

SEA POWER CENTRE AUSTRALIA

The New South Wales Reserve
Naval Legal Panel – 40 Years
of Service

Working Paper No. 17

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SPC-A Editorial Note

This paper is a project of the NSW Reserve Naval Legal Panel, rather than a history sponsored by the SPC-A. However, the SPC-A has been glad to assist in publishing the paper to capture for posterity information of relevance to the broader history of the RAN. The views expressed in the paper are those of the authors, and do not necessarily represent the official views of the RAN.

Acknowledgments

A comprehensive history of the New South Wales Reserve Naval Legal Panel remains to be written. Nevertheless, on its 40th Anniversary in 2004, it was considered appropriate to produce this publication. We would like to thank all of those who assisted us in preparing this document, and, in particular the Sea Power Centre - Australia, which arranged for its publication.

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*Dedicated to those whose way is in
the sea and whose paths are
in great waters*

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Foreword

It is 40 years since Vice Admiral Sir Hastings Harrington, RAN, then Chief of Naval Staff, summoned Sub Lieutenant L.W. Street, QC, RANVR (Rtd) to see him. Street emerged from this meeting as a Commander (Special Branch) RANVR, with the designation of Senior Officer Naval Reserve Legal Branch. He was joined in the Panel by Lieutenant Commander Bill Dovey, VRD, RANR (later a judge), Lieutenant ‘Sandy’ Gregory, DSC, RANR (later a Senior Crown Prosecutor) and, quite soon, by Lieutenants John Gallop, Tony Vincent and David Voss.

A Melbourne Panel was also established, led by Supply Lieutenant Commander L. J. Caldwell, and comprising Lieutenants Alwynne Rowlands (later a Rear Admiral and Judge-Advocate General of the ADF), Leopold Rosenthal, Neil Brown (later QC, Commonwealth Minister, and MP) and (Sir) Daryl Dawson (later a Justice of the High Court of Australia).

The Perth Panel was headed by Lieutenant Commander Philip Sharp, RANVR. In Adelaide, Commander Daniel O’Connell, RANVR, perhaps the greatest international lawyer of his day, was appointed to head the Panel, which he did until he took the Chichele Chair in Oxford and became a Commander, RNR.

The Panels were founded, as Sir Laurence Street explains, as a direct result of the First Voyager Royal Commission. Since then, the NSW Reserve Naval Legal panel has increased in size, as the list of current panel members in Annex C shows. It has provided Judge (and Deputy Judge) Advocates-General; naval judges, prosecutors, and defending officers; counsel presiding over, assisting or involved in boards of inquiry; and advisers on international, criminal, administrative and indeed most other branches of the law. It has advised all ranks from sailors to Chiefs of the Defence Force. Its role has expanded, and its importance has not diminished.

It has been part of the Navy and the Defence Force from the time of the Vietnam War, through a long intervening period of few, if any, operational deployments, to the recent Gulf wars and the current ‘war’ on terror.

This brief, selective collection of memoirs brings together the recollections of Panel Leaders Street, Cole, Callaghan and Slattery, as well as O'Connell's self-declared 'understudy' (now Emeritus Professor and UN Human Rights Committee Member) Shearer. Also included are short biographical sketches of the Panel Leaders.

It is hoped that there is something here to interest every reader. There is, however, more than interest in these few pages. There is justifiable pride in fulfilling the duties of giving advice, undertaking advocacy, and administering justice in a fearlessly independent, expert and skilled fashion while remaining part of a disciplined (and the senior) service.

Lieutenant Commander James Renwick, RANR

Glossary

| | |
|--------------|--|
| AC | Companion of the Order of Australia |
| ADF | Australian Defence Force |
| AM | Member of the Order of Australia |
| DNLS | Director/Directorate of Naval Legal Services |
| DJAG | Deputy Judge Advocate General |
| KCMG | Knight of the Order of St Michael and St George |
| HMAS | His/Her Majesty's Australian Ship |
| JA | Judge Advocate |
| JAG | Judge Advocate General |
| NBCD | Nuclear, Biological, Chemical Defence and Damage Control |
| QC | Queen's Counsel |
| RAAF | Royal Australian Air Force |
| RAN | Royal Australian Navy |
| RANR | Royal Australian Navy Reserve |
| RANVR | Royal Australian Navy Volunteer Reserve |
| RFD | Reserve Force Decoration |
| RN | Royal Navy |
| RNR | Royal Navy Reserve |
| ROE | Rules of Engagement |
| SC | Senior Counsel |
| TDLS | The Defence Legal Service |

Commander the Honourable Sir Laurence Street, AC, KCMG, QC, RANR (Retd)

(Panel Leader 1964-1965)

The Naval Reserve Legal Branch - An Historical Note on its Origin

Circumstances leading up to and the course of events during the first Voyager Royal Commission provide the context that gave rise to the formation later in 1964 of what was then called the Naval Reserve Legal Branch. This brief historical note draws substantially on an authoritative book written in 1992 by the eminent naval historian Bishop (as he now is) Tom Frame - himself a seaman officer graduate of the Royal Australian Naval College in 1979 - entitled *The HMAS Voyager Tragedy - Where Fate Calls*. The note on the dust jacket crystallizes the tragedy:

On the night of 10 February 1964, during naval exercises off the south coast of New South Wales, the destroyer HMAS *Voyager* inexplicably crossed the bows of the aircraft carrier HMAS *Melbourne* and was sliced in two. Within a matter of minutes, 82 men perished, making the collision Australia's worst peacetime disaster.

In an unprecedented action the Australian Government broke with established practices and ordered a Royal Commission into the tragedy.¹

As Frame notes, the first inquiry prompted the Board to establish a Naval Legal Service.²

The Naval Board and its advisers were not equipped with the knowledge or provided with reliable advice as to the approach that should be taken by the Navy in relation to the Royal Commission. Whilst the legal aspects of disciplinary matters such as Courts Martial and lesser disciplinary procedures were well understood, as were Naval Boards of Inquiry, a civil Royal Commission involved significantly different considerations. The Navy did not have the benefit of experience in, or advice in relation to, the forensic nature of a Royal Commission such as this.

1 Frame, T., *The HMAS Voyager tragedy - Where fate calls*, Hodder & Stoughton (Australia) Pty Ltd, Sydney, 1992.

2 Frame, 1992, p. 354.

There were four major forensic positions in play: firstly, the position and role of counsel assisting the Royal Commission; secondly, the position of HMAS *Voyager* in the events leading up to the collision; thirdly, the position of HMAS *Melbourne* in the events leading up to the collision; and fourthly, the position of the Navy in an overall sense and particularly in the subsequent rescue operations.

The events leading up to the actual collision involved in general terms issues of ship handling, bridge duties, seamanship and communications. These were issues that lay within the province of what might be described as a potential conflict between HMAS *Melbourne's* case and HMAS *Voyager's* case. The Navy would have been well advised to insulate itself from these forensic issues between HMAS *Voyager* and HMAS *Melbourne* pending the outcome of the Royal Commission's findings. Regrettably, this was not to be the case, for as Frame records:

The Naval Board had actually wanted Street QC, and had made a request for his services through the Crown Solicitor only to find that he had already been engaged by Mrs. Stevens.³

The brief was then accepted by Norman Jenkyn, QC, with Humfrey Henschman as his junior. What transpired can best be recounted by quoting again from Frame:

The Navy brief was likely to be unworkable. There were clearly too many competing and conflicting interests. Hints to this effect were made to Jenkyn, but he resisted every effort to 'split' the prestigious brief. Street's comments when he first approached the Commission should have suggested something to Jenkyn:

'If this had been a Marine Inquiry after a collision between merchant ships the owners would have borne the costs of representation including those of the ships' officers. In the event of the interests of any officer being divergent from those of the owner the Merchant Service Guild would provide representation for him.'

During an interview, Street suggested to me that Navy counsel should have been briefed on only two of the three inquiry terms of reference, namely, that the ships and officers were adequate

³ Frame, 1992, pp. 53-54. The widow of Captain Duncan Stevens, the Commanding Officer of HMAS *Voyager*.

and equipped for the task and that the rescue of the survivors was handled properly. Counsel could then have been specifically arranged for Robertson on the first term of reference, dealing with the cause of the collision.

Jenkyn, however, was of the opinion that having separate counsel for Robertson, Kelly and Bate could have created an impression that the Navy was divided and unsure of what it believed, with the Naval Board being of one opinion, the senior seagoing officers (represented by Robertson) being of another, the middle ranking officers (Kelly) holding another view, while the junior officers (Bate) possibly seeing things differently again. Whilst Robertson had refused counsel, and Kelly and Bate had not pushed for representation, Jenkyn was happy for them to remain unrepresented at the Bar table. At any rate - or so Henchman told Bate - the Navy brief would cover Bate's interests and those of Kelly. The only advice the young sub-lieutenant was given prior to the Royal Commission was simply "to tell the truth" as he saw it.⁴

And again:

From the beginning of Smyth's address, it would have been apparent to Jenkyn, as counsel for the Navy, that his task was not so much to assist the Commission to ascertain the causes of the collision, as to defend naval procedures. As these procedures were determined and promulgated by the Naval Board, the interests foremost in Jenkyn's brief were those of the Naval Board. As he received his instructions specifically from the Naval Board through the Deputy Crown Solicitor, he was already placed in the precarious position of siding with the Naval Board in any dispute or disagreement it might have with any of the other naval personnel covered by the single Navy brief.⁵

Frame recounts some of the course of the first seven days of the hearing of the Royal Commission and reviews the situation as it existed at the end of day seven:

Robertson's situation had become untenable. He was not performing well at the Bar table and his position had deteriorated every day. He had come to feel acutely that he

4 Frame, 1992, pp. 55-56.

5 Frame, 1992, p. 59.

was on trial, with Smyth acting as the prosecutor. He appeared powerless in defending his own position and reputation, and ineffectual in dealing with the submissions of other counsel. There was little alternative but for Robertson to take the advice he had been given from the start of the Commission and seek representation.

This decision was a painful one, especially since he had earlier been offered counsel and had refused. Street had personally implored him to engage counsel after the disastrous seventh day of the hearing. Jenkyn spoke with him as well and pointed out that the Naval Board could not be expected to side exactly with his version of events or agree with their significance. Finally, the problem of the scope of the Navy brief was acknowledged. This was affirmation that the principal problem with Jenkyn's brief was that it was too large and cumbersome and unable to carry all the interests and points of view being expressed by Naval personnel. Jenkyn strongly advised Robertson to arrange representation but permanent damage had already been done to his standing at the inquiry.⁶

By the end of day seven the tactical battle lines had been drawn at the Bar table in relation to the events leading up to the collision as between HMAS *Voyager's* case and HMAS *Melbourne's* case. The latter was encumbered by the duality or conflict of interest inherent in the same forensic team appearing for the Navy and for HMAS *Melbourne*. This affected much of the subsequent conduct of the forensic contest at the Bar table.

The uncomfortable position in which the Navy had been placed in consequence of the initial decision to retain a single team for the Navy and for HMAS *Melbourne* clearly demonstrated the importance of the Navy having access, within its own establishment, to sound and experienced legal advice.

At the conclusion of the first Royal Commission Laurence Street, QC, who had been a seaman officer in an Australian corvette attached to the British Pacific Fleet in 1945, leaving the Navy with the rank of Sub Lieutenant, was asked to call upon Admiral Harrington, the Chief of Naval Staff, with a view to his putting together a group of lawyers who could constitute a Naval Reserve Legal Branch, a request that he accepted

6 Frame, 1992, p. 65.

with enthusiasm. As he puts it, 'I entered Admiral Harrington's office as a retired Sub Lieutenant and emerged as a fully fledged Commander with the designation of Senior Officer Naval Reserve Legal Branch'.

Street's task was to put together three panels. The principal panel would be located in Sydney and would include responsibility for the Fleet and for Naval establishments in New South Wales and Queensland. The panel in Melbourne would be responsible for Victorian and South Australian Naval establishments. The Perth panel would be responsible for Naval establishments in Western Australia and the Northern Territory. A list of the original members is at Appendix A.

No history of those early days would be complete without reference to the contribution made by the RAN Judge Advocate General at that time - His Honour Judge Trevor Rapke of the Victorian County Court - an accomplished lawyer and a man of great vision and enthusiasm. He and the then Director of Navy Legal Services, Captain (Supply) Larry Winch RAN, shared a recognition of the need for a professionally constituted Naval Reserve Legal Branch. Judge Rapke was a valued and influential mentor to the newly established Reserve Legal Branch and its members.

There was a Naval Reserve Legal Branch conference at HMAS *Penguin* (the Naval Depot at Balmoral) early in 1965. This marked the first coming together of the Navy Reserve Legal Branch as a fully constituted part of the establishment of the Navy. The conference was attended also by the Army Director of Legal Services, and Group Captain Toby Nichols as well as by Judge Rapke and Captain Larry Winch, RAN, the Director of Navy Legal Services.

This conference laid the foundation for a close relationship between the Reserve Legal Branches of the three Services. Apart from other benefits, this was of value in pursuing the unifying philosophy which culminated in the Defence Force Discipline Act of 1982. The uniform disciplinary code was a topic in which Naval Reserve Legal Branch had been involved from the time it was formed. The USA and Canada had unified their disciplinary codes in 1950. Street established some lines of communication in that regard in January 1965 in a pre-arranged visit to the RAN Naval Attaché in Washington, in the course of returning from a Privy Council case. The Navy's role is recorded in the Report of the 1973 Working Party on the Defence Force Disciplinary Code:

Although the preparation of the code is a project of long standing, it was only in 1965 that, in response to a Navy Initiative, a decision was taken to prepare a uniform code.

It was envisaged from the outset that Officers from the Reserve Legal Branch would be available to appear in Courts Martial and other Inquiries and proceedings involving the Navy, that they would be available to provide general advice to the Navy as well as to individual Naval personnel in that connection, that they would be available generally for use where required in all other disciplinary proceedings and that over time they would be available to provide pastoral advice and help Naval personnel in relation to personal problems somewhat akin to, but extending far beyond, what had theretofore been the role of Divisional Officers.

It was also envisaged that the Reserve Legal Branch would grow to become a source of advice, both at sea and ashore, on the international law complexities of peace time and wartime Naval operations. Multinational involvement in the seas to the North of Australia was seen to have particular importance in that regard. Professor Ivan Shearer from the University of New South Wales (later to become a Captain in the Reserve Legal Branch) was a significant source of instruction in this field. A conference of Senior Permanent Officers and Reserve Legal Officers on this topic led by Professor Shearer was held at HMAS *Watson* during 1965.

Street retired from his position as Senior Officer of the Branch on his appointment to the NSW Supreme Court Bench in October 1965 (coincidentally he and Norman Jenkyn, QC were both appointed to the Bench on the same day, although sworn in on immediately successive days in deference to the seniority of Jenkyn, QC). Street's place as Senior Officer was taken by Harold Glass, QC, at the time a retired Lieutenant, Special Branch, RANVR.

Commodore the Honourable T.R.H. Cole, RFD, QC, RANR (Retd)

(Panel Leader 1977-1988)

The Naval Legal Reserve- A Memoir

I joined the New South Wales panel of the Naval Legal Reserve on 29 June 1969 as a Lieutenant, and retired with the rank of Commodore in 1998 from the position of Deputy Judge Advocate General of the Australian Defence Force. In that period of almost 30 years much changed: attitudes within the Naval Reserve, attitudes within the Navy to the legal component of the Reserve, the integration of the Reserve component into the permanent Navy, the nature of the work the reservists did and were expected to do, structures for membership of the legal panel, and promotion procedures, to mention just a few matters.

When I joined the legal panel, it was small. We comprised, as I recall, Harold Glass, QC (later Glass, JA), David Voss who later took silk,⁷ Anthony Vincent, who tragically suffered an early death, 'Bunter' Johnston, an aggressive common lawyer with wartime naval service, John Sinclair, who later took silk and was appointed to the District Court, who also had seen naval service in and after the Second World War, and who later preceded me as Panel Head, and Murray Tobias, who joined the reserve on the same day as me, succeeded me as Head of panel, became President of the NSW Bar, and presently sits on the Court of Appeal. There were no solicitors on the panel at that time.

One did not apply to join the panel - you were invited by the panel Leader. There was a meeting of a selection board but that was a formality as the number of applicants equated to the number of positions to be filled. Although the nature of the work was military discipline and criminal law, persons invited were not chosen for skills in those areas. I think I do Tobias, JA no disservice when I say that at the time of our joining the Naval Reserve his criminal law experience equated to mine, and mine was minuscule. The approach was that it was better to appoint young officers who had the capacity to learn the relevant law rather than exploit existing knowledge and experience.

⁷ To take silk: To be appointed as a Queen's Counsel. The term stems from the tradition of Queen's Counsel exchanging their former legal robes for silk robes. Since 1993 in NSW the title has been changed to 'Senior Counsel'

Once appointed, you were kitted out with necessary uniforms, but otherwise given no introduction into the Navy, its customs or formalities. There was no induction training, although you were invited to go to sea for a few days when you were expected to learn all you needed to know. I went to sea for four days on HMAS *Parramatta*, then steaming off the NSW coast. The officers were kind to the uninformed uniformed lawyer, although they had some difficulty in understanding what I was doing there. Having been given some lessons in practical navigation, one night at 0200 I was 'given the ship'. Fortunately I was under close supervision, and my period in command was, in the interests of safety, short lived.

The tradition in the Navy at that time was that discipline was a matter for the Captain of the ship. Those accused of a breach of discipline had the assistance of their Divisional Officer. It was before the days of multitudinous 'rights', and of putting disciplinary matters to proof. Those on board were expected to accept that the senior officers were fair and would act justly. It was implicit that an officer would not achieve senior rank and a position of authority without those qualities. It was rare indeed for a lawyer to appear at a Captain's Table or even at Courts Martial. This understanding continued long after the *Voyager* collision and inquiries. It explained the disquiet that senior officers had when sitting on a court martial, with the processes of the law which allowed and required that formal matters be strictly proved, that the Board accept from the Judge Advocate rulings of law, and most especially when they were excluded from *their* court whilst legal argument occurred and the Judge Advocate considered his ruling. Senior officers, used to the structure of command, did not readily welcome the intrusion of Reserve lawyers of junior rank and inexperienced in matters naval, yet after the experiences of naval justice in the 1960s such intrusion was inevitable.

There was thus an unhappy division between the Reserve lawyers and the Permanent Naval Forces. We were reservists, distinguished by an 'R' on our uniform.⁸ There was a slow but steady growth in naval understanding that societal changes required that naval personnel be afforded the same or similar rights as civilians. This change was resisted, primarily because of concerns regarding military discipline. One consequence of this attitude towards lawyers and Reserve

8 Until 1987 RANR officers wore a gold wire 'R' in the loop of the gold executive curl of their rank to denote their Reserve status and differentiate them from RAN officers who had an unadorned curl. In 1987 the uniform distinction was abolished and RANR officers have since worn the same unadorned curl as their RAN colleagues.

lawyers in particular, for the navy had few permanent legal officers, was the narrowness of the work we were invited or required to do. During the 1970s it was restricted to charges under the Naval Discipline Act, supported in many instances by Queen's Regulations and Admiralty Instructions (QR & AI). These were a complicated, outmoded and in many instances, contradictory set of rules, which had weathered time principally because there had been no comprehensive endeavour to unify them. They were a forensic lawyer's delight. Understandings of their meanings accepted for decades within the Navy were challenged, and at times upset. This did not enamour lawyers to serving officers.

As the Fleet was based in Sydney, the Sydney Panel received a disproportionate share of briefs at court martials. During the 1970s this was the substance of the panel's work. It soon became apparent that to properly prosecute or defend a serious charge, the outcome of which could affect a person's total career, competent solicitors were required to assist. Many were appointed to the panel. They brought a different envelope of skills and interest. Many had experience in other aspects of the law affecting the lives of sailors and officers - matrimonial and custodial disputes, finance transactions, wills, motor vehicle accidents and insurance consequences and similar matters. An issue arose regarding whether these matters were properly the function of naval legal reservists. The Melbourne Panel had a clear view that they were within the remit, and a significant attitudinal difference between the panels arose. I took the view that our function was to support the Navy and its personnel in disciplinary and criminal matters. It was my view that it was not for the reserve to intrude into the domestic concerns of navy personnel. If reservists wished to help personnel in such matters they should do so in a private capacity. This issue had serious financial consequences for the Navy, because legal reservists enjoyed a rate of pay which reflected, not entirely but in major part, the fact that lawyers in private life attracted remuneration far greater than that paid in the Navy. It was my view that the Navy should not become, or be treated as, a source of income, particularly as reserve remuneration was tax free. Rather, reserve service was an aspect of duty. There was an anomaly, in my view, in reserve lawyers being paid many times the rate of pay of an equivalent permanent officer, and frequently much more than a far superior officer. For my part, I elected not to render fees for naval work.

The contrary view was that as naval reservists were expected to leave profitable practices, with their attendant overheads, at short notice, to address naval matters, they should be appropriately remunerated. Permanent officers were not placed in this situation. In practice, this view was accepted by the Navy. I do not doubt that this hastened the increase in permanent naval lawyers, although the Navy faced difficulties in retaining many permanent legal officers once commission periods expired.

Changes in social attitudes, and in particular the increase in obligations imposed upon employers to have regard for the general welfare of employees, coupled with the special position of the Navy regarding its serving personnel, has resulted in the service providing assistance to personnel in a variety of fields. Whilst this assistance was once provided by senior officers, specialisation and complexity have meant that these services are now provided by, amongst others, lawyers, including Reserve lawyers on the panel.

When I joined the Navy in 1969, I was told that on taking silk a reserve officer would be elevated to the rank of Commander. That was regarded as appropriate because of the structured nature of the service: seniority should be reflected by rank. I took silk in 1976 but remained as a Lieutenant Commander. By then, problems had developed with the structure of the legal reserve. There was no overview of the pyramidal structure of the legal reserve, or of career paths for naval reservists. Progression in the law did not equate to progression in the service. There were clearly accepted periods which permanent officers expected to serve in a given rank, and thereafter promotion was on merit. Why should a naval legal reservist be differently placed? Further, the limited quantity of work available for legal reservists meant that many were unable to demonstrate their capacity, or earn their promotion. It was important from the Navy's viewpoint that there not be an imbalance between legal reservists and PNF personnel, both legal and otherwise, so far as promotion and rank were concerned. This problem was ultimately overcome by integration of the reserve element into the PNF and the application of standard naval procedures for promotion and rank to all personnel.

I took over as Head of Panel from Sinclair, QC when he was appointed to the Bench. I continued with the then Sydney panel view that our function was to assist with Courts Martial. By this time I had appeared

as prosecutor, accused's friend and Judge Advocate in a number of Courts Martial. I was appointed as Judge Advocate at the trial of the Captain and Navigating Officer following the grounding of the HMAS *Adelaide* whilst she was undergoing acceptance trials in the United States. Briefly stated, she ran aground in darkness when a light was mistakenly identified. The ship was badly damaged but there was, by good fortune, no loss of life. The unusual aspect of the trial was that it was held at the Long Beach Naval Station in California. It was the custom of the day for JA's to wear legal robes, and I was rigged out in silk robes and a full bottom wig. This had not been seen in the USA since about the time of the Boston tea party, and there was a barrage of photographers seeking to obtain a picture of this oddity from long distance, they not being allowed on base. I tried to avoid publicity as the event giving rise to this court martial was not something the Navy was inclined to magnify. However, one photographer succeeded and there was a picture of this bewigged being scurrying out the door on the front page of the local paper.

After my appointment as Deputy Judge Advocate General of the Australian Defence Force on 13 April 1992 I gave a paper at a military conference at which I raised doubts regarding whether the system of military discipline could survive future challenges before the High Court to its constitutionality. It had survived three challenges: Re Tracey: Ex Parte Ryan (1988) 166 CLR 518; Re Nolan; Ex Parte Young (1991) 172 CLR 450, the last by a 5-2 majority; Re Tyler: Ex Parte Foley (1993) 181 CLR 18 with one in the majority (McHugh, J.) at page 39 expressing the view that, at least for some time, there needed to be certainty in military discipline and accordingly he would side with the majority, although he was of the view that the minority view was correct.

This led to my being invited to consider alternative approaches to military discipline which had a clear constitutional base. The DNLS and I visited the US Military in Honolulu and Washington, the Canadians in Ottawa and the UK JAG in London. I produced a paper suggesting a revised system with a clear separation of judicial and administrative functions, and a judicial structure invoking the use of the Federal Court and the Federal Magistracy to address Courts Martial. Whilst this paper produced some short term flurry, because it took trials, other than minor administrative matters, out of the hands of the military, nothing came of it. It is of interest that in 2004 the Senate established a committee to enquire into the military justice system.

The requirements of the services for legal advice has greatly changed in recent years. Now there is a need for specialist operational advice based on a knowledge of relevant international law. Enquiries into conduct within the services are more common and more public. 'Transparency' is demanded at all stages. Administrative law has become of great importance. This is a very different climate to that which existed 35 years ago when I joined the Navy.

I should not leave this memoir without referring to one aspect I observed in my role as Deputy Judge Advocate General of the Australian Defence Force. Before matters came to me for review, they had been considered by a number of lawyers of varying seniority. Frequently, trials and verdicts had been reviewed by senior silks to determine if the result should stand. An applicant could petition the relevant Chief of Army, Navy or Air Force. On three occasions, notwithstanding firm advice given to these officers by service lawyers that convictions should be upheld, the Service Chief felt a disquiet, and referred the matters to me for consideration. In each instance, I agreed with that disquiet and advised that the convictions should be set aside, as they were. The legal perspicacity of these officers was most impressive. It demonstrated an attitude of concern that military justice be conducted at the highest standard. No longer was the intrusion of lawyers into military justice opposed; rather it was warmly embraced, a remarkable change in less than 30 years.

Captain P.R. Callaghan, RFD, SC, RANR

(Panel Leader 1993-2002)

The RANR Legal Panel

I was appointed to the RANR list 10 with the rank of Lieutenant Special Branch and seniority of 12 May 1976. I have served continuously since then. On 19 March 2004 I was granted an extension of service to the expiration of 05 April 2007.

The panel was under the control of the Director of Naval Legal Services in Canberra, then Captain Brian Gibbs, RAN. His staff included Second Officer Judith MacKenzie, WRANS⁹ now Commander Judith Horobin, RANR. My identity card was issued to me at HMAS *Waterhen* at Waverton and I was kitted out at HMAS *Kuttabul* and the Royal Edward Victualling Yard. On 19 and 20 January 1977 I attended the Sixth Naval Legal Conference at HMAS *Penguin*. These conferences were annual events and this time the conference was, we were told, for financial reasons reduced from two and a half to two days, but it still included a formal mess dinner on the first night and a buffet supper with guests on the second night. These were big conferences and this one was attended by, among others, the Judge Advocate-General of the Navy, Judge Trevor Rapke, QC (retired in September 1977), the Chief Naval Judge Advocate of the Royal Navy and the Staff Judge Advocate to the US Commander-in-Chief, Pacific, together with Justice Michael Kirby, then Chairman of the Australian Law Reform Commission. The conference was noted in (1976) 50 ALJ 547.

With Lieutenant John Brennan, RANR and Lieutenant Fabian Dixon, RANR as they then were, I undertook an orientation course - better known as a 'knife and fork' course - at HMAS *Cerberus* for 13 days commencing 31 January 1977. Navy Order 7/73 detailed all matters pertaining to the Reserve Legal Panel in just one page comprising only four paragraphs - how much simpler and more straightforward things were then!

Navy discipline was then regulated by the UK *Naval Discipline Act 1957*, as applied to the Naval Forces of the Commonwealth by virtue of

⁹ Prior to 1985 female personnel served in the Women's Royal Australian Naval Service (WRANS) or the RAN Nursing Service (RANNS), separate organisations to the RAN. On 7 June 1985 the Women's Royal Australian Navy Service Regulations were repealed, the separate Women's Services abolished, and female personnel were integrated into the RAN. From 1951 to 1980 WRANS officers had different rank insignia to the RAN - cornflour blue stripes with diamond shaped curls - and different rank titles. A Second Officer equated to a Lieutenant.

Section 34 of the *Naval Defence Act* 1910. Our bible was the Manual of Naval Law, ABR 5151.

The 7th Naval Legal Conference was held in the late 70s and by about then CAPT Keith Butterworth, RAN had taken over as Director of Naval Legal Services. He was later, tragically, killed in a car accident. In January 1983 the 8th Naval Legal Conference at HMAS *Watson*. The ninth and, I think last of these big RAN legal conferences was held in January 1986 back at HMAS *Penguin*. As I recall it, by about his time Captain Allan Thompson, RAN had become the Director Naval Legal Services, and he was succeeded by Captain Tom Stodulka, RAN, then Captain Martin Toohey, RAN, and finally Captain Geoff Earley, RAN. The Directorate of Naval Legal Services (DNLS) was subsumed by The Defence Legal Service (originally Defence Legal Office) in 1997, but I still have one bottle left of the DNLS decommissioning port.

Among my work as an advocate on Navy trials, in or around the early 1980s I represented one of the minor players in the HMAS *Adroit* problems, where a patrol boat crew had become a little over-enthusiastic as to property they might seize after boarding foreign fishing vessels in northern territorial waters. Charges as extreme as piracy were being talked about until the good judgment of Commander Peter Newman, QC, RANR was brought to bear and more balance was imposed on the prosecutors. My client, a leading seaman, pleaded guilty to a theft type charge and copped a small fine.

In 1985, as a Lieutenant Commander, I was sworn in as Judge Advocate and Defence Force Magistrate under the *Defence Force Discipline Act* which had just come into force. I took my oaths before the late Rear Admiral (Sir) David Martin, RAN, who was a much respected officer and later a beloved Governor of NSW, who died in that office from mesothelioma in 1990. Also sworn in as Judge Advocates and Defence Force Magistrates on that occasion were Commander Peter Newman, QC, RANR and Commander David Levine, RANR (as they then were). The clerk assisting the Admiral was the late Chief Petty Officer Jim ('Bomber') Atkinson, who was a great mate to the Panel for the better part of 30 years until he retired from the Navy in 1995; he assisted me on my first trial as a Judge Advocate and in so many other ways when we served together. A photo of the group on that day shows that, as Reserve officers, we still had an 'R' sown into the centre of

the executive curl on the top of our rings of rank; that practice of so distinguishing 'Rockies'¹⁰ ceased in 1987.

A couple of years later, I was junior Counsel for the Commanding Officer of HMAS *Penguin* when he was the respondent to *habeas corpus* proceedings brought in the High Court by a US Vietnam war deserter who had fallen into RAN custody: *re Bolton Ex parte Beane*; (1987) 162 CLR 514. This was probably the first time that the Navy had been taken to the High Court since *R v Beran ex parte Elias & Gordon*; (1942) 66 CLR 452, where the death sentences imposed by court martial on two sailors were challenged, and in which court martial Paymaster Lieutenant Trevor Rapke (as he then was) appeared for the accused.

On 3 August 1987, two sailors were lost at sea off Sydney from the submarine HMAS *Otama*. A Board of Inquiry commenced the following day at HMAS *Platypus* at Neutral Bay, presided over by Captain (later Commodore) Michael Dunne, RAN, with Lieutenant (now Captain) Vicki McConachie, RAN as Secretary. Counsel assisting was Lieutenant Commander Tom Harrison, RANR, a former submariner who was then in practice at the Bar. I appeared for the Commanding Officer HMAS *Otama* at the Board of Inquiry and also at an Inquest conducted the following year by the State Coroner Mr K.M. Waller. No disciplinary proceedings ensued.

I have sat as a Judge Advocate or Defence Force Magistrate in about fifty trials. I have found them all fascinating and demanding. A number of the earlier trials were held in Bomera House at Potts Point, opposite the HMAS *Kuttabul* Wardroom but now sold and redeveloped. In the mid 1990s a dedicated court room was set up in the historic Building 32 on Garden Island

I was humbled, but pleased, to be asked to succeed Captain Murray Tobias, QC, RANR as head of the Sydney panel in 1993. I enjoyed that role until I handed it over to Commander Michael Slattery, QC, RANR in 2002. It is a matter of delight to me that we have had such talent continuing to join the panel (despite the, perhaps unnecessarily, demanding regime of the current training programme) and that richness of legal experience is continuing to develop within the panel. The Reserve legal officers of all three services are *a* (if not *the*) principal

¹⁰ The term 'Rocky' is Navy slang denoting a member of the Australian Naval Reserve.

section of The Defence Legal Service (TDLS) and, indeed, TDLS cannot survive without them.

I have been involved in a number of Boards of Inquiry. Apart from HMAS *Otama*, not the least of them were the HMAS *Westralia* Board of Inquiry in 1998, where I was senior counsel assisting, and an Army Board of Inquiry, Exercise BIG WALL 2000, where I sat as President. Boards of Inquiry involve very hard, but rewarding, work and, I think, are the best investigative method available to the ADF in respect of major problems, and are essential if a public hearing is appropriate.

I have over the years always been impressed by, and often in awe of, the high quality and standards of so many Navy, and other ADF, personnel at all levels. I am honoured to have had, and to continue to have, the privilege of serving with them.

Commander Michael Slattery, QC, RANR

(Panel Leader since 2002)

2002-2004 - Navy Changes The Pace

The evolution of the Panel in the period 2002-2004 could hardly have been foreseen in August 2001. The tragic events of 11 September 2001 changed Navy's operational tempo. These distant events also altered the Navy's legal needs and in turn transformed the work of the Panel and its relationship with the Navy.

Since late 2001 the Navy has sustained a higher level of operations than at any time since the Korean War. The number of ships and personnel at sea during this period has exceeded even the levels reached during the Vietnam War. This inevitably meant that the assistance given by the Panel to the Navy would change. In just two years, the Navy altered its focus towards its legal reserve based in Sydney. The reserve was no longer seen as just a supplementary resource in administrative and discipline law. Instead, the Panel was asked to provide relieving personnel for the Fleet Legal Office, to become sea ready, to assist in advising commanders at sea and to provide expertise in international law, the law of armed conflict and law of the sea. The Panel was expected to respond quickly to these requests and it did so.

By the time the Iraq War started in March 2003 much of the necessary change had been accomplished. By mid-March that year a core group of panel members was sea ready. Two had undertaken full force preparation and were ready to be force assigned at short notice as part of a 'fly-away' legal team. All active panel members had had their operations and international law skills upgraded in a nine lecture program in the second half of 2002. Then they volunteered to join specialist advisory syndicates to assist the Fleet Legal Officer in January-February 2003. During the operational period itself, one member was force assigned and sent to the Northern Persian Gulf to conduct an investigation. After operations ceased, the Maritime Commander awarded the panel a commendation for its service during OP SLIPPER, OP BASTILLE and OP FALCONER.

Only a competent, flexible and cohesive panel could manage this rate of change. At the end of his watch Captain Callaghan handed just such a Panel over to me.

Retirement of CAPT Callaghan

For most of my own career in the Navy, Captain Callaghan was head of the Panel. Taking over from him presented a daunting challenge. On handover in March 2002, the Panel had excellent morale and was well serving all of Navy's then needs. In discipline and administrative law the panel was being called on to advise across every service and at every level of seniority. The Panel was frequently called on to provide advice to the ADF in relation to Government and Parliamentary inquiries and to assist some of the ADF's most senior commanders. Captain Callaghan's excellent service to the Panel was recognised at the handover. As incoming head of Panel, I described the contribution Captain Callaghan made to the development of the Panel in the notice announcing his retirement:

I am writing to inform each of the members and retired members of the Sydney Naval Legal Reserve Panel that Captain Peter Callaghan, SC, RANR is retiring after nine dedicated years of service as Head of Panel. He will continue as a member of the Panel. I have been appointed to succeed him in the position of Head of Panel.

It is difficult to measure in words the special value that Peter has given to the Navy since 1993 as Head of Panel. Peter's leadership of the Panel has been a constant assurance to the Navy of the quality of the Panel's legal work and also a constant assurance to Panel members that the best opportunities for the legal Reserve's contribution to the Navy were being sought. Peter's personal warmth and inclusive leadership approach has done so much to strengthen the cohesiveness of the Panel and has helped best to develop the career opportunities of Panel members within the Navy.

As well as undertaking a full Head of Panel administrative load and regular Judge Advocate and Defence Force Magistrate work, Peter has taken on a number of challenging Navy assignments and issues of importance to the Reserve. He was principal counsel assisting the complex and sensitive HMAS Westralia Board of Inquiry. He saw through the changes to the legal Reserve's role during the period of the co-location then dismantling of the various single service legal services directorates, followed by the creation of The Defence Legal

Service. In the debate about Reserve remuneration reform he has been a frequent advocate for practical and principled changes which would best serve the long term interests of the ADF. He has developed excellent working relationships with the Navy Heads of Panel in the other States of Australia and with the Army and Air Force Heads of Panel in Sydney. Most recently too he has represented a very senior member of the ADF in the current Senate Inquiry into a Certain Maritime Incident.

As his successor as Head of Panel, I am a principal beneficiary of Peter's close attention and commitment to his duties in the role of Head of Panel. I am already grateful for the goodwill, friendship and efficiency of the Panel which is the immediate legacy of his leadership. The Panel is very fortunate that Peter is continuing as a Panel member which will give us all the continuing advantage of his experience and judgment.

The Annual Mess Dinner was held on 17 May 2002 in Captain Callaghan's honour. In the presence of the then Maritime Commander, Rear Admiral Geoff Smith, AM, RAN, toasts to Captain Callaghan's service were given by present and retired members of the Panel. Warm messages and congratulations were sent to this occasion by interstate Heads of Panel with whom, by reason of his seniority, Captain Callaghan had enjoyed long associations. Since his retirement, CAPT Callaghan has continued to be a regular source of advice to me as the Head of Panel.

Some Early Steps

With more than 40 members, the Panel is the largest Panel of legal reservists in the ADF. Before becoming Head of Panel I requested Captain Helen Marks, RAN, then the Head of Category (Navy) within The Defence Legal Service, that an Executive Officer be allocated to the Panel. I feared that management of so many talented and busy reservists would consume the rest of my own professional practice unless I had dedicated assistance on hand. The management of a ship or establishment seemed to be a ready model for the provision of executive assistance. What the Panel needed was an Executive Officer. The idea of an executive officer seemed a logical one, even for a panel which had until then been wholly run by independent-minded barristers, who could and did generally do most necessary administration themselves.

From March 2002 Commander Christine Fowler has acted as the Panel's Executive Officer. Sixteen years as a seaman officer and attaining a law degree and working in the Commonwealth Director of Public Prosecutions were the right ingredients for a role that initially came with only the most general of instructions to 'improve the panel's administration'. What resulted was an energetic program of administrative change. Commander Fowler converted the Panel over to fully electronic communication. Electronic data and curriculum vitae were gathered on all Panel members, for distribution to the other services and to answer inquiries from within the ADF about Panel members' areas of experience. All enquiries from Panel members, depending on their level of urgency or sensitivity were dealt with either by Commander Fowler or me. Sharing the management of the Panel with an Executive Officer has been so successful that the model has now been replicated throughout many of the other regional Panels of barrister and solicitor reservists within The Defence Legal Service.

The Navy Signals Change

Within only weeks of taking over as head of Panel the then Fleet Legal Officer, Commander Dale Stephens foreshadowed to me that Navy was about to look to the Panel for a wider range of legal advice in both international and operations law than it had before. Elementary analysis made us both conclude that the panel needed preparation to meet any new request of this character from Navy. At that stage only a handful of Panel officers had undertaken courses in international, human rights or operations law. Very few of our members were sea ready. Security classifications had not been granted to officers in the Panel with this kind of legal work in mind.

From a series of breakfast meetings held in the Supreme Court Building in the legal precinct in Queen's Square, a plan emerged. Before starting other legal work, Commander Stephens, Commander Fowler, Lieutenant Commander Rogers and I met over three or four mornings at 0700 during April and May 2002. These discussions made clear that at least two tasks needed immediate action. The first was constructing a lecture course on International and Operations Law to be offered to the whole panel. The second was organising an accelerated program of NBCD¹¹ sea-readiness courses and improving opportunities for sea-going experience. Commander Stephens designed and arranged

¹¹ Nuclear, Biological and Chemical Defence and Damage Control. All seagoing personnel are required to maintain currency in NBCD skills for their own safety and that of their ship.

lecturers for the training course that ran from mid July 2002 to November 2002. Lieutenant Commander Rogers took responsibility for the sea readiness program, which resulted in half a dozen Panel members going to sea in the first six months and many more passing their NBCD courses on the way to becoming sea ready.

In the second half of 2002 Australian involvement in war in Iraq was looking increasingly likely. Commander Stephens made it clear that if a conflict occurred the Panel would be involved. This added special focus to the course-work being undertaken.

The Iraq War

The 2003 war against Iraq raised complex legal issues. These required resolution by both Maritime Command legal officers and Operational planners leading up to and during the maritime phase of the war.

Since the 1991 Gulf War, there had been numerous Conventions relevant to the conduct of war ratified by Australia that directly impacted upon military planning. These included the Additional Protocols to the Geneva Conventions, the Law of the Sea Convention and the International Criminal Court Statute. During the same period there was increasing sophistication in Australian rules of engagement doctrines and procedures. This demanded intense legal scrutiny and attention to Australia's Rules of Engagement (ROE) in anticipation of the Iraq War. A number of legal inter-operability issues also needed to be reconciled before Australian participation in combined operations with Coalition allies could be successfully achieved.

The legal issues being presented by this looming conflict required Maritime Headquarters Legal staff to be supplemented with Naval Reserve legal officers. This was particularly important during the planning and execution phases of maritime operations in the conflict. At the first Panel meeting in early February 2003, a number of discrete cells or syndicates were created to provide specialist legal input through the Fleet Legal Officer to operational staff at Maritime Headquarters, at Headquarters Australian Theatre and at sea.

Commander Collins was instrumental in providing logistical planning to refine the skills of the Panel to meet the emerging and changing legal priorities of the conflict. The cells, each comprising three

or four Reserve Legal Officers and some Maritime Headquarters staff, concentrated on a particular subject area of expected legal interest during the conflict. These included the following subjects: the reconciliation of the laws of naval warfare with the pre-existing United Nations Security Council authorities for the conduct of the maritime phase of the conflict; domestic constitutional and statutory issues arising in the transition to armed conflict; the determination of authoritative assessments of maritime boundaries under the Law of the Sea Convention and the reconciliation of belligerent rights in relation to such maritime claims; the resolution of International Criminal Court standards (pursuant to domestic legislation) with developing ROE; advice on Prize Court jurisdiction; advice on prisoner of war issues; and, finally, specialist assistance on investigations arising out of operational matters.

Reserve Legal Officers were rostered for duty with Maritime Headquarters staff throughout the conduct of the war. Apart from providing some specialist advice on operational issues arising from the conflict, these officers relieved for Maritime Headquarters staff rostered for duty at Headquarters Australian Theatre. Maritime Headquarters Legal and Operational staff anticipated almost all the significant legal issues that did in fact arise from the maritime phase of the conflict. Reserve support from the Panel assisted in producing this result. The contribution the Panel made was recognised by the Maritime Commander following the conflict. This is described more fully below.

The dedication of the entire Panel was outstanding. However, a few individual efforts should be particularly noted.

Commander Hilton and Lieutenant Commander Grigg addressed issues arising out of the special *jus ad bellum* questions for this conflict, which in turn fed back into the ROE development process.

Lieutenant Commander Kaye provided concise advice on matters concerning maritime delimitation issues in the Area of Operations. His early work enabled the Australian ships in the Gulf to operate with a safe and clear understanding of local maritime claims.

Lieutenant Commander Street identified significant deficiencies in Commonwealth Prize Court jurisdiction and recommended some potential remedies. Commander Horobin examined the application of the laws of naval warfare to potentially conflicting international legal standards. Lieutenant Commander Renwick analysed International

Criminal Court jurisdiction relevant to the conflict and interpreted Commonwealth International Criminal Court implementing legislation. Lieutenant Commander Needham assisted in analysing and perfecting the ROE which were eventually issued.

Throughout the conflict Commander Fowler, Commander Hoyle, Lieutenant Commander Rogers and Commander Brown were each instrumental in ensuring the timely provision of both legal advice and the marshalling of the Panel's legal resources to meet the needs of the Maritime Commander and Commander Australian Theatre.

At the end of the conflict I too was force assigned and called on to travel to the Northern Persian Gulf to conduct an investigation. This investigation assessed allegations that some sailors had been threatened by senior officers with adverse career consequences if they refused anthrax injections. I reported in May 2003.

The Panel Commendation

The Panel's response at the time of the Iraq conflict and its support to the Fleet throughout Navy's changing requirements was recognised in October 2003. At a training night that month Commodore Nigel Perry, RAN presented this commendation to the Panel, on behalf of the Maritime Commander Australia:

Commendation

SYDNEY LEGAL PANEL

ROYAL AUSTRALIAN NAVAL RESERVE

The Maritime Commander Australia commends the Sydney Legal Panel of the Royal Australian Navy Reserve for its outstanding support for Fleet operations which has been considerably enhanced since 2002.

During the past eighteen months, Royal Australian Navy Reserve lawyers based in Sydney have undertaken the Operational Law course run by the Fleet Legal Office which has, in turn, provided new and highly professional support for our permanent legal team leading up to and during Operations SLIPPER, BASTILLE and FALCONER.

Furthermore, the Sydney Panel has for the first time provided lawyers to join both Fleet units and Headquarters' teams for

deployment within and away from Australia. This level of support has included the availability of deployable Royal Australian Navy Reserve Lawyers to assist in recent operations in Iraq.

Panel members have repeatedly put aside civilian professional and personal interest when called on to provide assistance to the Royal Australian Navy. This enthusiastic response has significantly strengthened the output and reach of the Fleet Legal Office during a time of major international conflict. The transformation of the Royal Australian Navy Reserve legal service has been spearheaded by the Sydney Legal Panel to provide a level of support not previously available to the Fleet.

The professional skill and selfless support of the Sydney Legal Panel embrace Navy's core values, are of the highest order and are in the finest traditions of the Royal Australian Navy.

17 June 2003

R.W. GATES
Rear Admiral RAN
Maritime Commander Australia

In past years, individual members of the Panel have received commendations for their work for the service. This is the first time that any panel of legal reservists in the three Services has received a commendation for their contribution as a panel. It is a tribute to the work of all members of the Panel in 2002 and 2003 that this commendation was awarded.

The Restructuring of the Panel

By mid 2003 the administrative work of running the Panel had become substantial. To make better use of the Panel's experience, and for greater long-term efficiency, in February 2004 I decided to delegate this administrative work through a clear internal chain of command.

This should hardly have been surprising. The Panel is the largest single Panel of legal reservists in the ADF. It has just over 40 members of the active Panel and approximately 20 standby Panel members. It now undertakes legal work as varied as advocacy in courts martial and boards of inquiry, advising on operations law, lecturing on national security law, providing relief staff in the Fleet Legal Office and HMAS

Kuttabal, making sea-ready legal officers available for sea deployment and conducting investigations. The Panel consists of officers ranging in rank from Captain to Sub Lieutenant. We are in regular contact with Army and RAAF Legal Officers in many aspects of our work.

The new structure involved five senior Panel members each assuming two additional administrative roles. The Panel was divided into five task groups. The senior members of the Panel most actively engaged on behalf of the Panel during 2002-2003 were asked to head these five task groups. A Commander assisted by a Lieutenant Commander headed up each task group. This structure resembles the Command and Head of Department structure as it operates in a ship or establishment. Each of these Commanders gained two new types of responsibility for the future.

Career Management

The first additional responsibility of each Commander is to mentor and assist in the career development of five or six officers within his or her task group. In the future the Commanders will help in the Navy career planning for the Reserve officers in each task group. Each of these Commanders will assist in the distribution of legal work available to the Panel. Closer career management will enable the more junior members of the Panel to gain a broader range of service experience earlier in their careers. In this role the Commanders will also complete annual Officer Appraisal Reports on each of the officers.

Panel Administration

The second new role of each task group Commander is undertaking administrative responsibility on behalf of the Panel for part of its legal work. The five areas of responsibility and the five Commanders to whom they were allocated were as follows:

- Education & Training: Commander Hilton
- Tri-Service Deployment Opportunities and Liaison: Lieutenant Commander Street
- Panel Publicity & Communications: Commander Horobin
- The Regional Tri-Service Legal Conference, Interstate and DMP Liaison: Commander Hoyle
- Panel Sea-Readiness & Force Preparation: Commander Collins

Some of these responsibilities relate to newly emerging areas of Panel activity. Each Commander, assisted by a Lieutenant Commander, will take responsibility for all the Panel's functions in the area allocated to them.

Head of Panel Functions

The Head of Panel will still retain full command responsibility for the Panel but will only guide and be informed about many task group activities. Some decisions in relation to task group activities will include the Head of Panel but many do not. The role of Head of Panel includes the completion of Officer Appraisal Reports on the five Commanders in the performance of their respective roles and all the remaining functions of the Panel.

Advantages of the Restructure

The revised structure and the devolution of administrative roles within the Panel provide:

- the opportunity for senior Panel members to each have the experience of taking full responsibility for part of the Panel's administration and to liaise directly with other service personnel with whom the Panel communicate;
- junior Panel members with closer career management and more varied legal experience within the ADF;
- experience for senior Panel members in undertaking Officer Appraisal Reports on more junior officers within a chain of command; and
- the Head of Panel more time to focus on developing opportunities for the Panel and ensuring that the Panel's legal expertise is as useful to the ADF as possible.

Other Panel Developments

Although the Iraq War and the Panel restructure had major impacts over the last two years, the Panel has both held its regular events and developed in other new directions during that period.

In September 2003, the annual mess dinner was held, recognising two special guests and a guest of honour. The first special guest, Professor Captain Ivan Shearer, AM, RANR, a long standing member of the Panel and one of the world's leading authorities on the law of warfare at sea,

was honoured on his retirement. Also honoured was Captain Helen Marks, AM, RAN who was retiring from the position of Head of Category (Navy) within the Defence Legal Service. The principal guest of honour was Air Commodore Simon Harvey, RAAF, the new Director-General of The Defence Legal Service. Air Commodore Harvey was welcomed into his new role on the night and had the opportunity of meeting Panel members.

From late 2002 the Panel has been represented at quarterly meetings held with the permanent and reserve Airforce and Army legal personnel in the Sydney region. These meetings were instituted to assist in exchanging information about training opportunities, to take up common issues in relation to service legal information, to pursue common work opportunities and to exchange information about the legal expertise of service personnel available within the Sydney region. Practical results of this work have already been the increased contact by the Panel with the Director of Military Prosecutions based in Garden Island, the distribution of CD-ROMs containing important defence legal documents for use by Panel members and other service legal officers on deployment, and the exchange of data bases of information about Panel members with other Services.

Under the leadership of Commodore Michael Smith, AM, RAN, The Defence Legal Service has ensured that all legal officers from around Australia are able to meet, train and exchange ideas on a biennial basis. The first such meeting was Exercise CORROBOREE in which most legal officers from around Australia gathered at HMAS *Watson* in January 2002. The second Exercise CORROBOREE was held in January 2004 at RAAF Williams. Commodore Smith also instituted annual senior leadership conferences, where legal panel leaders from each of the three Services gathered to exchange information and report upon progress within their respective panels. The first of these was held at RAAF Amberley in August 2002, and the second in Canberra in August 2003.

The Panel has been fortunate with the qualities of its junior members who have joined in the last two to three years. In addition to the traditional value given to advocacy skills, there is now a greater focus in the selection of new panel members upon their ability to advise in international law and to leave practice at short notice for legal seagoing or administrative roles within the Service for short periods. This is working effectively and more panel members are undertaking

the necessary study and creating the necessary flexibility in their civilian practices to be ready in this way.

The Future

The future promises closer integration of the Panel with Navy, more seagoing career opportunities and more international law advising work for the Panel. Though as Panel members we constantly speak in terms of providing more efficient service to Navy, the work we do lies well beyond any ordinary civilian legal experience and holds a special priority in all our legal careers. It is very fulfilling. Almost every working day of the year a member of the Panel will do legal work for the ADF. We are all privileged to do so.

Captain I.A. Shearer, AM, RFD, RANR (Retd)

(Emeritus Professor of Law, Universities of Sydney and NSW, Charles H. Stockton Professor of International Law, United States Naval War College, Newport, Rhode Island, Member of the United Nations Human Rights Committee.)

Recollections

My service in the RANR, and my membership of the RANR NSW Legal Panel in particular, was of an unusual kind. I entered with little general naval knowledge, and no professional experience in the law suited to the tasks that most reserve legal officers undertook, such as prosecuting or defending at courts-martial, acting in boards of inquiry, advice to command, and advice on general legal problems encountered by navy personnel. I entered in 1973 to fill a particular need in international law.

My early service experience was with the RAAF. I had joined the Adelaide University Air Squadron during my student days, and was commissioned as a Pilot Officer in the year of my graduation (1960). There was no legal reserve as such at that time, but very soon one was established in order to meet the political imperative of the time to ensure that standards of justice, and the provision of legal services, within the Australian Defence Force were comparable with civilian standards. This meant an overhaul of the court-martial system, and improved provision of legal advice to service members in their conditions of service, and in their personal and family problems. I remember in particular being involved in a wills taskforce: it was decreed that every member of the RAAF should have a current will, and groups of Reserve lawyers travelled to all bases in Australia, and to Singapore, Malaysia and Vietnam writing wills. Long queues formed outside mess halls (The feared 'Air Force Wills cases' have - at least so far - not made their way to the courts, so skilful was our template).

International law was largely neglected in the 1960s. There were three notable figures, however, who helped to change this. The first was the Director of Air Force Legal Services, Group Captain D.B. Nichols. He was a scholarly and far-sighted officer who did much to change thinking throughout the Department of Defence (He was also an early admirer

of Samuel P. Huntington, and of his seminal book *The Soldier and the State*). The second was the Judge Advocate General of the Navy, Judge Trevor Rapke of the District Court of Victoria. The third was my teacher of international law at Adelaide, and mentor, Professor D.P. O'Connell. The three of them, together with Captain David Robertson, RN, Director of Naval Legal Services, and with the encouragement of the Admirals, ensured that international law became part of the curriculum of promotion courses in both Air Force and Navy. International law was also allocated a prominent position in the agenda of the annual conferences to which all reserve legal officers went (The Army was a later convert to the significance of international law).

Professor O'Connell was elected to the Chichele Chair of International Law at Oxford University in 1972. As a Commander RANR he had lectured throughout the Navy in Australia, and I was his understudy (in Air Force uniform!) His departure for England (and transfer to the RNR) left a gap, which I was very willing to fill, when invited by Captain Robertson to transfer to the senior service. Group Captain Nichols was very understanding and conceded that Navy's needs were greater than those of the RAAF in international law. Thus a RAAF Squadron Leader became a RANR Lieutenant Commander.

My change in service allegiance coincided with my move from the University of Adelaide to a chair in law at the University of New South Wales. This made it easier for me to deliver lectures and short courses at naval establishments on the eastern coast. Service needs dictated that all officers received basic training in the relevance of international law to naval operations, the law of the UN Charter governing the use of force, and in the international law of the sea.

It was also coincidental that in 1973 the United Nations Third Conference on the Law of the Sea (UNCLOS III) began its nine-year journey towards adoption in 1982 as the United Nations Convention on the Law of the Sea. Law of the Sea courses during this period were largely devoted to assessing progress towards codification of the law of the sea, especially as it affected naval and air operations. It was a useful lesson for the participants that the law is a dynamic process rather than a set of rigid rules handed down from on high.

Particular attention in courses and seminars was given to the navigational aspects of the law of the sea: innocent passage through territorial seas, transit passage in straits, passage through

archipelagic waters, protest against excessive maritime claims by other states, and the freedoms of the high seas (also applicable in exclusive economic zones). At a later stage, additional courses and seminars were introduced in the law of armed conflict (international humanitarian law - IHL).

It was at HMAS *Watson* that I was first introduced to war gaming. International law aspects (including IHL) soon assumed a crucial role in this activity. Largely due to Professor O'Connell's promotion of the centrality of international law in the drafting and application of rules of engagement through his book *The Influence of Law on Sea Power* (1975) - the title being a deliberate pun on Mahan's great work *The Influence of Sea Power on History* - the RAN was an early promoter of the concept in its officer education. In this it kept pace with the United States and Royal Navies. In the last months of his life, I managed to get Professor Julius Stone invited to a war game at HMAS *Watson* in order to see rules of engagement being exercised. He sat entranced, together with Chief Justice Sir Laurence Street, at the edge of the tactical floor. It was a new and exciting experience for him. He declared afterwards that, had he been given more time, this is what he would most like to write about next. What would he have made of my most recent experience of war gaming at the United States Naval War College in Newport, Rhode Island.¹² The law now has to deal with the fast changing world of technological invention and with information warfare.

It is pleasing that at the time of my retirement from the RANR in December 2000 so many permanent naval legal officers now work in the field of international law. Indeed, international law is now regarded as equally important to all three services, and advice is given largely on a tri-service basis. RANR officers have recently been given a greater opportunity to participate in this field through the inauguration of a special course in 2003 so as to widen the pool of experience.

¹² Captain Shearer was a visiting Professor at this institution in 2001.

ANNEX A - BIOGRAPHIES OF PANEL LEADERS

The Honourable Sir Laurence Street, AC, KCMG, QC



In 1943 the then Laurence Whistler Street, aged 17, and having just completed the Leaving Certificate, joined the Royal Australian Navy Volunteer Reserve as an Ordinary Seaman second class (the equivalent of a Seaman in today's Navy). The Navy was the only service an eager young lad could join at such a young age, as the Army and RAAF only accepted recruits over the age of 18 years. With an older brother already in the Navy and an uncle that had been killed at Gallipoli, the decision caused some anxiety for his parents.

After completing his initial training at HMAS *Cerberus*, Street was selected for the Officer Training School, which he successfully completed, graduating with the rank of Midshipman in 1944. After further training in anti-submarine warfare, he was posted as the anti-submarine officer aboard the corvette HMAS *Ipswich*, then part of the British Pacific Fleet. As HMAS *Ipswich* cruised north, the idyllic calm and lush islands of the tropical Pacific gave way to the rolling seas of the north Pacific. Seasickness aboard such a small vessel in such large seas was an almost universal complaint.

Street remained on HMAS *Ipswich* for the duration of the war. His diary note for 15 August 1945 reads '0800 - news received that peace has broken out. Dying to get back to civvy street again.' When the Japanese surrender was signed on 2 September 1945, Street was aboard HMAS *Ipswich* in Tokyo Bay, which held one of the greatest displays of naval power ever seen. The entire US 3rd Fleet and much of the British Pacific Fleet witnessed the end of World War II.

On his return to Sydney after the surrender, Street was posted as the Port anti-submarine officer and was promoted to Sub Lieutenant in 1946. He was demobilised in 1947.

By 1964, Street, QC was a leading member of the Sydney bar. In February of that year, the first HMAS *Voyager* Royal Commission was called and he was promptly engaged by the widow of *Voyager's* commanding officer, Captain Duncan Stevens, RAN. His leading role in that Royal Commission was appropriate considering he was then the only Queen's Counsel to have been an officer of the watch aboard a warship.

At the conclusion of the Royal Commission the Chief of Naval Staff, Admiral Harrington, RAN, asked Street if he would form a Naval Reserve Legal Branch. The offer was accepted and, 17 years after retiring as a Sub Lieutenant, Street emerged from Admiral Harrington's office with the rank of Commander. Street retired from his position as Senior Officer of the Branch when he was appointed to the bench of the New South Wales Supreme Court in October 1965. He was Chief Justice of New South Wales and Lieutenant Governor for many years. One son and daughter of his presently serve in the Reserve on the legal panel.

The Honourable Harold Glass, QC



On the elevation of Sir Laurence Street to the bench in October 1965, the role of Senior Officer of the Navy Reserve Legal Branch passed to Harold Glass, QC.

Like his predecessor, Glass was a member of the RANVR (Special Branch), who saw active service during World War II from 1942 to his discharge in 1946 with the rank of Lieutenant.

He was appointed to the Supreme Court of New South Wales in September 1973 and was subsequently made a Judge of Appeal.

In 1978 he was promoted to Rear Admiral and appointed Judge Advocate General (Navy), a position he held until 1983. Upon his promotion, his first port of call was to Norman Travers, an ex Royal Navy Petty Officer, who had also seen service during World War II and who at the time was the barman in the Bar Common Room. Travers showed Glass how to put his Admiral shoulder boards on!

It has been said that Glass derived more pleasure in achieving flag rank than being a Judge of Appeal in the New South Wales Supreme Court.

Harold Glass passed away on 29 March 1989.

John Sinclair, QC



At age 13, John Sinclair fulfilled his childhood ambition and joined the RAN as a cadet midshipman in January 1940. Three years later, in August 1943, he passed out of the Royal Australian Naval College at HMAS *Cerberus*. Shortly after, as was the tradition at the time, Sinclair was posted as a Midshipman to the Royal Navy to complete his 'big ship time'.

He joined the Royal Navy Home Fleet at Scapa Flow and early in January 1944 he was posted to the heavy cruiser, HMS *Cumberland*. By then the war in the Atlantic was slowly turning in the

Allies' favour. However the threat of German U-boats remained ever present and winter in the North Atlantic stood in stark contrast to the Australian summer he had left behind. After a few months of convoy duty in the North Atlantic, HMS *Cumberland* was transferred to the British Eastern Fleet at Trincomalee in Ceylon. During 1944 HMS *Cumberland* took part in offensive sweeps in the Indian Ocean and strikes against Japanese held ports and airfields in and near Sumatra.

On completing his big ship time in HMS *Cumberland*, Sinclair was transferred to HMS *Wager*, a modern fleet destroyer. HMS *Wager* continued to engage in offensive strikes as well as screening the fleet carrier HMS *Illustrious*.

In March 1945, only hours before HMS *Wager* left Trincomalee as a unit of the British Pacific Fleet bound for Sydney, an unlucky Sinclair was recalled to the UK to complete his Sub Lieutenant's courses. After a short time on HMS *Melbreak*, a *Hunt* class destroyer, doing anti E-Boat patrols and escorting Thames-Antwerp convoys, he attended his Sub Lieutenant's courses in Britain, which he completed in November 1945.

In January 1946 after six years in the RAN, Sinclair joined his first RAN ship, the light cruiser HMAS *Hobart*, then in Tokyo Bay as part of the Commonwealth forces occupying Japan. On his promotion to

Lieutenant in May 1947 he joined the corvette HMAS *Warrnambool*, and was engaged in minesweeping operations between Cairns and Cape York. After surviving the war without mishap, on 13 September 1947 Sinclair was on board HMAS *Warrnambool* when she struck a mine while sweeping off Cape Grenville. She sank with the loss of four sailors.

Sinclair retired from the RAN in 1950 and proceeded to study law at the University of Sydney under the Commonwealth Rehabilitation Training Scheme. He was called to the Bar in 1955 and took silk in 1974.

Sinclair was Street's junior during the *Voyager* Royal Commission. He subsequently declined Street's offer to join the founding Panel in 1964, but later agreed to join and became leader of the panel with the rank of Commander in February 1975. He was appointed to the NSW District Court bench in April 1977 and retired from the RANR in 1986.

The Honourable Terence Cole, RFD, QC



Terence 'Terry' Cole joined the panel in June 1969. Along with Murray Tobias he was the first since the founding of the panel five years before. At that time, the Director of Naval Legal Services would advise the panel leader that additional personnel were required and the

panel leader would make appropriate invitations. The invitees were then duly appointed following a meeting of a selection board.

Notwithstanding his relative lack of experience in matters criminal at the time of his appointment, Cole soon acquired the necessary skills in order to defend, prosecute and later preside over courts martial. His most noteworthy court martial, as Judge Advocate, was the trial of the Captain and Navigating Officer of HMAS *Adelaide* over her grounding during acceptance trials. The trial was held at Long Beach Naval Station in California. Cole took silk in 1976 and was appointed head of panel in 1977 upon Sinclair's appointment to the bench. Cole remained in that position for the next 11 years, until his appointment to the bench of the New South Wales Supreme Court in 1988. He was appointed to the Court of Appeal in 1994. Cole was appointed Deputy Judge Advocate General of the Australian Defence Force on 13 April 1992 and promoted to the rank of Commodore. He retired from the RANR and the Supreme Court in 1998. He was Royal Commissioner into the Building and Construction Industry between 2001 and 2003.

The Honourable Mr Justice Murray Tobias, RFD



Murray Tobias joined the panel in 1969. Then a promising junior barrister, he accepted the appointment with enthusiasm notwithstanding that at the time his services went unpaid.

His first sea posting was aboard the guided missile destroyer HMAS *Hobart* for five days during her work-ups for her deployment to Vietnam. Keen to play his part while aboard, Tobias attended the bridge as second officer of the watch where he learned to plot a course.

However, his enthusiasm didn't extend as far as the middle watch when his somnolence kept him in his bunk.

During his time in the panel Tobias appeared in many courts martial. His first court martial on his own was as the prosecutor of an unfortunate Chief Petty Officer submariner. The Chief had allegedly pulled the wrong lever that would have sunk the submarine had the captain not promptly seen it. He was duly convicted of negligent performance of his duties. Perhaps his most celebrated court martial was as junior defence counsel of the young seaman who was accused of setting fire to the fleet air arm whilst in the hangar at HMAS *Albatross*. The sailor maintained that he had no memory of the event and was later diagnosed with encephalitis. He pleaded not guilty by reason of insanity and was acquitted.

Tobias took silk in November 1978, and upon Cole's elevation to the bench in 1988 was appointed head of panel, a position he held until 1993. He retired in 1999 with the rank of Captain and was appointed to the bench of the New South Wales Supreme Court (Court of Appeal) in 2003.

Peter Callaghan, RFD, SC



Peter Callaghan was appointed as a Lieutenant (Special Branch) RANR on 12 May 1976 and has served continuously since that time.

He was appointed as a Judge Advocate in 1985 by Rear Admiral David Martin, RAN and has since presided over 50 trials.

Callaghan has also appeared in perhaps two of the most well known military Boards of Inquiry. In 1986 he appeared for the Commanding Officer of HMAS *Otama* at the Inquiry into the loss of two sailors when the boat dived off Sydney Heads. In 1998 he was counsel assisting in the Inquiry into the fire on board HMAS *Westralia*.

Callaghan was appointed head of panel in 1993 and promoted to Captain the following year, when he also took silk. During the next nine years under his helm, the legal services provided to Navy was fundamentally changed. The abolition of the Director of Navy Legal Services and the creation of The Defence Legal Service saw a significant increase in the number of Permanent Naval Force lawyers, as well as the integration of the reserve into the tri-Service legal environment. By the time of his retirement as head of panel in March 2002 Callaghan had overseen the greatest change to the nature of legal services provided by the panel since its foundation in 1964.

Michael Slattery, QC



Michael Slattery was admitted to practice as a barrister on 19 May 1978.

In February 1990, Slattery was appointed an Officer in the Royal Australian Navy Reserve and at the same time became a member of the NSW Navy Reserve Legal Panel. On 1 December 1992 Slattery was appointed Queen's Counsel. He was among the last group of Queen's Counsel appointed in New South Wales. Since then, as well as conducting commercial practice at the Bar, he has undertaken a variety of

tasks within Navy in criminal, commercial, human rights and warfare/operations law.

In December 1990 he prosecuted the HMAS *Swan* sexual assault trial. This trial was followed by a Board of Inquiry and then a Senate Inquiry into the incident and incidents of a similar nature within the ADF. He represented the Navy in the Senate Inquiry.

He was promoted to Lieutenant Commander in January 1996. In December that year, assisted by Lieutenant Street, he prosecuted in the navigation trial arising out of the running aground of HMAS *Torrens* in north-western Australia.

Between 1996 and 2000 his work for the ADF increasingly focused on advisory work for senior commanders, mediations and investigations under the Defence Inquiry Regulations. He undertook a major investigation into allegations of misconduct at the Australian Defence Force Academy in October 1998.

He was promoted to the rank of Commander in January 2000 and continued with criminal trial work, which by this time, after the establishment of The Defence Legal Service was increasingly conducted on a tri-Service basis. In March 2002 he was appointed Head of Panel.

ANNEX B - LIST OF ORIGINAL PANEL MEMBERS

Commander L.L.W. Street, RANVR

Lieutenant Commander W.G. Dovey, VRD, RANR

Lieutenant J.F. Gallop, RANVR

Lieutenant W.H. Gregory, DSC, RANVR

Lieutenant R. Vincent, RANVR

Lieutenant D.K. Voss, RANVR

Rather than create a new branch of the RANVR, the newly appointed lawyers were placed in the Special Branch, which was reserved for those with unusual qualifications or skills, who did not otherwise qualify for the Executive, Engineering or Supply and Secretariat Branches. The Legal Panels were first listed in the Navy List of March 1966.

Information provided by Captain T.J. Holden, RAN (Retd)

ANNEX C - List of Current NSW Reserve Naval Legal Panel Members

Commodore K.V. Taylor, AM, RANR
Captain P.R. Callaghan, RFD, SC, RANR
Captain D.A. Wheelahan, RFD, QC, RANR
Commander I.D.M. Roberts, SC, RANR
Commander A.S. Brown, RANR
Commander P.E. Collins, QC, RANR
Commander C.J. Fowler, RANR
Commander J.S. Hilton, SC, RANR
Commander J.J. Horobin, RANR
Commander T.R. Hoyle, SC, RANR
Commander M.J. Slattery, QC, RANR
Commander A.S. Brown, RANR
Lieutenant Commander C.B. Campbell, RANR
Lieutenant Commander R. Giovanelli, RANR
Lieutenant Commander D.J. Grigg, RANR
Lieutenant Commander S.B. Kaye, RANR
Lieutenant Commander P.E. King, RANR
Lieutenant Commander I.E. Mitchell, RANR
Lieutenant Commander C.A.T. Moore, RANR
Lieutenant Commander T.E. Popper, RANR
Lieutenant Commander J.M. Probert, RANR
Lieutenant Commander J.G. Renwick, RANR
Lieutenant Commander F.A.L. Rogers, RANR
Lieutenant Commander A.W. Street, SC, RANR
Lieutenant Commander N.L. Williams, RANR

Lieutenant Commander N.W. Wyatt, RANR
Lieutenant A.J. Abadee, RANR
Lieutenant G.M. Clayton, RANR
Lieutenant S. Emmett, RANR
Lieutenant M.C. Doherty, RANR
Lieutenant P. Duncan, RANR
Lieutenant M.R. Gracie, RANR
Lieutenant P.F. Hogan, RANR
Lieutenant B.L. Jones, RANR
Lieutenant P.W. Kerr, RANR
Lieutenant T.T. Lucas, RANR
Lieutenant P.L. Michie, RANR
Lieutenant C.A. Needham, SC, RANR
Lieutenant Y.E. Phang, RANR
Lieutenant S.H. Patterson, RANR
Lieutenant D.W.J. Shepherd, RANR
Lieutenant G. Smirlios, RANR
Lieutenant J.E. Solomon, RANR
Lieutenant M.R. Tyson, RANR
Lieutenant M.T. Vesper, RANR
Lieutenant M.S.C. York, RANR
Sub Lieutenant D. Abrahams, RANR

