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# Book Review

Editor: Dr Emily Hammond

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## MILITARY LAW IN AUSTRALIA

Reviewed by Matthew Groves\*

*Military Law in Australia* (2nd ed), by Robin Creyke, Dale Stephens and Peter Sutherland, Federation Press, 9 August 2024, 547 + lxi pages: ISBN 9781760025175. \$140.00.

The scholarship of Australian domestic military law has undergone something of a revival of late, due in no small part to interesting work from Pauline Collins<sup>1</sup> and Anthony Gray<sup>2</sup> about aspects of military discipline and command. While that work has provided valuable insight into particular areas of military law, a book of wide scope is needed to cover the many and fragmented areas that comprise military law in a meaningful way. That function is served by the second edition of this valuable edited work. The contemporary nature of military law and its wider environment was illustrated by the report of the Royal Commission into Defence and Veteran Suicide handed down on 9 September 2024.<sup>3</sup> That important Royal Commission is the latest of a seemingly endless number of reviews, royal commissions, inquiries and other reports into aspects of our defence forces, most of which seem to have little lasting impact.<sup>4</sup> The report of this Royal Commission noted the odd legal landscape of the military, and explained that:

serving members commit to a service contract with the ADF under which they voluntarily surrender some of their independence and many of the liberties they would otherwise enjoy as Australian citizens.<sup>5</sup>

The report continued:

As part of this contract, serving members are subject to a regulated and controlled environment, and a hierarchical structure of command under which they are required to follow orders and submit to military law and discipline.<sup>6</sup>

A depressingly familiar finding of this latest large-scale inquiry into aspects of our defence forces was the obscure and often highly dysfunctional administrative and legal framework of the military. An equally important part of the Royal Commission findings is the interconnected nature of many of the problems experienced by current and former defence members. A poorly managed disciplinary review can cause mental and physical health problems, which are as badly managed as the process that helped to cause them. This book is part of the antidote to the problem of navigating the military, its laws and its administrative processes. It provides a detailed coverage of every key aspect of the laws governing the military, its operations and its members.

This new edition continues the best features of the first edition. The authors are drawn from a range of military officials as well as practitioners and scholars of military law. The result is mix of those inside

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<sup>1</sup> See, eg, Pauline Collins, “The Significance of the Defence Force Discipline Appeal Tribunal: Analysis of Its Activity over Four Years” (2021) 32 *Public Law Review* 348; Pauline Collins, “In Search of Certainty for Military Discipline” (2021) 50 *Australian Bar Review* 1; Pauline Collins and Arcala Hall (eds), *Military Operation and Engagement in the Domestic Jurisdiction: Comparative Call-out Laws* (Brill, 2022).

<sup>2</sup> See, eg, Anthony Gray, “The Australian Government’s Use of the Military in an Emergency” (2021) 44 *University of New South Wales* 357; Anthony Gray, “The Defence of Superior Orders (and Related Defences) in Australian Military Law” (2022) 43 *Adelaide Law Review* 678; Anthony Gray, “The Doctrine of Command Responsibility in Australian Law” (2022) 45 *University of New South Wales Law Journal* 1251.

<sup>3</sup> Commonwealth, Royal Commission into Defence and Veteran Suicide, *Final Report* (2024).

<sup>4</sup> The continued difficulty in the conduct of such inquiries was acknowledged with remarkable frankness at Commonwealth, Royal Commission into Defence and Veteran Suicide, n 3, Vol 1, 186–191. The detailed response of the Commonwealth to this report was tabled just as this review was completed suggests that this royal commission may be an exception: [Australian Government], *Australian Government Response to the Final Report of the Royal Commission into Defence and Veteran Suicide* (2024).

<sup>5</sup> Commonwealth, Royal Commission into Defence and Veteran Suicide, n 3, Vol 1, 9.

<sup>6</sup> Commonwealth, Royal Commission into Defence and Veteran Suicide, n 3, Vol 1, 9.

and outside the defence tent, so to speak, that provides an informed and well-balanced assessment. Another striking feature is the careful attention given to blending relevant international and domestic law materials. The book achieves the rare feat of covering both international and domestic law, without having the flavour of being devoted to one in preference to the other. A good balance of a different nature is struck with the writing. Although this book contains contributions from 27 authors, as well as the editors, there is a remarkable consistency in the style of writing. It is refreshing to read an edited book that does not suffer from dramatic shifts in style between chapters.

The core topics of military law are covered in careful detail. Two of the editors (Creyke and Sutherland) provide an overview of military compensation, superannuation and insurance issues. As every practitioner, scholar and defence force member knows very well, military and veteran compensation law deserves its own lengthy book.<sup>7</sup> The lengthy chapter in this book on the topic provides a masterful overview. The military disciplinary system is divided into separate chapters about the general disciplinary law (Ch 10 by John Devereux) and the legal issues that flow from dismissal on disciplinary or administrative grounds (Ch 11 by Matthew Stubbs and Kellie Toole). This sensible division means that questions about dismissal from the military, which can have lifelong impact on people, receives appropriate attention.

Another notable feature of several chapters is their focus on a defence related perspective. The extremely readable chapter on freedom of information (FOI) is the best example. Administrative law practitioners would know that FOI is an acquired taste that the vast majority of those working in the field never acquire. FOI is complex, technical and not well understood except by the small number of true specialists in this field. The chapter “FOI in the Defence Context” by Leo Hardiman provides an admirably clear account of every key part of FOI and many of the peculiarities that arise in defence related claims. Another chapter that adopts this focused explanation of legal doctrines through a military perspective is “Administrative Law in the Defence Context” by Robin Creyke and Matthew Stubbs. The chapter provides a comprehensive overview of the administrative law framework and how much of its application is modified when applied to defence related matters. The operation of avenues of redress such as judicial and merits review, or particular doctrines such as procedural fairness, is explained in a way that strikes a careful balance between the overarching principles (useful for non-specialists) and technical detail (useful for informed readers who have very specific questions). The balance that is struck in this chapter between the general and the particular reflects the style of the book as a whole. A considerable amount of technical detail is conveyed in a very readable style.

The notable inclusions in this new edition include a chapter on command responsibility by Anthony Gray. Although the chapter opens with the spectre of the Inspector-General of the Australian Defence Force *Afghanistan Inquiry*, widely known as the Brereton Report in recognition of its author, Gray astutely acknowledges that the impact of the Brereton Report remains unclear in large part because the longstanding uncertainty about the extent of culpability that should be required for command responsibility. Gray provides a measured analysis of the doctrine, including the uncertainties and apparent gaps in the statutory expression of command responsibility in s 268.115 of the *Criminal Code Act 1995* (Cth). The analysis of international law principles in light of the prevailing approach of the High Court of Australia to fault in criminal law leads Gray to a compelling interpretive solution that is both consistent with Australia’s general principles governing criminal liability but also applies s 286.115 without undue unfairness.<sup>8</sup>

Some of the other new chapters may not deal with such high-profile topics, but they are well chosen additions to a work about military law. The chapter on defence procurement by Colette Langos reflects not only the enormous scale of procurement in the military sector but also the revisions to this area that

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<sup>7</sup> R Creyke and P Sutherland, *Veterans’ Entitlements and Military Compensation Law* (Federation Press, 4th ed, 2024). This book is the definitive work on compensation issues affecting the military and its members.

<sup>8</sup> Gray seems less willing to offer a solution to an especially odd feature of s 268.115, which is the absence of any penalty. Gray speculates that this lacuna “suggests an intention by Parliament that the commander will be held liable for the offence/s of their subordinates” though he concedes it is perhaps “impossible” for a court to so impose a punishment for breach of command responsibility in isolation from the underlying offence: A Gray, “Command Responsibility” in Dale Stephens, Peter Sutherland and Robin Creyke (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024) 83, 88.

occurred in the wake of the *Defence Strategic Review* completed in 2023.<sup>9</sup> That Review was largely focused on strategic and financial issues rather than the legal framework of procurement,<sup>10</sup> which leaves many aspects of the procurement regime unsettled. Another notable new addition is a chapter titled “Australia’s Export Control and Weapons Review Regimes” by Lauren Sanders and Damian Copeland. That chapter also draws heavily from the recent *Defence Strategic Review* and explains the complex procurement framework with striking clarity.

Any future edition of this book could include a similar chapter about the Commonwealth Ombudsman. While that office has a wide jurisdiction over the military and its personnel, like so many other parts of our legal system, the jurisdiction of the Ombudsman over military matters is subject to many exceptions or technical requirements. A key example is the requirement that complainants use the *Redress of Grievance* process of the Australian Defence Force.<sup>11</sup> The Royal Commission into Defence and Veteran Suicide lamented that this process was originally intended to be simple and quick but is now often a “complex and a potentially lengthy” process in the ADF.<sup>12</sup> Whether a hurdle of that nature should stand before the jurisdiction of the Ombudsman seems ripe for reconsideration. However the role of the Ombudsman evolves in relation to the military, the many challenges that the institution faces in relation to the military seem to deserve its own chapter. To suggest a new chapter of this nature is a small quibble. This is an excellent work.

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<sup>9</sup> *Defence Strategic Review* <<https://www.defence.gov.au/about/reviews-inquiries/defence-strategic-review>>.

<sup>10</sup> A useful analysis of this issue is provided by D Mendoza-Jones, “The Application of Administrative Decision-Making Principles to Defence Procurement” (2024) 31 AJ Admin L 142.

<sup>11</sup> A process contained in the *Defence Regulation 2016* (Cth) Pt 6. The redress procedure is briefly explained in R Creyke and M Stubbs, “Administrative Law in the Defence Context” in Dale Stephens, Peter Sutherland and Robin Creyke (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024) 138, 142–143.

<sup>12</sup> Commonwealth, Royal Commission into Defence and Veteran Suicide, n 3, Vol 3, 473.

