Sexual Assault and Misconduct and the ADF’s Military Justice System

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Overview

• 2011: Seven cultural reviews into the ADF
  Cultural reviews considered wide range of topics, from use of alcohol and social media to the treatment of women in the ADF
• March 2012: launch of *Pathway to Change: Evolving Defence Culture*, creating 175 items for action
• At 5 August 2013:
  – 114 action items have been finalised
  – 15 key recommendations completed
  – 86 of the 160 recommendations completed
  – 21 recommendations have been closed
Outline

• Overview of key differences between the military justice systems of the United States and Australia
• Reforms made to the Australian military justice system in 2003 and 2006
• Overview of ongoing reform in response to sexual assault and misconduct in the Australian Defence Force (ADF)
Australian Military Discipline System

• Current military discipline system for the ADF: the *Defence Force Discipline Act 1982* (DFDA)

• In force since 1985

• ADF equivalent to the Uniform Code of Military Justice
Key Differences

- The DFDA has a narrower jurisdiction
- ‘Substantial purpose test’: disciplinary proceedings under the DFDA need to ‘reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline’ in order to be valid
- Unlike the UCMJ, jurisdiction under the DFDA is not based on the status of an individual as a service member
Key Differences

• The DFDA is complementary to the civilian Australian criminal justice system

• Very serious offences – including most sexual assaults – are generally dealt with by civilian authorities

• The consent of civilian prosecution authorities is required to prosecute most serious offences, including sexual assault, under the DFDA

• Administrative action remains open to command

• Less serious sexual offences can be tried under the DFDA
Key Differences

Chart: Process for determining whether the ADF or civilian authorities will exercise jurisdiction

1. What type of offence has occurred?
   - Hybrid military-civilian offence
     - Purely military offence
       - Matter would in most cases be handled exclusively by the ADF discipline system
       - Most likely
     - Territory offence
       - The following factors are considered:
         1. Threshold jurisdiction: Would the prosecution of the offence substantially serve the purpose of maintaining ADF service discipline?
         2. Mandatory mechanism/section 63 offence: Is the offence a prescribed offence?
         3. Policy mechanism/application of the DMP/DPP MOU: either: (a) DMP hold doubts as to threshold jurisdiction; or (b) threshold jurisdiction is made out but policy dictates that offence should be tried in civilian courts

2. Does DPP consent to the ADF handling the matter?
   - Yes
     - Discussion between DMP and DPP determines which forum the offence will be tried in
   - No
     - ADF Discipline System

3. Civilian Criminal System
2003 and 2006 reforms

- Most recent reforms started in the mid-1990s
- The key aims:
  - increase impartiality, independence
  - fairness of military justice system
- The focus of the reforms was the role played by convening authorities
2003 and 2006 reforms

• Before the reforms, a convening authority in the ADF could:
  1. determine whether there should be a trial;
  2. determine the nature of the tribunal and the charges;
  3. select the Defence Force magistrate or judge advocate and court martial panel members;
  4. select the prosecutor; and
  5. as the Reviewing Authority, review the proceedings
Pre-2006 Handling of an ADF Sexual Offence

Victim reports sexual assault

CO or military unit must report matter to Service Police

Service Police investigates matter using DFPDA powers

Convening Authority determines which forum should hear charge:
(1) CO/SUPSA
(2) CM/DFM

Sufficient evidence: AO charges member

Insufficient evidence: Service Police can investigate where civilian police do not but would not where civilian police do

No further ADF involvement

Convening Authority decides:
(1) not to proceed
(2) to proceed and
(2.1) hears matter (unlikely for a sexual offence) or
(2.2) refers matter to be heard by a higher authority

Convening Authority considers three matters:
(1) service connection test
(2) sufficient evidence
(3) Federal DPP consent to proceed for serious offences (that is, section 63 prescribed offences)

Convening Authority arranges retrial where:
(1) DFPDA orders new trial or
(2) RA orders new trial in accordance with section 160 DFDA

CM/DFM takes place

Not guilty

All three satisfied

Reviewing Authority obtains legal officer report and automatically reviews conviction

Member (1) accepts conviction or considers any of the following non-exclusive options:
(2) Petitions RA for second review
(3) Seeks review from CDF or Service Chief
(4) Appeals to DFDAT

Member punished by military system

DFDAT hears appeal (member can appeal at any time, which puts other reviews on hold)

CFA or Service Chief obtains binding legal report from JAG/DJAG and considers review (if conviction upheld go to (1))

RA/CDF/Service Chief quashes conviction

Abbreviations
ADF Australian Defence Force
AO Authorized Officer
CDF Chief of the Defence Force
CM Court Martial
CO Commanding Officer
DFDAPDF Discipline Appeals Tribunal
DFM Defence Force Magistrate
DPP Director of Public Prosecutions
JA Judge Advocate
JAG Judge Advocate General (DJAG: Deputy JAG)
RA Reviewing Authority
SA Summary Authority
2003 and 2006 reforms

• Gradual move to abolish the position of the convening authority, over the last decade

• Starting point: the 1999 - 2002 policy-based reforms:
  – Prosecution policy introduced for convening authorities
  – Convening authorities no longer permitted to be a reviewing authority for a trial they convened
  – Convening authorities no longer able to select the judge advocate or Defence Force magistrate
  – Established the position of the Judge Advocate Administrator
2003 reforms

• **In 2003**: the 1999 - 2002 policy changes were given legislative force

• The DFDA was amended to ensure:
  – the impartiality of a reviewing authority
  – the selection of members of the court martial panel and the judge advocate, or a Defence Force magistrate, would be made by the Judge Advocate General
  – the creation of the position of the Chief Judge Advocate, as a statutory appointment
  – convening authorities were required by legislation to excuse themselves where actual or perceived bias existed

• A new position was also created: the Chief Judge Advocate
2006 reforms

• The 2006 reforms abolished convening authorities

• The responsibilities of the convening authority were transferred to the:
  – Director of Military Prosecutions
  – Registrar of Military Justice; and
  – Superior Authorities

• A new position was created: the Director of Defence Counsel Services
Basis for Reforms

• Two factors influenced reforms:
  – Decisions from superior courts in comparable jurisdictions (UK and Canada) relating to the fair trial rights of service members
  – Anecdotal evidence indicating that the Australian military justice system needed structural reform to lessen the role played by command
2006 Reforms – the New Positions

• **Director of Military Prosecutions**: given the power to decide what cases to prosecute at the court martial and Defence Force magistrate level, and who the prosecutor would be

• **Registrar of Military Justice**: given the power to choose the panel members on a court martial, at random

• **Superior Authorities**: created to represent the service interests in relation to the decision to prosecute

• Command input into the discipline system was retained through **Superior Authorities**
2006 reforms

• Director of Defence Counsel Services established to provide legal support to accused members

• ADF military police given power to independently and directly recommend serious charges to the Director of Military Prosecutions
Post-2006 Handling of an ADF Sexual Offence

Victim reports sexual assault to CO or military unit

ADVIS can refer matter where service connection test unsatisfied or matter more appropriately dealt with by civilian police

ADVIS investigates matter using DFDA powers

- Insufficient evidence
  - ADFIS briefs the DMP
  - All three satisfied or
  - One or more not satisfied

- Sufficient evidence
  - CO or military unit must report matter to ADFIS

Victim can at any time report matter to civilian police

Civilian police investigate matter and, with sufficient evidence, lay charges. Civilian DPP organises prosecution in the civilian courts like any other non-military prosecution. ADF is not involved.

Abbreviations

- ADF: Australian Defence Force
- ADFIS: Australian Defence Force Investigative Service
- CDF: Chief of the Defence Force
- CM: Court Martial
- CRA: Competent Reviewing Authority
- DCS: Defence Counsel Services
- DFDA: Defence Force Discipline Appeals Tribunal
- DFM: Defence Force Magistrate
- DMP: Director of Military Prosecutions
- DPP: Director of Public Prosecutions
- JA: Judge Advocate
- JAG: Judge Advocate General (DJAG; Deputy JAG)
- RMJ: Registrar of Military Justice

DMP (1) Prepares charge sheet. (2) Organises prosecution witnesses. (3) Conducts prosecution (and represents Service Chief at DFDA appeals)

RMJ arranges, in conjunction with the JAG, pre- and post-trial administration, including convening CMs and referring matters to trial by DFIM

JAG nominates and RMJ appoints JA or DFIM for each trial

DCS organizes defence counsel

DMP determines three matters:
- (1) service connection test
- (2) sufficient evidence
- (3) Federal DPP consent to proceed for serious offences (that is, section 83 prescribed offences)

DMP consults with superior authority on decision to prosecute, taking into account interests of ADF

DMF/DIM takes place

Not guilty

Competent Reviewing Authority obtains legal officer report and automatically reviews conviction

Member (1) accepts conviction or considers any of the following non-exclusive options:
- (2) Petitions CRA for second review
- (3) Seeks review from CDF or Service Chief
- (4) Appeals to DFDA

Member punished by military system

CDF or Service Chief obtains binding legal report from JAG/DJAG and considers review (if conviction upheld go to (1))

DFDA hears appeal (member can appeal at any time, which puts other reviews on hold)

Appeal unsuccessful

CRA/CDF/Service Chief quashes conviction

Appeal successful
2003 and 2006 reforms

• Have they been successful?
• Street/Fisher Review in 2008: the reforms enabled the Australian military justice system to deliver impartial, rigorous, and fair outcomes
• In the future, statistics will be available through the Sexual Misconduct and Prevention Response Office - SeMPRO
Ongoing Reform

• Review into the Treatment of Women in the ADF (2012)

• Sexual Misconduct and Prevention Response Office (SeMPRO) launched on 23 July 2013

• SeMPRO allows restricted disclosures and unrestricted disclosures to be made by victims of sexual assault or misconduct – similar to the United States Sexual Assault Prevention & Response Program
Ongoing Reform

• The Chief of the Defence Force has directed reform of the mechanisms available for dealing with the needs of victims

• Existing and proposed mechanisms:
  – evidence by video-link
  – further investigative training for military police
  – victim impact statements at trial
  – dedicated legal assistance for victims
Questions