australian territorial waters, none of the States or Territory Courts had any jurisdiction. Under the DFDA a court martial was the only option.¹⁸

8.22 The Attorney-General's Department is of the view that this was:

*"probably the only practical course. A foreign court would not have jurisdiction. It is arguable that a State or Territory court could have jurisdiction under the Crimes at Sea Act 1979 (Cth), but the application of this Act to RAN ships is far from clear."*¹⁹

8.23 Because the alleged sexual assault took place on board a Navy vessel, outside Australian Territorial waters, the Navy found itself in a unique position - one that would not apply to any Australian employer outside the Defence Force. In addition to meeting its corporate responsibility of assistance to the victim of the alleged assault, the current requirements of the DFDA meant that Navy also had the responsibility for conducting the preliminary investigations in the case, for making a decision whether to proceed to court martial and for conducting the court martial proceedings in which its own employees acted as jurors. No matter how professional and even-handed an organisation is in such a situation, it can become the target of criticism from any party that is not satisfied with the outcome.

16 VADM R. Taylor, Committee Hansard, p. 1251.

17 See section 63 of DFDA.

18 The Attorney-General's Department points out that this provides protection for the accused in civilian proceedings since the Director of Public Prosecutions has a discretion to discontinue proceedings. Attorney-General's Department's submission, p. 4.

19 Attorney-General's Department's submission, p. 1. A more detailed examination of the applicability of the Crimes at Sea Act is on p. 3. of the submission.

8.24 Recommendation Twenty Seven: The Committee recommends that amendments to the Defence Force Disciplinary Act be considered to allow for alleged sexual offences involving only Australian military personnel that occur outside Australian territorial waters, including on board Australian vessels, to be tried in a civilian criminal court under the relevant law applying in the Jervis Bay Territory in Australia, having been investigated by the appropriate civilian police and prosecuting authorities.²⁰

20 See section v (a) of Recommendation Thirty Nine.