

Our sights must be set on justice

- **Simon Bronitt and Mark Nolan**
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Illustration: Andrew Dyson

We should ensure military courts meet minimum guarantees for a fair trial.

AUSTRALIA'S military justice system is in turmoil. The Australian Military Court, a relatively new military tribunal, is now out of business, having been declared unconstitutional by the High Court.

This follows a challenge to the validity of the AMC by Brian George Lane, a former seaman who was charged by the navy with indecently assaulting a superior.

Some have been quick to argue that the AMC should have been set up as a federal court with all the implications of that, including trial by jury for serious offences, appointment of judges with security of tenure and so forth.

Indeed, constitutional law expert George Williams has already said that if only the former government had accepted the recommendations of a 2005 Senate inquiry that this new military court be established as a federal court, the fallout from the Lane case could have been avoided.

But is creating a new federal court for the Australian Defence Force the right approach? From our perspective, it may be wise to exercise restraint in rushing to "federalise" our military discipline system for several reasons.

The military justice system is distinctive in many ways: it applies to both uniformed ADF members and civilians working for the ADF at home and abroad in times of war as well as peace. Any tribunal serving these needs must be ready for deployment in Australia or in theatres abroad.

The body of law applied to the military must serve the objective of maintaining discipline. Many of the offences applied to the ADF are unique, such as prejudicial conduct or disobeying lawful commands. Clearly, any tribunal determining these matters would require special knowledge of the military context and culture.

There is no doubt that the creation of the AMC in 2006 was an attempt to improve the quality of and legitimacy of the military justice system. Indeed, the creation of the jury in the AMC sought to address the feeling that the service tribunals lacked legitimacy.

In an effort to modernise decision making in the military justice system the new jury in the AMC even applied the majority jury verdict rules imported from the civilian criminal justice system. Moreover, unlike the court martial system, the AMC was designed to be independent of the military chain of command, a feature of the old system that had attracted much criticism.

Through our involvement in the training of military lawyers at the ANU, we have observed the significant efforts taken in recent years to ensure that the military police and military lawyers (both prosecution and defence) are equipped to provide services for this system comparable with their civilian counterparts.

This week's High Court decision should not provoke a knee-jerk response. The military discipline system will not fall apart or grind to a halt. Indeed, the bulk of routine proceedings relating to maintaining discipline in the ADF are administered at the lower summary level, and supplemented by an "on-the-spot" penalties scheme administered by Discipline Officers.

Also, the High Court has upheld the validity of the previous system of courts martial and service tribunals. The fact that these proceedings are within the military chain of command, and the determinations of guilt or innocence are not beyond further review, will ensure that such proceedings will not be unconstitutional.

Within Australia, matters that fall within military jurisdiction may also be prosecuted as federal, state or territory offences. The wearing of a military uniform does not displace local criminal jurisdiction or provide immunity from the ordinary criminal laws of the land.

Indeed, there are prosecution guidelines governing when sexual offences involving ADF members should be referred to civilian prosecutors, and the trend is firmly in favour of referring such matters out of the military system to civilian counterparts.

The High Court decision should not be viewed as an invitation to stop the modernisation of the military justice system.

Even though the AMC has been ruled unconstitutional, this should not allow us to lose sight of the continuing international human rights obligations to ensure that any determination of guilt must follow from a process that is fair.

Australia is obligated to ensure that its ADF members receive a fair trial as guaranteed by the International Covenant on Civil and Political Rights.

One approach now following the High Court decision is simply to leave military tribunals within the chain of command, which would preserve their constitutional status.

We should focus our efforts on ensuring our military justice system meets the minimum guarantees for a fair trial, consistent with best practice in the civilian justice system and international human rights law. It is surely fairness and legitimacy, rather than merely military effectiveness, that should now be the touchstone guiding our response to the High Court's decision and the modernisation of the military justice system.

Professor Simon Bronitt and Dr Mark Nolan work at the ANU College of Law where they teach military discipline law to ADF legal officers at postgraduate level. They are members of the Australian Centre for Military Law and Justice at ANU. The opinions expressed are personal and do not represent the views of the ADF.