

'World of woe' in store for military

James Eyers

The government should reconsider its decision to establish a Chapter 3 court for military prosecutions and the system of court martial should be preferred in cases that were essentially professional disciplinary matters, NSW Supreme Court judge Paul Brereton, an Australian Army Reserve commander, said.

Speaking in a personal capacity at the Rule of Law Institute of Australia's conference at the weekend, Justice Brereton described preoccupation with the supposed benefits of a Chapter 3 court as "misconceived". He also defended director of military prosecutions Lyn McDade after she was criticised for charging three Australian soldiers with military offences following operations in Afghanistan where six civilians, including four children, were killed.

The trials will take place under the court martial system, following the decision of the High Court in 2009 to strike down the Australian Military Court as unconstitutional. The government is preparing to introduce legislation to create a new Chapter 3 military court, administered by the Federal Court.

But Justice Brereton said: "There is a risk that retrospective forensic

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NSW judge Paul Brereton

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."

The military justice system was "fundamentally a disciplinary, not a criminal, jurisdiction", he said.

"Most of our professional disciplinary systems have tribunals which are dominated by members of the relevant profession," he said, pointing to the NSW Medical Tribunal and the Legal Services Division of the Administrative Decisions Tribunal for lawyers.

"They bear many similarities to the court martial, from which they might well be historically derived. I would suggest that such a court martial is better equipped to judge prosecutions for service offences than a judge of a Chapter 3 court without operational military experience."

Neil James, executive director of the Australia Defence Association (ADA), said the government should re-adopt the court martial system, given it had been working well and was a critical part of maintaining discipline in an armed force. "Court martials aren't courts — they are disciplinary tribunals," he said. Changing their name to "defence force disciplinary tribunals" may overcome any perception they are acting as Chapter 3 courts, he added.

Mr James said the ADA was yet to find a senior lawyer or judge with military experience who supported the government's bill for a new military court. "Justice Brereton is merely the latest one," he said.

"But all the civilian lawyers in the A-G's Department and Parliament are wedded to a solution that won't actually work. They are going to create a world of woe."