Should there be a new military court?

By David McLure

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

On 21 June 2012 the Australian Government introduced into parliament the *Military Court of Australia Bill 2012*. The Bill proposes to create a new federal court established under Chapter III of the Constitution, which will exercise original and appellate jurisdiction over Australian Defence Force (ADF) personnel charged with service offences. This article considers whether the system proposed by the Bill is desirable and its susceptibility to further constitutional challenge.

A (relatively) brief history of military justice in Australia

Before federation each of the Australian colonies had legislation that in differing ways applied statutes of the United Kingdom to provide for the discipline of their naval and military forces. Following federation, the naval and military forces of the states were transferred to the Commonwealth and came under the command of the governor-general.[2] *The Defence Act 1903* (Cth) caused the provisions of the UK Army Act and the Naval Discipline Act to apply to the new military and naval forces of the Commonwealth while on active service. Under that system, commanders had the authority to summarily punish service personnel for minor offences. More serious offences were dealt with by courts martial.

The *Defence Force Discipline Act 1982* (Cth) (DFDA) was introduced to modernise and consolidate discipline law applicable to the ADF, although most elements of the old system were retained. The DFDA laid out a series of military-specific offences, such as mutiny, insubordination and absence without leave. Additionally, the DFDA created an offence of engaging in conduct that would be an offence against the civilian criminal law of the Jervis Bay Territory. Like the old system, military commanders retained the jurisdiction to summarily try and punish certain classes of minor offences. More serious offences were dealt with by courts martial and a newly created form of service tribunal constituted by a legally qualified Defence Force magistrate sitting alone.

The constitutional validity of the old UK-based system and the DFDA system were challenged in the High Court on numerous occasions. Those challenges culminated in the court's decision in *White v Director of Military Prosecutions*[3] where it was held that the DFDA was a valid exercise of the defence power in s 51(vi) of the Constitution and service tribunals established under that Act validly exercised judicial power standing outside Chapter III.

In 2005 the Senate Foreign Affairs, Defence and Trade Committee undertook a comprehensive review of the military justice system.[4] Among other matters, the committee recommended the establishment of a permanent military court independent of the military chain of command to replace the system of trials by courts martial and Defence Force magistrates. Adopting some of the committee's recommendations, the then government amended the DFDA in 2006[5] to create the Australian Military Court (AMC). The amendments declared the AMC to be a court of record, but not a court for the purposes of Chapter III. In 2009 the High Court unanimously held in *Lane v Morrison*[6] that the AMC was constituted to exercise the judicial power of the Commonwealth otherwise than in accordance with Chapter III and hence its establishment was invalid. In response to the court's decision, the parliament reintroduced the system of trials by courts martial and Defence Force magistrates on an interim basis while the government considered its next move.[7]

The proposed Military Court of Australia

The proposed Military Court of Australia (MCA) sets out to achieve the same objectives of the invalid AMC. The summary system exercised by commanders will continue, however, the new court will replace courts martial and Defence Force magistrates, save for instances where the MCA determines that it is necessary, but not possible, for it to conduct a trial overseas. They key differences between the AMC and the proposed MCA are:

- the AMC was constituted by legally qualified military judges who were serving ADF members. The MCA will be constituted by civilian judges appointed under Chapter III;
- the AMC allowed for trial by a military judge sitting alone, or by a military judge sitting with a military jury of up to 12 officers depending on the seriousness of the offence. The MCA will try all offences by a single civilian judge sitting alone.

The Bill proposes trial by single judge or magistrate, without a court martial panel or military jury

Since federation, Australia's military forces have employed a disciplinary system which has, at its apex, the trial of serious offences by court martial.[8] In a trial by court martial, the judge advocate and the panel of military officers perform substantially the same function as a judge and jury in a civilian criminal trial.[9] That is to say, the judge advocate decides all questions of law and gives the panel directions of law with which they must comply.[10] The panel is the sole judge of the facts and decides the ultimate question of whether the accused is guilty or not. If the accused is found guilty, the panel determines the appropriate punishment.[11] This aspect of the military justice system has served the ADF well, especially since the introduction of a statutorily independent director of military prosecutions (DMP) and registrar of military justice in 2005.[12]

The Bill proposes a system that effectively does away with courts martial and entirely removes the involvement of military officers in determining whether ADF members should be found guilty of serious offences and if so, how they should be punished.

Clause 64 of the Bill provides that charges of service offences brought before the MCA are to be dealt with otherwise than on indictment. The purpose of this provision is to avoid the requirement under s 80 of the Constitution that the trial on indictment of any offence against a law of the Commonwealth shall be by jury.

The distribution of the MCA's business will depend on the maximum punishment applying to the offence charged. The Superior Division of the MCA (constituted by a single judge) will deal with offences of a military character having a maximum penalty of between five years and life imprisonment.[13] The Superior Division will also deal with offences against s 61 of the DFDA, picking up the civilian criminal law in force in the Jervis Bay Territory, where the maximum punishment is between 10 years and life imprisonment.[14] The trial of all other offences will be dealt with by federal magistrates in the General Division.[15]

The proposal to conduct trials by a judge or federal magistrate sitting alone is not the product of a policy decision[16] that it would be better to exclude military officers from the role they currently play in a court martial panel. Rather, as clause 10 of the explanatory memorandum makes clear, 'a jury in a Chapter III court could not be restricted to Defence members and a civilian [jury] would not necessarily be familiar with the military context of service offences'. It can be seen from this that the proposal to conduct trials by a judge or federal magistrate sitting alone without a military jury or court martial panel is the price to be paid for the choice to establish the MCA under Chapter III, based on the recognition that it would be inappropriate for a military court to be constituted by a civilian judge and civilian jury.

The Bill proposes a system that is out of step with the civilian justice system and the military justice system of Australia's closest allies

A single judge of the MCA will have the power to try members of the ADF for a number of DFDA offences punishable by life imprisonment, such as s 15B aiding the enemy whilst captured, s 15C providing the enemy with material assistance, s 16B offence committed with intent to assist the enemy and s 20 mutiny. No civilian court will have the jurisdiction to deal with those offences. Additionally, a single judge of the MCA will have the power to try civilian offences picked up by DFDA s 61 which are also punishable by life imprisonment, such as murder (*Crimes Act 1900*

(ACT) s 12) and numerous offences in the *Criminal Code 1995* (Cth). In most cases where such an offence was committed by an ADF member on operations overseas, a civilian court would not have jurisdiction to deal with the matter.[17]

The system proposed by the Bill will be out of step with the civilian criminal justice system. Under Commonwealth law, offences punishable by imprisonment for a period exceeding 12 months are generally indictable offences and therefore tried by a judge and jury. Offences punishable by imprisonment for a period not exceeding 12 months are generally summary offences and are tried by a magistrate.[18]

A number of Australian states and territories have legislative regimes allowing for the trial of indictable offences by a judge alone. Initially, a trial by judge alone was permitted only at the election of the accused. More recently, a number of states[19] and the ACT have allowed for a judicial discretion to order a trial by judge alone. One of the primary uses that has been made of judge alone trials is where there has been highly prejudicial media reporting of a matter leading to a fear that a fair jury trial could not be secured.[20] No Australian state or territory has adopted a system of mandatory judge alone trials for serious offences.

If the Bill is enacted, Australia will be alone among its closest allies such as the United States, the United Kingdom, Canada and New Zealand in having a system that limits the trial of serious service offences to a civilian judge without the option of a court martial panel or military jury.

Australian soldiers providing security at Malalai Girls School in Tarin Kot. Photo: Able Seaman Jo Dilorenzo /Commonwealth of Australia / Department of Defence.

Will the Bill achieve the objectives that justify a separate military justice system?

In *Re Tracey; ex parte Ryan*,[21] Brennan and Toohey JJ reviewed the development of the British military justice system from around the time of the reign of Charles I. Their Honours noted that at the time, the regulation of a standing army was needed for:

> …the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline…[22]

ADF doctrine embraces the importance of maintaining discipline, not merely for the purpose of protecting the civil population from an undisciplined army, but as an integral element of establishing an effective fighting force.[23] A disciplined and well-led defence force is one that is likely to possess the skill, morale and dedication required to undertake the hazardous duties expected of its members both on operations and in training.

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The need for a disciplined and law-abiding defence force is obvious, but what is the benefit of achieving that effect in a separate military justice system? Theoretically, there

is nothing that the military justice system does that the civilian legal system could not be empowered to do. If it was thought expedient to do so, the jurisdiction to investigate, prosecute and try any offence against the DFDA could be vested in the civilian police, prosecuting authorities and courts. The point of distinction is that a military justice system that is effectively administered and participated in by military officers enhances the authority of commanders which in turn, contributes to the effectiveness of the organisation as a fighting force.

What is the advantage of trying serious offences by a court martial panel?

While the vast majority of the activity in the ADF military justice system is conducted in summary hearings before commanders, the relatively fewer hearings of more serious charges before courts martial are no less (and in some cases, more) important.

In the United States, consideration has previously been given to removing the role of military officers on a court martial panel in determining the punishment to be imposed upon convicted members. In 1984 an advisory commission reported to Congress that if sentencing by judge alone was adopted, an important source of feedback would be lost, and another bonding link between the military justice system and the command might be severely weakened.[24]

Those observations are equally apposite to the ADF.

Recognition of the importance of the involvement of military officers in the conduct of military trials is to be found in the reforms undertaken since the 2005 Senate committee report. In the explanatory memorandum to the bill introducing the now defunct AMC, the then government said that the philosophy underpinning its approach to the design of the AMC was that:

> A knowledge and understanding of the military culture and context is essential. This includes an understanding of the military operational and administrative environment, the unique need for the maintenance of discipline of a military force in Australia and on operations and exercises overseas. The AMC must have credibility with, and acceptance of, the Defence Force.[25]

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The force of this observation has not been diminished by the demise of the AMC following the High Court's decision in *Lane v Morrison*.[26] The involvement of military officers in a court martial ties the system to the community it serves, namely, the ADF. Decisions in which military officers have participated are more likely to attract acceptance and be credible to members of the ADF. Participation in the military justice system encourages a shared sense of responsibility for the maintenance of discipline, in a way that an externally imposed system will not.

What is the benefit and cost of establishing the Military Court of Australia under Chapter III of the Constitution?

The key benefit of establishing the MCA under Chapter III of the Constitution is that the judges and federal magistrates will enjoy the independence attached to such an appointment and thereby stand apart from any command influence. Possibly of lesser importance will be that the parliament will be prevented from conferring on the MCA jurisdiction that is incompatible with the exercise of the judicial power of the Commonwealth.[27]

As discussed above, the price to be paid for these benefits is the loss of the ability to try serious offences with a court martial panel or a military jury.[28] The question is: is that price too high?

The ADF currently has two permanent judge advocates and occasionally utilises a reserve judge advocate. It is difficult to see how in theory or in practice the conduct of their duties is improperly influenced by ADF commanders. Judge advocates are appointed to the judge advocates' panel on the nomination of the judge advocate general (JAG), who is a judicial officer appointed by the governor-general. Judge advocates are not appointed to particular cases by

commanders, but by the registrar of military justice. DFMs are appointed to a case upon nomination by the JAG.[29]

Judicial independence in the military, as in the civilian sector, is not an end in itself. Rather, it is a measure to enhance the prospect of the system arriving at just results according to law. In the United States, where this topic has been the subject of debate, one judge advocate considered that if military judges were replaced by civilian judges, 'the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibilities effectively'.[30]

The Bill attempts to ameliorate the loss of the ability to try serious offences with a court martial panel by confining appointments to the MCA to persons who, by reason of experience or training, understand the nature of service in the ADF.[31] While this is a valuable measure and an admirable ideal, the reality is that there will be very few candidates for judicial appointment who have had recent command experience and fewer still with operational experience. To say so does not cast any doubt on the skills or dedication of the judicial officers who might be appointed to the MCA. Rather, it is submitted that a system in which military officers participate in the trial of serious offences with the assistance of a legally qualified judge is likely to be a better one, both in terms of the accuracy of decision-making[32] and the credibility of such decisions in the perception of the public and members of the ADF.

Major General the Honourable Justice Brereton[33] recently reflected on the benefits of a court martial panel in the context of a military prosecution that generated considerable controversy. His Honour said:

> The pre-occupation of some with the supposed benefits of a Ch III court in this context is, I suggest, misconceived. The military justice system, though something of a hybrid, is fundamentally a disciplinary, not a criminal, jurisdiction. Most of our professional disciplinary systems have tribunals which are dominated by members of the relevant profession, with a legal advisor or chair, for instance in New South Wales, the Medical Tribunal for medical practitioners, and the Legal Services Division of the Administrative Decisions Tribunal (and its various predecessors) for legal practitioners. They bear many similarities to the court martial, from which they might well be historically derived. There is a risk that retrospective forensic analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating. I do not think there is much risk of that in a court martial, in which the tribunal of fact is a panel of military officers, who will bring their specialist knowledge, understanding and experience to the task – just as do the doctors to the Medical Tribunal. For my part, I would suggest that such a court martial is better equipped to judge prosecutions for service offences than a judge of a Ch III court without operational military experience.[34]

Will the proposed system be held to be valid?

As already noted, the Bill attempts to avoid the requirements of section 80 of the Constitution by specifying that all charges will be dealt with otherwise than on indictment. On several occasions the High Court has dealt with the question whether there are limits to the parliament's power to prescribe what is and is not an indictable offence for the purposes of section 80. While it is clear that the balance of authority favours the conclusion that the parliament's power in this regard is unlimited, there have been a number of powerfully expressed contrary views, not the least of which include Dixon J in Lowenstein[35] and Deane J in *Kingsell v R*.[36] The Bill's proposal to allow the MCA to deal with offences carrying a punishment of life imprisonment may well be considered to be a suitable vehicle to reconsider this question. In Cheng[37] the court declined to reconsider the issue, however, Gleeson CJ, Gummow and Hayne JJ said that if s 80 were to be re-interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so would be where there was a legislative denial of trial by jury in the conduct of a prosecution involving issues susceptible of trial by jury.[38]

No doubt those involved in the development of the Bill hope that the proposed arrangements will finally put to rest the constitutional uncertainty that has, at times, shadowed the military justice system for the last 30 years. History

suggests, however, that a challenge to the system proposed by the Bill is inevitable.

Conclusion

The Bill proposes a system where charges are preferred by the DMP who is statutorily independent of command, to be heard and determined by civilian judges in a Chapter III court. The almost complete disengagement of military officers from this layer of the military justice system undermines its objective of maintaining a disciplined and effective fighting force. It is submitted that a military justice system that has the flexibility to permit the trial of serious offences by a court martial panel is better than one that does not. The existing system of courts martial does that in a way that is constitutionally valid and accords with modern standards of fair trials.

The potential for a successful constitutional challenge to the MCA should be a strong deterrent to the Bill's passage. It would be deeply inconvenient if the ADF had to undergo a repeat of the disruption caused by the High Court's decision in *Lane v Morrison*.[39] The safer and better course is to utilise the existing system approved by the High Court in *White v Director of Military Prosecutions*.[40]

The Bill has been the subject of a recent inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. The government members of the committee recommended the Bill's approval.

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The Coalition and Greens members recommended an amendment to allow trial by civilian jury for serious offences. That is an option that neither the government nor the ADF would appear to want. The Bill is expected to return to the parliament for further debate.

Endnotes

1. David McLure is a reserve officer in the Australian Army. The views expressed here are his own.
2. Constitution, ss 68, 69.
3. (2007) 231 CLR 570.
4. Senate Foreign Affairs, Defence and Trade Committee, The effectiveness of Australia's military justice system (2005)
5. *Defence Legislation Amendment Act 2006* (Cth).
6. (2009) 239 CLR 230
7. *Military Justice (Interim Measures) Act (No. 1) 2009* and *Military Justice (Interim Measures) Act (No.2) 2009*.
8. See: *Lane v Morrison* (2009) 239 CLR 230, [38] – [45].
9. There are also significant differences, eg. it is a trial by the accused's superiors, not his/her peers.
10. DFDA s 134(4).
11. DFDA ss 132 – 134.
12. *Defence Legislation Amendment Act (No. 2) 2005* (Cth).
13. *Military Court of Australia Bill 2012*, schedule 1, items 1 – 18.
14. Ibid, items 19 – 22.
15. Ibid s 65.
16. At least not one that is disclosed in the explanatory memorandum or the second reading speech.
17. One obvious exception is the war crimes offences contained in division 268 of the Criminal Code. See also *Crimes (Overseas) Act 1964* (Cth) s 3A(10).
18. *Crimes Act 1914* (Cth) ss 4G, 4H.
19. New South Wales, Queensland and Western Australia.
20. For a helpful analysis of the state regimes, see Jodie O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35 *Criminal Law Journal* 154.
21. (1989) 166 CLR 518.
22. Ibid 557.
23. Australian Defence Doctrine Publication 00.1 Command and Control (2009) 1-2. Australian Defence Doctrine Publication 00.1 Leadership (2007).
24. The Military Justice Act of 1983 Advisory Commission Report, 14 December 1984, 20
25. Explanatory Memorandum to the Defence Legislation Amendment Bill 2006, [4].
26. (2009) 239 CLR 230.
27. *Kable v Director of Public Prosecutions (DPP) (NSW)* (1996) 189 CLR 51.
28. *Cheatle v R* (1993) 177 CLR 541 at 560.
29. DFDA ss s 119, 129C, 179, 196.
30. Fansu Ku, 'From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century' (2009) 199 *Military Law Review* 52 – 53.
31. Bill clause 11.
32. Ie. findings of fact and decisions on guilt and punishment based on the panel's specialised military knowledge and experience.
33. Major General Brereton is a justice of the Supreme Court of New South Wales and an experienced commander in the Army.
34. Justice Paul Brereton, 'The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law' (2011) 85 *Australian Law Journal* 91.
35. *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 582
36. (1985) 159 CLR 264, 307 – 322.
37. *Cheng v R* (2000) 203 CLR 248,
38. (2000) 203 CLR 248, [43].
39. See DMP's submission to the committee dated 13 July 2012
40. (2007) 231 CLR 570.