THE ROLE OF CONVENING AUTHORITIES IN THE ADF'S MODERN DISCIPLINE SYSTEM (1985 – 2006)

Introduction

1. As part of the key infrastructure supporting the ADF's discipline system after the introduction of the *Defence Force Discipline Act 198*2 in 1985, a number of senior officers in the Defence Force (usually of One or Two Star rank) held secondary appointments as convening authorities. In that capacity, they were the sole arbiters of whether subordinates accused of serious service offences would face trial by court martial or Defence Force magistrate (DFM) – a military judge sitting alone. These officers, who had no legal qualifications themselves, decided:

a. what, if any, charges would be preferred against an accused;

b. signed the charge sheet;

c. appointed the prosecutor;

d. decided whether the accused would be tried by court martial or Defence Force magistrate;

e. selected and appointed the members of the court martial panel (usually from the ranks of officers under their command);

f. appointed the judge advocate or the DFM; and

g. in the event of conviction, the convening authority typically changed roles and acted as the reviewing authority, confirming or correcting the tribunal's findings and punishments.

Rationale for the Convening Authority's Multiple Roles

2. Few seriously questioned the centralisation of these multiple roles in a single commander, because there had always been broad acceptance that discipline was a key aspect of command. Commanders knew best the needs of discipline within the forces under their command. While it is not an approach readily understood outside of the Services, it is fair to say that commanders regarded themselves as being concurrently responsible for the maintenance of discipline, including the decision to bring charges; and for the welfare of the accused, including the obligation to ensure that he or she was treated fairly. These responsibilities were not mutually exclusive; they were regarded as complementary.

3. Convening authorities and reviewing authorities acted on legal advice; but in any event, their function was connected with the administration of discipline, not the administration of justice.

European Jurisprudence – Impetus for Change

4. By the late 1990s a body of jurisprudence involving the United Kingdom[1] and Canada[2] had illuminated the tension between a command-based discipline system

[1] See for example *Findlay* v. *United Kingdom* (110/1995/616/706) (1997) 24 EHRR 221.
[2] See for example *R.* v. *Genereux* [1992] 1 SCR 259.

and the importance of structural independence and impartiality in the notion of a 'fair trial'. The court martial structures of these countries had previously shared similar characteristics with the Australian system. While this overseas jurisprudence had developed in the context of human rights instruments[3] which had no direct parallel in Australia, it pointed to trends likely to enjoy increasing prominence in Australia.

5. In 1992, the Canadian Supreme Court in the case of *R.* v. *Genereux* [1992] 1 SCR. 259 had held that the court martial system did not satisfy the constitutional requirement for a fair and public hearing by an independent and impartial tribunal, guaranteed by the Canadian Charter of Rights and Freedoms. In particular, courts martial as previously constituted were found to lack sufficient independence from the Executive, and for that reason were vulnerable to the possibility of actual or perceived Command influence on the exercise of their judicial functions. *Genereux* led to fundamental structural changes to the Canadian military discipline system that, among other things, altered the basis for the appointment of military judges and established a courts martial administrator to convene courts martial at the request of the Canadian Director of Military Prosecutions.

6. In 1997, the European Court of Human Rights in *Findlay* v. *United Kingdom* (110/1995/616/706) (1997) 24 EHRR 221 held that British courts martial were not sufficiently separated from the chain of command to be considered 'impartial tribunals' for the purposes of Article 6 of the European Convention on Human Rights[4] which guarantees a fair trial for the determination of criminal charges or of civil rights and obligations. The European Court was concerned that the convening officer's multiple roles left open the possibility of unlawful command influence on those entrusted with the discharge of disciplinary functions. *Findlay* led to the abolition in the United Kingdom of the role of convening officers and the division of their functions among prosecuting and administration authorities.

Abadee Report

7. In Australia, the role of the convening authority came under increasing criticism in a series of Defence and parliamentary reviews of the military discipline system commencing in 1997 with a report by Brigadier the Honourable Justice Alan Abadee, a Deputy Judge Advocate General.[5] Among other things, Abadee had been commissioned to examine the Canadian and United Kingdom jurisprudence and assess its relevance to the Australian system. He noted that the Canadian and European human rights provisions were generally based on the International Covenant on Civil and Political Rights (ICCPR)[6] which Australia had ratified, but observed that the ICCPR had not been incorporated into Australian municipal law.[7]

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[3] Such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, in force 3 September 1953, (1950) CETS 005 and *Canadian Charter of Rights and Freedoms*.
[4] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, in force 3 September 1953, (1950) CETS 005.
[5] In 1995 the then Chief of the Defence Force commissioned Brigadier the Honourable Justice Alan Abadee RFD to conduct a 'study into the Judicial System under the Defence Force Discipline Act'. Abadee reported his study to the Chief of the Defence Force in August of 1997. It was subsequently published as a *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), Department of Defence, 1997.
[6] *International Covenant on Civil and Political Rights*, New York, 19 December 1966, in force 23 March 1976, 999 UNTS 171; (1980) ATS 23.
[7] Abadee, *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), Department of Defence, 1997 at para. 2.26.

While the forces for change, therefore, had no direct counterpart in Australia, he recognised that the ICCPR was playing an increasing role in Australia.[8]

8. Abadee recommended changes to policy to separate the role of the convening authority for trials by courts martial and DFMs from the role of the reviewing authority.[9] He recommended that consideration be given to establishing an independent Director of Military Prosecutions (DMP) in place of convening authorities,[10] and recommended interim policy changes to remove from the convening authority the role of selecting the judge advocate and court martial members and to place Judge Advocates/Defence Force magistrates under the command of the Judge Advocate General.[11] Although many of Abadee's recommendations were initially rejected by the ADF, they would ultimately be implemented in legislation, not just in policy.[12]

Burchett Report

9. Abadee's recommendation to consider establishing an independent DMP was echoed by the Joint Standing Committee report on Military Justice Procedures in 1999.[13] However, while those recommendations were still under consideration, the ADF's military discipline system again came under the spotlight when the Joint Standing Committee on Foreign Affairs, Defence and Trade investigated allegations of indiscipline which had emerged from the 3rd Battalion, the Royal Australian Regiment (3RAR).[14] The Committee's findings were limited to 3RAR, so the Chief of the Defence Force decided to appoint Mr James Burchett QC, a former Federal Court judge, to inquire into how widespread and pervasive in the Defence Force was the culture of indiscipline identified in 3RAR.[15] While Burchett concluded that the culture of indiscipline was not widespread,[16] he made a number of useful recommendations to enhance military discipline including the appointment of an independent DMP and a Registrar of Courts Martial.[17] Burchett's recommendations resolved the indecision that had followed previous reviews which had examined the

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[8] For example in *Minister of State for Immigration and Ethnic Affairs* v. *Teoh* (1995) 183 CLR 273 the High Court of Australia held although the *United Nations Convention on the Rights of the Child*, New York, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, formed no part of Australian municipal law, Australia's ratification of the convention created a legitimate expectation that Government decisions would be made in accordance with the terms of the Convention.

[9] Abadee *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), Department of Defence, 1997 at para. 1.26.2.

[10] Abadee *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), Department of Defence, 1997 at para. 126.4.

[11] Abadee *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), Department of Defence, 1997 at paras. 1.26.6-7.

[12] Notably the establishment of the statutory offices of the Director of Military Prosecutions and the Registrar of Military Justice to replace the convening authority's roles in the decision to prosecute and the organisation of the trial by the *Defence Legislation Amendment Act (No. 2) 2005*.

[13] Joint Standing Committee on Foreign Affairs, Defence and Trade *Military Justice in the Australia Defence Force* Report No 89, 21 June 1999.

[14] The Joint Standing Committee on Foreign Affairs, Defence and Trade *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* Report No 99, 22 May 2001.

[15] Mr James Burchett QC was appointed as an Investigating Officer by the Chief of the Defence Force on 15 December 2000 and reported his investigation on 12 July 2001. The inquiry was conducted under the *Defence (Inquiry) Regulations 1985* and was subsequently published as *Report of an Inquiry into Military Justice in the Australian Defence Force* Department of Defence, 2001.

[16] Burchett *Report of an Inquiry into Military Justice in the Australian Defence Force* Department of Defence, 2001 at paras. 5-8.

[17] Burchett *Report of an Inquiry into Military Justice in the Australian Defence Force* Department of Defence, 2001, pp. 29-41

role of convening authorities, and a DMP was established on an interim, non-statutory basis, in 2003.[18]

Statutory Change - 2006

10. The role of DMP was made statutory in June 2006,[19] at which time convening authorities were finally abolished and their functions divided between the DMP and a newly-created Registrar of Military Justice.[20] From that time onwards, the DMP would decide whether or not serious service offences would be prosecuted, and if so would provide the prosecutor,[21] and the Registrar would convene the trial including randomly selecting and appointing court martial panel members.[22]

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Disclaimer: This paper has been provided to the Response Systems to Adult Sexual Assault Crime Panel to provide a general overview and understanding of the issues in the paper. This paper is not, and does not purport to be, a definitive examination of all relevant issues. More detailed guidance is available from relevant legislation, Department of Defence policies and from Defence Legal, Department of Defence.

[18] See the Judge Advocate General's Report for the period 1 January to 31 December 2003, Department of Defence, 2004, p. 14.
[19] By the insertion of Part XIA into the *Defence Force Discipline Act 1982* by the *Defence Legislation Amendment Act (No. 2) 2005*.
[20] Also by amendment to the *Defence Force Discipline Act 1982* by the *Defence Legislation Amendment Act (No. 2) 2005*.
[21] *Defence Force Discipline Act 1982* s. 188GA.
[22] *Defence Force Discipline Act 1982* s. 188FA.