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THE EMPEROR'S OLD CLOTHES: LACK OF TRANSPARENCY IN THE COURTS-MARTIAL BOARD OF REVIEW

Gordon P Hook*

The Courts-Martial Board of Review is a supervisory military tribunal which reviews decisions of courts-martial. The Board has the power to quash convictions and vary sentences. However, none of its members is legally qualified; nor is it bound by the legal advice it receives from the Judge Advocate General. The Board has no rules of procedure, and extends no natural justice protection to a convicted service member. This article argues for the abolition of the Board of Review and its replacement with a strengthened Courts-Martial Appeal Court, in order to enhance transparency and accountability, and to bring the military justice system into line with New Zealand's international legal obligations.

I INTRODUCTION

When First Lieutenant James Cook of the Royal Navy set foot on New Zealand shores in 1769 he brought the first European law—naval discipline law—to this country.¹ Ironically, while the first element of the modern legal system to arrive, military law has in many ways been the last to undergo fundamental reform.² Despite the rapid pace of

* Senior Legal Adviser, Criminal and International Law, Ministry of Justice, Wellington. This article is based on a chapter of the author's 2002 doctoral thesis at the Victoria University of Wellington Law School, *The Constitutional Status of Military Tribunals: Paradigm Lost, Paradigm Regained*. The opinions expressed in this article are personal and not necessarily those of the Ministry of Justice. Thanks are due to Alex Conte of the University of Canterbury Law School for his helpful comments on an earlier draft.

1 On 8 October 1769 Cook anchored his ship, HM Bark *Endeavour*, in what is now named Poverty Bay. As a member of the Royal Navy, Cook was responsible for the discipline of his crew under the Naval Discipline Act 1766 (UK), both on ship and ashore.

2 An internal review of the military justice system, begun in 2003, was ongoing at the time of writing. The review may lead to future amendment of the Armed Forces Discipline Act 1971 (AFDA), the key military justice statute.

military justice reform set by countries with similar historical roots, democratic ideals, and human rights aspirations,³ military justice procedures in New Zealand have foundered on a centuries-old paradigm of discipline which subordinates the need for justice to the requirements of military order.⁴ The Armed Forces Discipline Act 1971 (AFDA), the successor to three different enactments for the three services,⁵ was described by Government MP Sir Leslie Munro during the parliamentary debates as "nothing fundamentally new",⁶ and simply brought together in one Act a system characterised by the Australian Minister for Defence in 1982 as a "Serbonian bog of archaisms".⁷

The AFDA is the statutory framework for three distinct service tribunals. Two of them—summary disposals and courts-martial—exercise criminal and disciplinary jurisdiction, while the third, the Board of Review, exercises a quasi-appellate jurisdiction over convictions and sentences from courts-martial. This article focuses primarily on the Board of Review. It examines the status and procedures of that tribunal, as well as the effect that it has on the independence of courts-martial. It will be shown that the Board seriously undermines the adjudicative independence of courts-martial and offers virtually no natural justice protections to convicted service members. The Board lacks transparency and inherent fairness. It should be discarded, and its jurisdiction transferred to the Courts-Martial Appeal Court (CMAC), an independent civilian appeal court.

II BACKGROUND

Before examining the Board of Review, it is worth considering some general background: the basic structure and procedures of courts-martial; the types and status of convening officers; the role of the Judge Advocate General (JAG) and judge advocates; the composition and jurisdiction of the Board of Review; and the two types of review which may be undertaken by the Board. All of these matters will inform the analysis to follow.

3 Canada, Australia, and the United Kingdom have revised their military justice systems in the light of various human rights treaties and constitutional instruments.

4 Charles Clode *Military Forces of the Crown; Their Administration and Government* (John Murray, London, 1867) vol II, 361: "It must never be lost sight of that the only legitimate object of Military Tribunals is to aid the Crown to maintain the Discipline and Government of the Army". The preamble to the AFDA states that the purpose of the Act is "to provide for the discipline of and the administration of justice within [the armed] forces", and in so doing continues the subtle subordination of justice to discipline.

5 New Zealand Army Act 1950, Royal New Zealand Air Force Act 1950, and Navy Act 1954, incorporating the Naval Discipline Acts of 1866 and 1957 (UK).

6 (28 October 1971) 375 NZPD 4176.

7 Hon D J Killen (29 April 1982) 127 CAPD 2083.

A *Courts-Martial*

Courts-martial are military courts convened by senior military officers to hear the most serious allegations of misconduct by members of the armed forces and, in limited circumstances, non-military persons.⁸ Such misconduct may under current New Zealand law include military offences under the AFDA as well as criminal offences under other statutes, including the Crimes Act 1961 and the Misuse of Drugs Act 1975.⁹

Courts-martial have a long history. They evolved from the defunct 14th- to 17th-century Earl Marshal's Court, or Court of the Marshal (hence the derivative "court-martial"),¹⁰ as a tool for the enforcement of discipline by military officers among conscripted soldiers and sailors overseas, on behalf of the King and with the utmost ruthlessness.¹¹ Justice was no particular concern: the good order of military forces was seen as an "exact discipline" which could only be effected by speedy and summary procedures of a "more exemplary nature" than the "usual forms of law would allow";¹² and in any case, the King's justice did not apply outside England.

In general outward appearance, modern New Zealand courts-martial resemble District Courts acting in their criminal jurisdiction. They have the semblance of a judge, a jury, and a prosecutor, and are bound by the rules of evidence applicable at civilian criminal trials. But courts-martial differ sharply from civilian courts in both their trial procedure, which is governed solely by the AFDA and the Armed Forces Discipline Rules of Procedure 1983 (RPs), and the manner in which the members of the court-martial "jury" are selected and appointed.¹³ Unlike in civilian courts, neither the court-martial trial prosecutor nor defence counsel has any role in the selection of the members of the court-martial; members are selected exclusively by the convening officer.

8 AFDA, ss 20, 74. The AFDA also applies to prisoners of war, spies, and passengers on military ships, aircraft, and vehicles, and in some circumstances to former members of the armed forces: AFDA, ss 12-18.

9 The AFDA, s 74 provides that civil offences under other statutes may be charged as offences under the AFDA.

10 *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] 1 All ER 387 (Court of Chivalry); G D Squibb *The High Court of Chivalry* (Clarendon Press, Oxford, 1959).

11 Early military courts could impose punishments of amputation, beatings, keel hauling, and other forms of torture – not to mention death by hanging, drowning, or starvation: Sir Travis Twiss (ed) *The Black Book of the Admiralty – Monumenta Juridica* (reprinted Professional Books, Oxford, 1985).

12 Mutiny Act 1689, 1 Will and Mary, c 5, preamble.

13 *R v Linzee and O'Driscoll* [1956] 3 All ER 980, 984-985 (CMAC) Lord Goddard CJ: "[T]here is no true analogy between a court-martial, a jury or a bench of magistrates. It is a court which is sui generis."

A court-martial may be composed of five members (a general court-martial) or three (a restricted court-martial). The latter has a more limited punishment jurisdiction, though both have the power to imprison. Although there is a presumption of innocence and the prosecution has the burden of proving the charges to the criminal standard of proof, questions of guilt and punishment are determined by simple majority of the court members. Determinations are made in private conference with the judge advocate, to the exclusion of the accused and prosecutor and without giving reasons. If the convicted service member's sentence includes imprisonment or detention, there is no right of release, or right to apply for release, pending appeal to the CMAC or review by the Board of Review.

B Convening Officers

There are no standing or permanent courts-martial in New Zealand. Courts are established when required by order of a military convening officer. There are two types of convening officer: those who hold their appointment by virtue of the Defence Act 1990 and the AFDA ("statutory convening officers")¹⁴ and those who are authorised by a statutory convening officer ("subordinate convening officers"). The Governor-General, Chief of the Defence Force, and the three service Chiefs of Staff are all statutory convening officers. They derive their convening authority from the AFDA and RPs. A subordinate convening officer, on the other hand, is responsible to the statutory convening officer who issued his or her convening authorisation. The statutory functions applicable to subordinate convening officers may be limited by the instrument of authorisation.

As the most senior officer of the armed forces, the Chief of the Defence Force is responsible to the Minister of Defence for the general conduct of the armed forces, and in particular for "the maintenance of good order and discipline among ... subordinates whether on duty or not".¹⁵ The three service Chiefs of Staff are in turn responsible to the Chief of the Defence Force for the general conduct (including discipline) of their respective services. From this chain of responsibility, it is apparent that military convening officers, both statutory and subordinate, are effectively part of the executive branch of government: except in the special case of the Governor-General, they are all ultimately responsible to the Minister of Defence.¹⁶

Upon an application for a court-martial by an officer responsible for investigating and laying charges, a convening officer may direct on what charges an accused is to be tried,

14 AFDA, ss 2, 119.

15 Defence Force Orders for Discipline, s 1, para 0102(1).

16 See, in the Canadian context, *R v Généreux* (1992) 70 CCC (3d) 1, 37 (SCC) Lamer CJ: "The convening authority [is] an integral part of the military hierarchy and therefore of the executive."

and direct that further evidence in support of those charges be gathered. The convening officer also appoints the members of the court, the judge advocate, the prosecutor, and defence counsel. The role of the convening officer, of which there is no civilian equivalent, is, to use Lord Cooke's characterisation, "pervasive".¹⁷ At once the principal prosecutor (to whom the trial prosecuting counsel is responsible), the court administrator, and the senior officer responsible for military discipline within his or her area of command, the convening officer wields an extensive array of prosecutorial and judicial discretions—but with no formal training or guidance on the proper discharge of those powers. This was noted by Members of Parliament in 1971 during the first reading of the Armed Forces Discipline Bill. One member remarked that:¹⁸

Very wide discretionary powers are necessarily left in the hands of those who administer [military] law—powers very much wider than we would ever consider giving to any civil officers engaged in the maintenance of discipline. There is also a very wide discretion as to whether to apply disciplinary measures for a breach of the code. This causes me some concern.

C *The Judge Advocate General and Judge Advocates*

Courts-martial are assisted by legally qualified civilian "judge advocates" who "represent" the JAG. The JAG, who must be a barrister or solicitor of at least seven years' standing or a current or former judicial officer, is appointed by the Governor-General at pleasure under section 203 of the AFDA. The JAG superintends the administration of military law—but is not responsible to any military officer or to the Minister of Defence. The office of JAG is not part of the executive, judicial, or legislative branches of government; it is constitutionally *sui generis*.

The JAG has a variety of functions, one of which is to maintain a panel of legally qualified persons who may be appointed to act as judge advocates at courts-martial. The JAG also provides professional directions and training to judge advocates. But while one might expect the JAG to be able to select and appoint judge advocates to particular courts-martial, that is in fact a function reserved for the convening officer. The JAG's role is simply to maintain the panel. When the need arises the convening officer appoints a "suitable" candidate: "suitable", that is, to the convening officer, not to the JAG.¹⁹ However, once appointed, the trial judge advocate represents the JAG (not the convening officer), and his or her rulings on questions of law and procedure are binding upon the court-martial. It was not until 1983 that the rulings of judge advocates were binding. Before then,

17 *Preiss v General Dental Council* [2001] 1 WLR 1926, 1932 (PC).

18 Dr G A Wall (28 October 1971) 375 NZPD 4177–4178.

19 JAG Practice Note "Appointment of Judge Advocates" (5 April 1993). See also RP 58.

their rulings were simply "advice" or directions which could be ignored by the court (albeit only for "weighty reasons").²⁰

A judge advocate is somewhat similar to a judge in a civilian criminal trial, standing between the executive authority of the prosecutor, with the resources of government available to prosecute accused persons, and the accused. The analogy breaks down, however, when one considers the status of judge advocates. Like the JAG, judge advocates are not part of the judicial branch of government. They are "part-time" judicial officers with no security of tenure, who may be appointed to specific courts-martial at the pleasure of convening officers.

When it comes to the Board of Review, the JAG (not a judge advocate) fulfils the critical function of providing legal advice on the legality and propriety of court-martial convictions and sentences, and in doing so reviews the legal rulings of the judge advocate at the trial. But unlike the rulings of judge advocates at trial, the legal advice of the JAG to the Board on legal issues relating to conviction and punishment may be ignored by members of the Board and without a "weighty reasons" caveat; it is purely "advice".

D The Composition, Status, and Jurisdiction of the Board of Review

Section 151 of the AFDA provides that the Board of Review shall consist of three senior officers from the three services, personally selected and appointed "under the hand" of their respective service chiefs of staff.²¹ Structurally, therefore, the Board is an extension of those chiefs of staff who are statutory convening officers (a point of importance for the analysis later); it lacks any measure of independence from the executive.

Under section 152 of the AFDA, the Board is charged with reviewing the "legality and propriety" of court-martial convictions and sentences. In performing these functions the Board is the master of its own procedure.²² A range of statutory remedies is available to it under sections 153 to 160A of the AFDA: it may quash convictions and order re-trial; vary, postpone, substitute, or commute sentences; terminate suspension orders; and make orders for compensation or restitution (even if the court-martial made no such orders). The Board may quash convictions when, as a result of a wrong decision on a question of law at trial, the conviction is unsafe or manifestly unreasonable having regard to the evidence.

As for sentences, the Board may decrease, but not increase, their legal severity. "Severity" is determined by where a particular sentence is located on the scale of

20 New Zealand Army Act 1950; Rules of Procedure 1951, r 28(f).

21 AFDA, s 151(1)(b)(i)-(iii).

22 RP 137(1): "The board of review ... shall ... regulate its procedure as it sees fit."

punishments in the Second Schedule to the AFDA.²³ The higher the punishment on the scale, the more severe it is considered to be. Imprisonment is the most severe sentence and a reprimand the least. A combination of punishments is deemed less severe than a particular punishment if the highest of the combination is lower on the scale than the particular punishment. In general, the policy that the Board may not increase the legal severity of sentences is designed to allow service persons to be relieved of harsh punishments imposed by their peers at trial. But, in the discussion to follow, it will be seen that the structure of the scale of punishments and the supporting regulations do in fact allow the Board to increase the effective severity of court-martial sentences.

E Automatic Reviews and Petitions for Review

The AFDA provides for two kinds of review by the Board of Review. When a service member is convicted, the Board meets to review the legality and propriety of the conviction and sentence. This review is mandatory. A convicted service member may then "petition" the Board to examine his or her conviction, sentence, or both, within six months of conviction. If the service person files a petition for review subsequent to an automatic review, the Board "shall consider the petition" but need not conduct a review unless the petition "appears to the board" to raise sufficient grounds for a further review. The two forms of review do not have to be heard together, and, in fact, the legislation contemplates that they will not. A convicted member may file a petition any time within six months after conviction and sentence, whereas the Board must dispose of a review within three months if it is to retain jurisdiction to order a re-trial; otherwise it may conduct a review at any time after trial, even years later. The AFDA sets no limitation date for a review.

23 The Second Schedule provides as follows :

- (a) [Repealed by the Abolition of the Death Penalty Act 1989, s 5(10)];
- (b) Imprisonment:
- (c) Dismissal from Her Majesty's Service:
- (d) Detention:
- (e) Reduction in rank:
- (f) Forfeiture of seniority:
- (g) Stay of seniority:
- (h) A fine:
- (i) A severe reprimand:
- (j) A reprimand.

There is no requirement in the AFDA or RPs to notify a service person when the Board will meet for either form of review, and, in practice, notice is not provided. The affected member is not entitled to be present in person or through counsel or other service representative, and in practice, never is. Consequently, a service member can never make written or oral submissions to the Board on automatic reviews, and can only make written submissions on petitions for further review, if they occur. Furthermore, although a service member may present a petition and raise legal or even factual issues, the JAG's legal advice to the Board, which includes an examination of the arguments and position put forward by the service member, is not disclosed to that member prior to the Board's meeting.

F The CMAC and the Board of Review

The Courts-Martial Appeals Act 1953 constitutes the CMAC. This court is an institutionally independent and impartial civilian superior court of record, not a military court, and is composed of High Court judges and limited-term appointed members who have no connection with the armed forces. When it sits, the senior High Court judge presides. But appeal lies to the CMAC from a court-martial on the issue of conviction only, and not on sentence. No appeal lies for the prosecution on any issue.

Because the jurisdiction of the CMAC is restricted to conviction alone, there is an interesting relationship between the Court and the Board of Review. Following a court-martial conviction, the affected service member has the option of appealing conviction to the CMAC. If the member does, the Board's jurisdiction is automatically restricted to considering the legality and severity of the member's sentence, following completion of the appeal. If the member does not appeal to the CMAC, the Board will consider both conviction and sentence. In either case, the service member may submit a separate petition to the Board or may do nothing; in which case, as seen, the Board will automatically review the issues for which it has jurisdiction. If the member appeals the conviction, he or she has a further avenue of appeal, subject to conditions, to the Court of Appeal and Supreme Court, whereas there is no right of appeal or review from the Board (although judicial review may be available). Because the convicted service member cannot appeal sentence, and the Board (it will be seen) may in fact increase the severity of sentence, the member may end up in the unenviable situation of having no redress from increased sentence by the Board, but three levels of appeal to redress conviction.

The following section of this article examines the effect of the Board of Review, as an executive review tribunal, on the independence and impartiality of courts-martial. The sections which follow consider natural justice issues relating to the Board.

III THE EFFECT OF THE BOARD OF REVIEW ON THE INDEPENDENCE OF COURTS-MARTIAL

Recent cases from the European Court of Human Rights have held that administrative review bodies, similar to the Board of Review, offend Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").²⁴ Article 6(1) requires that in the determination of criminal charges courts must be independent and impartial. In *Brumarescu v Romania* the Court held that Article 6(1) includes the right to a court which administers justice unobstructed by review tribunals with the "power to annul without limit of time a final, binding and executed judgment".²⁵ The same reasoning was applied to the United Kingdom's court-martial review system in *Morris v United Kingdom*, in which the European Court, citing *Brumarescu v Romania*, held that the army review procedure, similar to New Zealand's Board of Review, undermined the independence of the trial court-martial.²⁶

[T]he very fact that the review was conducted by such a non-judicial authority as the "reviewing authority" is contrary to [independence required by Article 6(1) of the European Convention]. The Court is particularly concerned by the fact that the decision whether any substituted sentence was more or less severe than that imposed by the court-martial would have been left to that authority. The Court's concerns are not answered by the Government's argument that the existence of the review serves the interests of convicted soldiers such as the applicant nor by the essentially fair procedure followed by the authority when conducting its review. The Court is of the view that the fundamental flaws which it has identified were not corrected by the applicant's subsequent appeal to the Courts-Martial Appeal Court ...

The Court went on to conclude that the review tribunal adversely affected the objective independent status of the court-martial, and that such courts were therefore not "independent and impartial" for the purposes of Article 6(1) of the European Convention.

Section 25(1) of the New Zealand Bill of Rights Act 1990 provides that persons charged with criminal offences are entitled to a court which offers the same guarantees of independence and impartiality as contained in Article 6(1) of the European Convention. As an executive tribunal sharing the same characteristics as the British Board in *Morris*, the Board of Review would appear to violate the right to an independent and impartial court mandated by the Bill of Rights Act. The Board's unfettered discretion may be seen to undermine the adjudicative independence of courts-martial—in the same way that a

24 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222.

25 *Brumarescu v Romania* (1999) 33 EHRR 862.

26 *Morris v United Kingdom* (2002) 34 EHRR 1253, paras 75, 76.

civilian board of review, consisting of hand-picked police officers (who perform prosecutorial functions) appointed by the Solicitor-General (whose overall responsibility is civilian prosecutions) to review the convictions and sentences of District Court criminal trials, would interfere with the independence of the District Court. The New Zealand public would not accept such a tribunal as a fair vehicle for the dispensing of justice. And any argument that a right of appeal to the CMAC (a court which satisfies the requirements of independence and impartiality) mitigates the need for an independent tribunal of first instance must fail. As Mahoney CJ of the Canadian CMAC said when dealing with the issues of independence and impartiality of Canadian courts-martial:²⁷

Para 11 (d) [of the Charter] seems clearly to guarantee the right to a hearing by a fair and impartial tribunal at trial, since it is at the trial, and not the hearing of the appeal from its verdict, that guilt must be proven.

In many ways, the membership, status, and functions of the Board resemble, and are perhaps historically derived from, the 13th-century action of "attaint", in which a jury of 24 knights assembled at the direction and under the writ of the King to examine a jury judgment.²⁸ If on the facts the attaint jury found differently from the trial jury, it substituted its decision for that of the trial court. Attaint was reserved primarily for civil matters, although constitutional scholars note that the criminal procedure had its equivalent action in the Court of Star Chamber—a court "apt to treat any verdict of acquittal which it considered to be against the weight of evidence as corrupt",²⁹ which could punish the jurors of first instance by imprisonment and forfeiture of their lands and chattels.³⁰

As indicated earlier, the Board of Review does not review acquittals, but does have jurisdiction to review a court-martial's factual findings, and is empowered to reach any decision on the facts which a court-martial could have reached. Although the Board cannot punish or order the punishment of the members of the court-martial, its members may, in their capacities as senior officers to the members of the court-martial, professionally evaluate or have input into the evaluation of those officers in their judicial performance.³¹

27 *R v Ingebrigtsen* (1990) 5 CMAR 87, 96 (CMAC) Mahoney CJ.

28 C T Flower (ed) *Introduction to the Curia Regis Rolls, 1199-1230 AD* (Bernard Quaritch, London, 1944) 296; see also H G Richardson and G O Sayles (eds) *Select Cases of Procedure Without Writ Under Henry III* (Bernard Quaritch, London, 1941) 87-89.

29 W Holdsworth *History of English Law* (Methuen, London, 1922) vol 1, 337-340, 344.

30 Thomas Pitt Taswell-Langmead *English Constitutional History* (5 ed, Stevens and Haynes, London, 1896) 143.

31 Board of Review members are also senior officers of their service and may evaluate or have input into subordinate officer's evaluations for career purposes. See also *R v Sullivan* (1994) 1 NZCMAR

Those evaluations are used for future career purposes such as promotion, postings, or other officer benefits. Unfavourable reports may lead to denial of those benefits. By contrast, the United States Uniform Code of Military Justice (a military justice statute similar in status to the AFDA) explicitly bars career reporting of officers fulfilling mandatory judicial appointments as part of their military duties.³² The United States system further provides for four "courts" of military appeal, with substantially enhanced transparency in its decision-making procedures.

IV AN ANALYSIS OF THE PROCEDURES OF THE BOARD OF REVIEW

It was noted earlier that Board members may be subordinate convening officers holding an authorisation from the relevant chief of staff, who is a statutory convening officer and performs a fundamental prosecutorial role in relation to courts-martial. The connections between the chiefs of staff and individual Board members indicate the degree to which the Board as a whole is subservient to the interests of the service chiefs, and in turn to the organisational and prosecutorial interests of the armed forces. Members of courts-martial take no oath to do justice "without fear or favour, affection or ill will",³³ for no such oath exists. Nor are there any written guidelines or rules of conduct.

Against this backdrop, the following sections of this paper analyse the Board of Review from a variety of perspectives. The first section reveals the Board's ability to increase the severity of punishments imposed by courts-martial. The second examines the lack of appeal rights on sentence from courts-martial and the role the Board fulfils in this regard, as well as the implications of that under the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights (ICCPR).³⁴ The third section examines the inherently conflicting nature of the JAG's role with respect to the Board of Review and courts-martial. The final section considers whether the Board complies with the requirements of natural justice contained in section 27 of the Bill of Rights Act.

209, 218 (CMAC), in which Barker J commented in relation to convening officers and courts-martial members: "The Convening Authority ... evaluates ... officers on the Court-Martial He also sees the reports on the more junior officers and is able to comment on their efficiency and effectiveness from reports prepared by others."

32 Uniform Code of Military Justice 10 USC 837 § 37.

33 Oaths and Declarations Act 1957, s 18 (judicial oath).

34 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

A The Board's Jurisdiction to "Increase" Sentence Severity

A justification often put forward for retaining the Board of Review is that it "benefits" convicted service persons because it can only decrease sentences.³⁵ And yet, while the Board cannot increase the "legal severity" of court-martial punishments (that is, where court-martial punishments fit on the scale of punishments), the structure of the AFDA and supporting regulations permits the Board to increase the "effective severity" of those sentences in four ways.

First, the Board may impose a punishment lower on the scale than the punishment imposed by the court-martial but with more punitive "sting" in its administrative or collateral effect. For example, the United Kingdom CMAC in *R v Andrews* observed that although a sentence of dismissal is high on the scale of punishments, if a convicted service member "wants out" of the service, dismissal may act as a reward, whereas a lower punishment on the scale, such as detention, may have a more severe effect.³⁶ This is precisely what occurred in a 1999 New Zealand army court-martial and, of course, it prompted statements in the media that the member was effectively rewarded, not punished, when the court-martial dismissed him from the service.³⁷ However, following conviction, the Board could have substituted the dismissal sentence with a term of detention and a fine (keeping the member in the service), both of which are lower on the scale of punishments. Clearly, the punitive effect of the substituted sentence would have been greater: detention in a military prison is an unquestionably more severe sentence than dismissal from the service where the member no longer wishes to remain in service.

Another example underscores the point. Reduction in rank of a sergeant (a senior non-commissioned officer) to the rank of private will have more severe consequences for that member than a suspended sentence of 14 days' detention, despite the fact that the detention sentence is higher on the scale than rank reduction. The suspended detention has

35 This was the United Kingdom Government's submission before the European Court of Human Rights in *Morris v United Kingdom*, above n 26.

36 *R v Andrews* (23 February 1998) (CMAC) para 21 Hobhouse LJ: "In such cases it is clearly inappropriate to treat the sentence of dismissal, although it is a punitive sentence, as containing a punitive element."

37 "Army Comedy" (20 August 2000) *Sunday Star Times* Auckland A8: "What has this expensive court-martial achieved? He sought release from the army after 16 years of exemplary service, so he was arrested, tried, convicted and at the end of this despicable ordeal, has been granted release, which was all he had requested in the first place."; "Major to Accept Dismissal for Desertion" (7 September 2000) *Waikato Times* Hamilton 2 ed, 9: "Ironically, I got what I wanted out of [the trial]."

limited if any effect on the service member,³⁸ while reduction in rank to private not only affects the member's professional standing within the military community, but also his or her daily rate of pay and superannuation benefits.

Second, the Board may add punishments lower on the scale to an existing sentence.³⁹ For instance, the Board may vary a sentence of reduction in rank by imposing the additional punishment of a fine, which is lower on the scale than rank reduction. Or the Board may add a fine to a sentence of detention. Technically, by virtue of the combination rule,⁴⁰ the highest sentence has not advanced on the scale, and therefore the punishment has not been increased. However, it defies logic to say that the member's sentence has not increased in severity when additional punishments are imposed.

Third, while a court-martial may suspend the operation of most punishments, the Board is empowered to terminate suspension orders (including those of imprisonment or detention), thereby bringing the sentence into immediate effect. Terminating a suspended imprisonment sentence has the two-fold effect of sending the member to prison and subtracting a full day's pay for each day in custody, while a terminated detention suspension imposes immediate loss of liberty and forfeiture of one-half day's pay for each day in custody.⁴¹ It is difficult to argue that when the Board terminates a suspended sentence it is not increasing the severity of the offender's punishment: clearly it is. Loss of liberty with its concomitant effect on pay is, without a doubt, a more severe punishment than if the sentence were suspended.

Fourth, and finally, the Board may impose financial burdens on a convicted service member through compensation orders (which are not on the scale of punishments) in respect of property damaged and victims of physical or emotional harm.⁴² It is no comfort to the service person to point out that "legally" the Board has not increased the severity of

38 The AFDA, s 82(3) provides that detention of a non-commissioned officer is deemed to include reduction to the lowest rank prescribed (Armed Forces Discipline Regulations 1990, reg 3), but suspension of the primary sentence suspends the included sentence.

39 AFDA, s 158(2): "[The board may] impose, in place of the punishment imposed by the court, one or more punishments that are not more severe or that are less severe, as the case may be, than the punishment imposed by the sentence of the court." A "not more severe" punishment includes the court-martial sentence with an additional punishment located lower on the scale. To effect this, the Board would simply quash the original court-martial sentence and replace it with a new one consisting of the original sentence and the additional punishment.

40 AFDA, sch 2, nn 4, 5.

41 Armed Forces Discipline Regulations 1990, reg 8(1), (2).

42 AFDA, ss 86, 186A, 160.

the sentence. The reality is that a more severe consequence has been imposed on the member by the creation of a financial obligation.

It is clear, then, that the Board of Review may increase sentence severity because of the peculiar structure of the scale of punishments in the Second Schedule to the AFDA. When the Board increases the effective severity of a court-martial sentence it effectively re-sentences the affected member. The lack of procedural safeguards for the service member (a point explored below) seriously undermines the independence and impartiality of the Board. It is difficult to dispel the perception that the Board will not on occasion use the structure of the scale of punishments to advance the prosecutorial interests of the chiefs of staff (to whom Board members are responsible) or the overall interests of the armed forces in maintaining discipline. As will be discussed next, there are no appeal remedies available to a convicted service person whose court-martial sentence has been increased by the Board, even though, as will be seen later, the convicted member lacks a host of natural justice rights.

B The Lack of Sentence Appeal Rights

Under section 25(h) of the New Zealand Bill of Rights Act 1990, everyone charged with an offence has "the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both". This provision gives domestic effect to New Zealand's international obligation under Article 14(5) of the ICCPR:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

1 Lack of sentence appeal from courts-martial

According to ICCPR General Comment 13 (Article 14), the term "crime" at Article 14 of the Covenant is "not confined only to the most serious offences", and includes military convictions entered by courts-martial.⁴³ The expression "according to law" does not give a state party discretion to refuse to establish a higher review process, but refers to the "modalities by which review is to occur".⁴⁴ A full re-hearing of a case is not required to

43 UN Human Rights Committee "General Comment 13" (13 April 1984) in "Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies" (1994) UN Doc HRI/GEN/1/Rev.1 para 17.

44 *Reid v Jamaica* Communication No 355/89 (8 July 1994) UN Doc CCPR/C/51/D/355/1989; *Montejo v Columbia* Communication No 64/1979 (24 March 1982) Selected Decisions of the Human Rights Committee UN Doc CCPR/C/OP/1 127, 129-130.

satisfy this Article, although an evaluation of the evidence is.⁴⁵ In *R v Slater*, the Court of Appeal suggested that the expression "according to law" in section 25(h) of the Bill of Rights Act has the same meaning as that given to it by the United Nations Human Rights Committee, but would not extend to a further appeal beyond the first appeal.⁴⁶

The rules around court-martial *convictions* meet the Article 14(5) standard, as appeal on conviction lies to the CMAC (albeit with leave). But the lack of *sentence* appeal rights to the CMAC, with review the sole reserve of the Board of Review, would appear to breach the ICCPR as well as the Bill of Rights Act. By "higher tribunal", Article 14(5) contemplates a "judicial tribunal" that is both independent and impartial.⁴⁷ Given its substantial links with the executive and service chiefs, who are statutory convening officers exercising prosecutorial functions, the Board of Review is neither independent nor impartial. If "higher tribunal" in Article 14(5) meant anything less than an independent and impartial judicial body, the integrity of the lower tribunal, which must comply with the requirements of independence and impartiality under Article 14(1),⁴⁸ would be seriously undermined.⁴⁹ Harris, O'Boyle, and Warbrick, commenting on substantially similar wording in Article 2 of the Seventh Protocol to the European Convention,⁵⁰ have argued that:⁵¹

[T]he fair trial requirements in Article 6 [including the requirements for independence and impartiality] of the Convention, as they apply to appeal proceedings, must be respected by the

45 *Perera v Australia* Communication No 536/1993 (28 March 1995) UN Doc CCPR/C/53/D/536/1993 para 6.4; also *Domukovsky v Georgia* Communication No 623/95 (6 April 1998) UN Doc CCPR/C/62/D/623/1995 para 18.11.

46 *R v Slater* (1996) 14 CRNZ 189, 195 (CA).

47 UN Human Rights Committee "General Comment 13", above n 43, para 17, where reference is made to "procedures of appeal" and the "fair and public hearing requirements" (involving independence and impartiality) of Art 14(1) when referring to higher tribunals.

48 Article 14(1) of the ICCPR provides as follows:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

49 See for example *Morris v United Kingdom*, above n 26.

50 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (22 November 1984) ETS no 117, Art 2(1): "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal."

51 D J Harris, M O'Boyle, and C Warbrick *Law of the European Convention on Human Rights* (Butterworths, London, 1995) 567.

'higher tribunal' when it conducts its review of the [lower] tribunal decision for Article 2 to be complied with.

The New Zealand Bill of Rights Act reflects this interpretation of the ICCPR at the domestic level in section 25(h), by use of the terms "appeal" and "higher court" in the place of "review" and "higher tribunal". This complies with the Human Rights Committee's interpretation outlined in General Comment 13 .

The New Zealand military justice system is seriously deficient in not providing a sentence appeal right to convicted service persons. Even in Canada, where there is no equivalent to section 25(h) of the Bill of Rights Act in the Charter of Rights and Freedoms, the National Defence Act (the Canadian equivalent to the AFDA) was amended in 1998 to provide military sentence appeal rights to the Canadian CMAC in order to enhance transparency and fairness.⁵² Any argument that the absence of such appeal rights is demonstrably justifiable under section 5 of the Bill of Rights Act must fail the proportionality limb of *Moonen v Film and Literature Board of Review*,⁵³ on the basis, first, of the elevated importance of the appeal right as one recognised as an international obligation binding upon New Zealand,⁵⁴ and secondly, that the beneficial effect of allowing sentence appeals from courts-martial to the CMAC is not outweighed by any deleterious effect. Indeed, there does not appear to be any compelling military need to deny an appeal right on sentence. When appeal already lies on conviction to an independent and impartial superior court of record, it is difficult to see why sentence severity issues must be the sole reserve of military officers.

Sentence appeal rights were also recently granted to British service members in response to the United Kingdom's obligations under the European Convention. In the first cases to be heard by the British CMAC, that court amply demonstrated that it understood the unique military environment and the need to articulate clear rules for dealing with military sentencing issues,⁵⁵ thereby countering the charge that only military officers can determine whether any particular sentence suits the needs of military discipline. There is no question that civilian judges are better placed to hear those issues on appeal. Having no connection with the military hierarchy allows independent civilian judges to assess the

52 See *R v Monette* (1987) 4 CMAR 599 (CMAC) and *R v Oliver* (1988) 4 CMAR 559 (CMAC).

53 *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224 (CA).

54 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 Dickson CJC: "a value [that] has the status of an international human right either in customary international law or under a treaty ... should generally be indicative of a high degree of importance attached to that objective."

55 *R v Love* [1998] 1 Cr App R 458; *R v Metcalffe* [1998] EWCA Crim 3406; *R v McHenill* [1998] EWHC Admin 825; *R v Cooney, Allam and Wood* [1999] 3 All ER 173 (CMAC).

disciplinary needs of the armed forces in an impartial manner. Ultimate civilian oversight of all aspects of military justice is just as vital as it is for determining other military needs or missions.

2 *Lack of appeal rights from Board of Review decisions*

As to the lack of appeal rights from the Board of Review to a higher court, Article 9 of the ICCPR stipulates that:

Anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

At first glance this might seem to suggest that the principle of review for detention is limited to the circumstances of pre-trial loss of liberty. But United Nations General Comment 8 provides that Article 9 is "applicable to all deprivations of liberty [and] to all persons deprived of their liberty".⁵⁶ In a case originating in Finland, the Human Rights Committee confirmed this comment in the context of military detention following conviction. The principles that emerge from the case are highly relevant to New Zealand.

In *Vuolanne v Finland*,⁵⁷ a Finnish soldier was sentenced to 10 days' detention in a military cell for failing to appear for duty. The soldier was not told that he could have submitted a "request" to superior military authority to review his punishment under Finnish military law. After learning of the right—while still in custody—he filed a review request, submitting that his punishment was too severe. Without a hearing, his request was declined by the superior officer. Finnish law did not provide an appeal right either inside or outside the military justice system. In rebuttal of the complainant's argument that the review was non-judicial and failed to comply with Finland's obligation under the ICCPR, the Government argued that the superior officer review "is comparable to a judicial scrutiny of an appeal" and submitted that "the need to judicial control [sic], if not strictly superfluous, is significantly less in military disciplinary procedure than in detention [in other contexts]". The Human Rights Committee rejected this argument and upheld the complaint, noting inter alia that:⁵⁸

[W]henever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that Article 9, paragraph 4 [of the ICCPR] obliges the State party

56 UN Human Rights Committee "General Comment 8" (30 June 1982) in "Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies" (1994) UN Doc HRI\GEN\1\Rev.1 8.

57 *Vuolanne v Finland* Communication No 265/1987 (8 July 1988) UN Doc CCPR/C/35/D/265/1987.

58 *Vuolanne v Finland*, above n 57, para 9.6.

concerned to make available to the person detained the right of recourse to a court of law. In this particular case it matters not whether the court would be civilian or military. [T]he supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a "court" within the meaning of article 9, paragraph 4, therefore the obligations laid down therein have not been complied with by the authorities of the State party.

Assessing the Board of Review's jurisdiction to terminate court-martial suspension orders of either imprisonment or detention against the Human Rights Committee's decision in *Vuolanne*, we find that the Board may "deprive" someone of their liberty. Further, the Board is not a judicial or quasi-judicial authority but an administrative body, and in many ways is simply an extension of the court of first instance. Advisory opinions, even from independent and impartial authorities such as the JAG, do not transform an administrative body like the Board of Review into a "court" for the purposes of the ICCPR, as advisory bodies lack the authority to decide the issue.⁵⁹ The Board therefore fits squarely within the principle articulated in *Vuolanne*.

Vesting an administrative or quasi-judicial body, such as the Board of Review, with statutory discretion to increase the effective severity of punishments, including termination of detention or imprisonment suspension orders, carries significant enough consequences that an appeal right should exist to an independent court— independent, that is, from the military. The failure to provide such appeal rights is very likely a breach of Article 9 of the ICCPR.

An additional concern is that while the Board may impose more severe punitive sanctions on a service member than originally imposed by the court-martial, the role of the JAG is reduced to an advisory one, even in regard to the legality of convictions.

C The Role of the JAG

1 Advisory for both convictions and sentences

The Board of Review's ability to seek legal advice, but not binding rulings, from the JAG reflects the supervisory role that senior officers have traditionally played in military justice—a role historically justified on the basis that disciplinary needs in the military outweigh the requirements of justice.⁶⁰ But ignoring the JAG's advice that a conviction should be quashed on the basis that it is wrong in law, or not supported by the evidence, cannot be justified on the basis of the disciplinary needs of the military. Ignoring legal

⁵⁹ *X v United Kingdom* Series A No 46 (1981) 4 EHRR 188, para 61.

⁶⁰ See for example the major United Kingdom courts-martial review *Lewis Report* (Cmd Rep 7608, 1949) 34, para 138.

advice in such circumstances would prejudice military discipline, not serve it, as other service members would lose confidence in the discipline system applicable to them: they would see themselves as governed by personalities and not by law. And any argument that the discretion is justified on the basis that the member has appeal rights to the CMAC on conviction which, if exercised, would have precluded review by the Board of the legality of conviction, must also fail. The standard of review by the Board should be no different from that for the CMAC: it should be based on legality, not the interests associated with discipline or with individual service members.

Complex legal issues may also be raised in sentencing matters before the Board. Choice of punishment may involve a balance of competing factors: not just aggravating and mitigating factors, but issues of rehabilitation, general and specific deterrence, and a host of others, all within an overarching constitutional framework that "everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment".⁶¹ But the Board of Review is not bound by the principles of punishment articulated at Chapter 11 of the Manual of Military Law. That chapter binds courts-martial and summary disposal tribunals only. The JAG's legal advice on sentencing issues is therefore critical, and the same argument raised above with respect to legality of conviction can also be made with respect to legality and propriety of sentence (indeed more so given the lack of CMAC appeal rights on sentence): it is not conducive to the maintenance of discipline—indeed counter-productive—for the Board to be permitted to ignore the JAG's legal advice on sentencing.

In comparison, although Canada has retained the mechanism of court-martial sentence review, it also has an appeal right to the CMAC. Reviews occur only after exhaustion of all appeals and are removed entirely from the armed forces and placed with the Governor in Council, who receives independent legal advice from the (federal) Department of Justice. That department, in turn, advises the (federal) Attorney-General, who, under constitutional convention, advises the Governor in Council on both conviction and sentence severity.⁶² By the same convention, that legal advice is rarely if ever ignored, but if it is ignored, reasons for doing so are provided—unlike the Board of Review.

2 *The inherent conflict of interest in the JAG's role*

Earlier it was noted that judge advocates at courts-martial represent the JAG: they discharge the functions of the JAG at the trial level.⁶³ But the role of the JAG at the Board

61 New Zealand Bill of Rights Act 1990, s 9.

62 National Defence Act, s 249(1); Queen's Regulations and Orders, para 116.04.

63 RP 63(1).

of Review is among other things to tender advice on two questions: whether "as a result of a wrong decision on a question of law determined during the [court-martial] proceeding, the conviction was wrong", and whether "a question of law which might have affected the conviction was wrongly determined".⁶⁴ The answer to both of these questions relates directly to the function of the judge advocate at trial – that is, to the trial's "legal authority", who represented the JAG at the court-martial. These two functions of the JAG (rulings at trial and advice on review) are inherently conflicting.⁶⁵ The officer who effectively made the legal rulings at trial is in turn expected to review those rulings for accuracy. And drawing a comparison between the judge advocate and the JAG with a trial court and its higher appeal court does not help. An appeal court is institutionally independent of the trial court; judge advocates and the JAG, on the other hand, are not independent of one another. Moreover, trial judges do not "represent" appeal judges. The conflict of interest inherent in the JAG's trial and review functions underscores the need to remove the quasi-appellate functions of the Board of Review from its lay membership.

3 Non-disclosure of JAG's advice

Because the issues before the Board are almost entirely legal in nature, the JAG's advice is critical to the service member affected. But requests by service persons to view the JAG's legal advice prior to or after making submissions to the Board have been consistently denied in the past, on the basis that the advice is subject to legal professional privilege.⁶⁶ The practice in the United Kingdom is the same.⁶⁷ However, in *Duncan v Canada (Minister of National Defence)*, the Federal Court of Canada held that the legal advice received by a reviewing authority should be disclosed to the service member in order for the member to make submissions in response.⁶⁸

At the very least, an appellant ought to have a copy of the [legal advice] or memorandum first, and then a clear opportunity to place his own or his counsel's submissions, last, directly before

⁶⁴ AFDA, ss 153(1)(a), 153(2)(a).

⁶⁵ See also (although not directly on point) *Re Sawyer and Ontario Racing Commission* (1979) 24 OR (2d) 673 (CA) where a lawyer participated in a lower tribunal then subsequently participated in reviewing the lower tribunal's decisions. The Ontario Court of Appeal held that this breached the principles of natural justice.

⁶⁶ Gordon Hook *The Constitutional Status of Military Tribunals: Paradigm Lost, Paradigm Regained* (PhD Thesis, Victoria University of Wellington, 2002) 716.

⁶⁷ See for example John Mackenzie "The Independence of the Judge Advocate General" (1996) New LJ 1254, where the author quotes a letter from the JAG (UK): "I take the view that this privilege is the privilege of the person who stands in the position of the client, in this case the Secretary of State for Defence."

⁶⁸ *Duncan v Canada (Minister of National Defence)* (1990) 32 FTR 189 (Fed TD) 201.

the designated authority ... without any intermediary intervention. These considerations are of especial importance because there is no appeal from the decision of [the reviewing authority] under the present dispensation.

The Court went on to liken the procedure to one where the service member would have a right of reply in oral argument if appeal were permitted on sentence.

It is difficult to accept that in New Zealand the JAG's advice should be protected under legal professional privilege, for three reasons:

- (1) The relationship between the Board and the JAG is not one that can be characterised as a solicitor and client relationship. The Board does not seek advice about its rights or obligations protected at law. It is a tribunal the jurisdiction of which involves making a determination about a third party's legal rights and obligations.
- (2) The JAG, through his or her judge advocate, was a participant in the court-martial proceedings (by providing binding directions on law and procedure) which he or she then reviews for the Board; that participation was in open court before the accused. Claiming legal privilege over the advice to the subsequent review exacerbates the inherent conflict of the JAG's role, identified earlier.
- (3) From the wider public interest perspective, refusing to disclose the JAG's advice undermines both the public's confidence in the administration of military justice by the Board of Review, and the independence and impartiality of the JAG, the purpose of which is to ensure fairness and justice in dealing with service persons.

Fairness demands that where no appeal lies on sentence—the one opportunity a member has to persuade the decision-maker of his or her argument—all material before the Board, including the JAG's advice as well as any other advice placed before the Board (such as single service, non-legal, staff advice on sentence issues), should be disclosed to the member. It may be that the JAG's advice contains recommendations not to decrease the severity of a particular sentence. Non-disclosure in such circumstances places the service member at a distinct disadvantage, and undermines the administration of justice and the enforcement of discipline rather than serving them.

In *Duncan v Medical Practitioners Disciplinary Committee*, the High Court dealt with a similar issue relating to non-disclosure of a legal assessor's memorandum of "law, procedure and evidence" for the medical discipline committee. Jeffries J commented that:⁶⁹

69 *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 525 (HC).

By the preliminary statement of the Chairman it can be deduced [that the assessor's memorandum] had a material bearing on the approach of the Committee to the inquiry itself. In short it was a document which should have been made available to [the accused] and not to have done so constituted a breach of natural justice.

Likewise, failure to disclose the legal advice of the JAG to the service member prior to the Board's consideration is a breach of natural justice.⁷⁰

D Mandatory and Discretionary Reviews

The AFDA provides for two modes of review: mandatory automatic reviews and reviews initiated by petitions from convicted service persons. Automatic reviews occur whenever the record of proceedings of a court-martial is transmitted to the Board of Review by the judge advocate through the convening officer.⁷¹ When that occurs, however, there is no rule that the Board convene immediately on receipt. The scheduling and sitting of the Board is determined in a wholly ad hoc manner by an informal system of communication between Board members and the office of the JAG. Timings and sittings are based on the availability of Board members and the JAG; the service member affected is not consulted, nor indeed is the lawyer who represented him or her at the trial. Petitions, on the other hand, are initiated by the convicted service member in accordance with section 162 of the AFDA and RP 139, but scheduling and sittings are administered in the same ad hoc fashion, without consultation with the member.

The interface between automatic reviews and petitions is not addressed in the AFDA or RPs. But while the Board is the master of its own procedure, remarkably, in the 20 years it has performed its review functions, it has failed to promulgate any rules of procedure. Of course, that does not mean that the Board may ignore the rules of natural justice. Given its jurisdiction to increase punishment, including terminating suspension orders of imprisonment or detention, a high degree of procedural fairness is called for.⁷²

70 *Re Irwin and the British Columbia College of Physicians and Surgeons* 40 DLR (2nd) 103 (BCSC), where an investigating officer's report to a discipline board which earlier suspended punishment for College member was disclosed to the member prior to a subsequent hearing: "natural justice has been awarded the applicant by reason of the fact that she did have notice and was furnished therewith with full particulars of what would be placed before the Council."

71 RP 134.

72 Unlike courts-martial, which are not open to judicial review, the Board is subject to such review: AFDA, s 143. For instance see *Re Thompson and Town Hall of Oakville* (1964) 41 DLR (2d) 294 (Ont HC): "wherever the Legislature has constituted a Council a quasi-judicial body [to review police disciplinary decisions] then I think the duty is on the Court to see that they exercise their powers in a judicial manner." See also *R v Admiralty Board of Defence Council; ex parte Coupland* [1998] EWHC Admin 763; *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985) 19 CCC (3d) 195 (FCA) Thurlow J: procedures must be "fundamentally just".

Because there are no procedural rules, the nature of the interface between automatic reviews and petitions is left in doubt. The two procedures are separate and distinct, although in some cases petitions have been heard together with mandatory reviews. When conducted separately, however, automatic reviews involve no participation of the service member whatsoever. But upon completing an automatic review and receiving a petition, the Board may decide not to consider the issues raised by the petitioner if it determines that no further issues are raised that were not considered by the Board at the first meeting. The service member is then left in the position of not knowing what issues were considered in the automatic review (not having had an opportunity to be heard, and not having received reasons for the decision) and not being able to appeal sentence to the CMAC. The one opportunity the member may have had to persuade the reviewing authority to quash a conviction or reduce punishment is lost, without the member's knowledge or input.⁷³ An apposite example is the case of *Re Thompson and Town Hall of Oakville*, in which the Ontario High Court held that a municipal council sitting as a quasi-judicial appellate body over a disciplinary decision of the town's police chief in relation to one of his subordinate officer's actions (similar in many respects to the New Zealand Board of Review) was not merely sitting to decide a question of public interest in some municipal matter:⁷⁴

They were sitting as [a quasi-]appellate body deciding whether the Chief Constable's decision in the first place was a legal decision, and in the second place whether it was a just and fair decision and not only that, but whether the sentence imposed was just and fair having regard to all the circumstances.

The affected subordinate officer was not provided with any notice of this proceeding, nor an opportunity to be heard by the Council; the Council was therefore held to have committed a significant breach of natural justice, and its decision was quashed.

E The Right to be Heard

Given its jurisdiction to vacate and substitute convictions, alter sentences (by decreasing or increasing their severity), and impose financial burdens, the Board of Review is clearly a "tribunal" or "public authority" with the "power to make a determination with respect to [a] person's rights, obligations or interests protected or recognised by law" for

73 "Why do we allow the Star Chamber procedures of military courts sitting secretly in judgment and dispensing military punishments? Why do we allow these same military courts to inquire into their own procedures when something goes wrong – also in secret?" C A Smith (20 October 1984) *The Listener* Auckland.

74 *Re Thompson and Town Hall of Oakville*, above n 72, 309 McRuer CJHC.

the purposes of section 27(1) of the New Zealand Bill of Rights Act 1990.⁷⁵ The Board effectively "re-tries" a service person's case, particularly given its authority to substitute one conviction for another if the evidence does not support one but does the other.⁷⁶ Section 27(1) applies, notwithstanding that the Board is characterised as one of "review". As one leading scholar has noted, "[i]t is the tendency of a decision to affect rights or legitimate expectations of individuals that matters, not the name of the process by which the power is exercised".⁷⁷

A fundamental natural justice right under section 27(1) is the right to be heard.⁷⁸ This right involves prior notice of a hearing,⁷⁹ including the right to be informed when the hearing will occur,⁸⁰ and notice of the range of possible remedies available to the decision-maker.⁸¹ But when it comes to the Board of Review, the only notice service members receive, through their commanding officer, is what the Board's "formal decision" was, without reasons – nothing prior.

Lack of prior notice and the right to be heard were discussed in *Upton v Green (No 2)*,⁸² where the High Court held that section 27(1) of the Bill of Rights Act applied in District Court sentencing. In that case a person was sentenced to three months' imprisonment for breach of a periodic detention order. The sentence was imposed without a plea being entered by the accused and without the accused being present to answer the allegations. In sentencing the accused in absentia, the District Court failed to comply with the rules of natural justice in general and the right to be heard in particular. On the basis of *Upton*, the failure to notify a service member of either an automatic or a petitioned review and to hear any submissions on this point, either oral or written, is a clear violation of the right to natural justice. The same reasoning applies whether the Board increases the severity of sentences or decreases the severity as well as terminating any suspended sentence. On this last point, the British Columbia Supreme Court has held that in disciplinary hearings

75 See also s 3(b): "This Bill of Rights applies only to acts done ... [b]y any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

76 AFDA, s 155.

77 J R S Forbes *Justice in Tribunals* (Federation Press, Sydney, 2002) 90.

78 This right goes back at least to *R v Chancellor, Master and Scholars of University of Cambridge (Dr Bentley's case)* (1723) 1 Strange 557; 93 ER 698 (KB).

79 *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758, 764 (CA) Richardson J.

80 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA).

81 *Terry v District Court at Greymouth* (1992) 10 FRNZ 135.

82 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC).

where a punishment is suspended, it is a requirement of natural justice that prior notice of the hearing be given to the affected member.⁸³

There is also a strong argument that although the service member may have made written submissions in a petition for review, given the possible jeopardy he or she may face before the Board, the member should be entitled as of right to be heard *orally*, whether in person or by counsel, or both.⁸⁴ Commenting on the court-martial review procedures in the British army, and in particular on the reviewing authority's discretion to terminate a suspension order, a judge advocate in the United Kingdom's JAG's office said:⁸⁵

It is perhaps questionable, and likely to be a breach of Art. 6 of the European Convention of Human Rights, that a military officer sitting in an office can bring into immediate effect a sentence which a court-martial has thought right to suspend, without any kind of hearing.

Finally, tying the right to be heard together with the issue of disclosure of the JAG's advice, the Federal Court of Canada in *Duncan v Canada (Minister of National Defence)*⁸⁶ examined a very similar ad hoc military review procedure of court-martial sentences. That procedure denied (although not expressly) the service member's direct access to the decision-maker (in this case the Minister of National Defence) by a written or oral hearing, and denied access to the legal advice placed before the reviewing authority. In that case, imprisonment was imposed by a court-martial. Submissions were made by the member that the sentence was too severe. The military adopted an ad hoc procedure not stipulated in any rule requiring the member to submit his petition through the Minister's legal adviser, who was also member of the JAG's staff, and who evaluated the submissions before providing legal advice to the Minister directly without disclosing that advice to the service member. On judicial review to the Federal Court, this procedure was severely criticised as "unconstitutional," "invented", and one in which "no fundamental justice was inherent". The Court held that service persons must have "direct access" to the decision-maker in written submissions, oral hearing, or both, prior to the making of the decision.⁸⁷ Further, the service member's submissions must not be "filtered" through the Minister's legal adviser prior to the hearing. Moreover, said the Court, the adviser's opinion to the Minister should be disclosed so that the member may then address the issues in that

83 *Re Irwin and the BC Council of College of Physicians and Surgeons* (1963) 40 DLR (2nd) 103 (BCSC).

84 Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 864, 874.

85 P Camp "Sentencing Options and Principles Before Courts-Martial" (1999) 149 New LJ Part I 850, Part II 940, 941.

86 *Duncan v Canada (Minister of National Defence)*, above n 68.

87 *Duncan v Canada (Minister of National Defence)*, above n 68, 195.

opinion of law and fact with further submissions. The Court also held that where military detention or imprisonment is an issue, the "highest procedural protection known to our law"⁸⁸ must be accorded the service person before the reviewing authority. Those protections must include an oral, or in-person, hearing in addition to the right to make initial written submissions.⁸⁹ The failures of natural justice in this case resulted in an order by the Federal Court prohibiting the sentence of imprisonment from being executed.

In New Zealand, the Board of Review's practice to date in automatic reviews has been not to invite the member to make representations, even where the issues before the Board involve imprisonment or detention. Even when the member files a petition, the Board still, by practice, does not advise the member when it will meet, nor invite the member to make oral representations. The same comments made by Canada's Federal Court may be made with respect to Board of Review: its procedures, by which the member is denied notice of an automatic review or petition for review, denied full disclosure of the material to be considered by the Board (the JAG's advice), and denied the right to make oral representations, are "invented" and "unconstitutional" in the sense that they fail to comply with the requirements of section 27 of the Bill of Rights Act and are therefore procedures in which "no natural justice is inherent". This point is driven further home by the fact that decisions of the Board are made without giving reasons.

F The Giving of Reasons

Although there is no general common law duty for administrative decision-makers or judges to provide reasons for their decisions,⁹⁰ judges have suggested that reasons should be provided to enhance transparency in judicial and quasi-judicial decision-making and to give meaningful effect to appeal and review rights.⁹¹ In the 1983 case of *Potter v New Zealand Milk Board* Davison CJ stated that:⁹²

There can be no doubt that it is desirable that all Courts and Tribunals where possible give reasons for decisions. The giving of reasons helps to concentrate the mind of the Tribunal

88 *Wigglesworth v R* (1987) 45 DLR (4th) 235 (SCC) Wilson J.

89 *Duncan v Canada (Minister of National Defence)*, above n 68, 203 Muldoon J: "Whatever military discipline requires, it is clear that it does not require stripping members of the armed forces of the dignity of making their own submissions personally or by counsel, directly to the officer designated to judge their appeals in mitigation of sentence severity."

90 *Baker v Public Service Board* [1982] 2 NZLR 437, 444 (HC) Bisson J.

91 See Fisher J "Improving Tribunal Decisions and Reasons" [2003] NZLR 517, 529 where the author states that "the time may well be ripe for reversal of the common law starting point".

92 *Potter v New Zealand Milk Board* [1983] NZLR 620, 624 (HC). See also *R v Awatere* [1982] 1 NZLR 644 (CA).

upon the issues for determination: it enables litigants to see that their cases have been carefully considered and the arguments understood and appreciated.

When reasons are not provided, those affected, and indeed the public in general, are less likely to feel that justice has been done. Since *Potter* there has been a marked trend towards greater openness in decision-making and a requirement that reasons be provided as an effective means of detecting error in appeal or review. For instance, in *Lewis v Wilson and Horton Ltd*,⁹³ the Court of Appeal determined that a District Court judge erred when granting a name suppression order without reasons: the failure was not conducive to open justice, did not contribute to consistency in judicial decision-making, and failed to provide those affected with an effective basis for review.

With respect to courts-martial, the failure to provide reasons in the sentencing phase of the trial was tested in judicial review in 1997. In *R v Ministry of Defence; ex parte Murray*,⁹⁴ the English High Court held that military courts are required to give sentencing reasons to enhance the value of judicial review. Where courts-martial may choose between loss of liberty and a lesser penalty, the need to give reasons is clearly more acute.⁹⁵ The Court noted recent amendments to the Army Act 1955 (UK), providing that judge advocates may not retire with court-martial members during sentencing deliberations, but may question those members once their decision is made and provide reasons in the presence of the accused.

The failure to give reasons in the New Zealand court-martial sentencing phase of a trial is not the same as the failure to give reasons on verdict. On conviction, an accused may appeal to the CMAC, relying on the evidence and the judge advocate's recorded legal rulings and directions to detect any error. In court-martial sentencing, however, the judge advocate meets with the members of a court-martial in closed court to the exclusion of all parties, including the accused, and no directions are recorded on the record of proceedings or in the transcript of the trial. After the deliberations, the court members and the judge advocate emerge with a decision, but with no reasons. There is little difference between this trial procedure and that of the Board of Review where the affected member is not permitted to be present and the JAG's advice is not disclosed. If courts-martial are required to give sentencing reasons then logically the Board should also be required to.

93 *Lewis v Wilson and Horton Ltd* (2000) 18 CRNZ 55 (CA). See also *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 (CA); *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL); and *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 241 (Div Ct).

94 *R v Ministry of Defence; ex parte Murray* [1997] EWHC Admin 1136.

95 *R v Ministry of Defence; ex parte Murray*, above n 94, para 42 Hooper J.

In *Murray*, the Court examined whether a court-martial reviewing authority is required to provide reasons for its decisions. Although it stopped short of saying that the reviewing authority must give reasons on the facts of the case, it did say that there was "much force in the argument that it should". And in making this comment the Court noted that the Armed Forces Act 1996 (UK), enacted just after the case was filed, now requires all reviewing authorities to articulate reasons for their sentencing decisions,⁹⁶ thereby providing transparency and meaningful grounds for judicial review.

The decision in *Murray* is directly applicable in New Zealand. It is difficult to argue that the Board of Review should continue to refuse to articulate reasons for its decisions in the light of the "openness of justice" principle and the need to detect error in its decisions on judicial review. While no one has yet challenged a decision of the Board in judicial review, there is no statutory bar, as there is with courts-martial, to reviewing the decisions of this tribunal. Other military tribunals exercising statutory powers have been reviewed in the High Court.⁹⁷ In light of section 27(2) of the Bill of Rights Act,⁹⁸ review by the High Court would likely settle this issue in New Zealand in the same way as in the United Kingdom. The failure of the Board to give reasons for its decisions is, like so many other practices adopted by the Board, a breach of the rules of natural justice.

V SUMMARY AND CONCLUSION

The Courts-Martial Board of Review is an anachronistic vestige of a military justice system from another age, a system which asserts the interests of discipline over the interests of justice. Members of the Board are personally selected and appointed by the chief of staff of their service, are not required to swear an oath to do justice according to law or act impartially, and may themselves be subordinate court-martial convening officers whose primary function is prosecutorial. The Board fails to satisfy the requirements of a higher tribunal for the purposes of Article 14(5) of the ICCPR, and fails also to satisfy the requirements of an independent and impartial appeal court required under section 25(h) of the New Zealand Bill of Rights Act 1990. And although it has been argued that the Board "benefits" service persons convicted by courts-martial by altering punishment to what is less severe on the scale of punishments, this argument ignores the fact that the punishment scale from which Board members may select less legally severe

96 *R v Ministry of Defence; ex parte Murray*, above n 94, para 44 Hooper J.

97 *Bradley v Attorney-General* [1986] 1 NZLR 176 (HC) and *Bradley v Attorney-General (No 2)* [1988] 2 NZLR 454 (HC) [review of navy promotion board determinations].

98 "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."

punishments and its supporting statutory provisions are structured in such a way that the Board may in fact increase the severity of punishment.

A tribunal with such wide-reaching powers should no doubt be required to comply with the fundamental rules of natural justice. But the Board of Review does not. Convicted service members receive no notice of Board meetings, are denied the opportunity to make representations at automatic reviews, do not receive a copy of the JAG's advice prior to hearing, and receive no reasons for the Board's decision; and, where petitions are filed by those members for further reviews, the Board may decline a review if no "sufficient grounds" are disclosed for a further review from the first (at which they are not provided with notice or the right to make submissions), thereby denying the member their one, and only, opportunity to persuade the decision-maker to alter punishment in their favour. The perception of the Board as an instrument of executive power within the military command chain, targeted solely at the maintenance of discipline and military order and having nothing to do with the administration of justice is not dispelled by the presence of the JAG, whose advice Board members may ignore and whose role on review conflicts with his or her role at trial. It is difficult to avoid the conclusion that the Board of Review is indeed a Star Chamber.

Since the creation of the CMAC in 1955, the need for a Board of Review to review convictions has gone. The CMAC's jurisdiction is currently unnecessarily restricted to conviction appeals only. Legality and severity issues relating to sentences remain the sole jurisdiction of the Board. But there is no cogent reason for this. The Board of Review should be abolished, and the Courts-Martial Appeal Act 1953 amended to grant convicted service persons the extended right to appeal to the CMAC on legality and severity of sentence. This civilian appeal court is far better placed to supervise military courts-martial and to ensure that the interests of justice are advanced over the need to enforce discipline. The CMAC complies with New Zealand's international and domestic obligations to provide an independent and impartial avenue of appeal on convictions and sentences. If the Board of Review is abolished and the CMAC clothed in an expanded jurisdiction, individual service persons will have greater confidence in the military justice system. Discipline will still be served – it will automatically follow when service persons know they are being treated fairly and in accordance with international and domestic law – but it will be properly subordinated to justice. New Zealand can then move into the 21st century with a military justice system aligned with those of its defence allies – allies who have already discarded the Emperor's old clothes.

