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Military Justice: Adjudication of Sexual Offenses

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Australia

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SUMMARY Various aspects of the military justice system in Australia have been reviewed and adjusted over the last two decades. The most significant reforms took place in 2006 with the establishment of a Military Court, which removed proceedings for serious offenses from the chain of command. However, this new system was abolished in 2009 following a successful constitutional challenge. The current system for serious offenses therefore involves hearings by courts-martial and Defence Force Magistrates, with an independent Director of Military Prosecutions (DMP) determining whether to initiate prosecutions and providing advice to commanders on handling serious allegations. A bill currently before Parliament seeks to re-establish a Military Court system.

A Defence Instruction provides detailed guidance on the management and reporting of sexual offenses, including requirements that commanders report complaints involving such offenses to the Australian Defence Force's (ADF's) investigative service, which will consider any jurisdictional questions. Alleged sexual assault offenses must be referred to the relevant civilian prosecutor by the DMP, while other sexual offenses will also involve advice from the DMP and possible referral to civilian authorities.

In April 2011, following allegations of sexual misconduct involving cadets, the Minister for Defence initiated several reviews relating to sexual abuse in the military, the treatment of women, and complaint handling. These reviews resulted in the development of a broad strategy for changing aspects of ADF culture. A Defence Force Abuse Taskforce was also established to receive and assess allegations of sexual and other abuse that occurred prior to April 2011.

The several reviews from the past four years that have commented on the effectiveness of the military justice system, including the handling of sexual offense complaints, have highlighted issues associated with the recording of statistical information regarding complaints and the underreporting of incidents. Various recommendations from these reviews are in the process of being implemented by the government and the ADF.

I. Introduction

There have been multiple reviews and inquiries in the last twenty years that have examined aspects of the military justice system and issues related to sexual harassment and offending in the Australian Defence Force (ADF).[1] Senior officials at the Department of Defence have noted that "these inquiries illustrate a long history of issues that have continuously plagued Defence in

[1] For example, a review of the military justice system in 2009 stated that there had been twelve separate reviews and reports on aspects of the system in the previous decade. L. STREET & L. FISHER, REPORT OF THE INDEPENDENT REVIEW ON THE HEALTH OF THE REFORMED MILITARY JUSTICE SYSTEM 5 (Jan. 23, 2009), http://www.defence.gov.au/publications/Report_Reformed_Military_Justice_System.pdf. The relevant reviews are listed at *id*. pp. 6–8.

terms of its culture, the military justice system, and complaint handling and inquiry processes."[2] In addition, various court cases have examined jurisdictional questions relating to the military justice system.[3]

One of the most significant reports arose from an inquiry by the Senate Committee on Foreign Affairs, Defence and Trade into the effectiveness of the military justice system (Senate Report),[4] which was completed in 2005 and led to the passage of major reforms to remove proceedings for serious offenses from the ADF chain of command. As a result of a successful constitutional challenge in the High Court, however, the Military Court that commenced operations in 2007 was disbanded in 2009 and the previous military justice system reinstated. The role of the independent Director of Military Prosecutions (DMP), which was first created in 2003, remains a key part of this system. Proposals to re-establish a separate military court are currently before the federal Parliament.

More recent reviews are also referred to later in this report, including those that have taken place in the last two years following allegations of sexual misconduct by ADF Academy cadets in early 2011. The policies regarding the management and reporting of sexual offenses were revised later that year. The relevant instructions issued by the Chief of the Defence Force provide information on jurisdictional considerations and responsibilities relating to sexual offense complaints, including the role of the DMP and the ADF investigative service in determining whether to refer a complaint to civilian authorities.

II. Overview of the Current Military Justice System

The military justice system currently operating in Australia is primarily governed by the Defence Force Discipline Act 1982 (Cth)[5] (DFDA) and its subordinate rules and regulations.[6] The DFDA provides for "the investigation of disciplinary offences, types of offences, available punishments, the creation of Service tribunals, trial procedures before those Service tribunals,

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[2] Department of Defence, Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence: Report on Stage A (Research and Analysis Stage) 26 (Aug. 1, 2012), http://www.defence.gov.au/header/documents/StageAreport.pdf.

[3] For a discussion of some of these cases *see* Geoffrey Kennett, *The Constitution and Military Justice After White v Director of Military Prosecutions*, 36(2) FED. L. REV. 231 (2008), http://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au /files/flr/Kennett.pdf.

[4] Senate Foreign Affairs, Defence and Trade References Committee, The Effectiveness of Australia's Military Justice System (Senate Report) (June 2005), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/report/index.htm.

[5] Defence Force Discipline Act 1982 (Cth) (DFDA), http://www.comlaw.gov.au/Details/C2012C00181.

[6] *See*, *e.g.*, Defence Force Discipline Regulations 1985 (Cth), http://www.comlaw.gov.au/Details/F2011C00695. Provisions related to appeals are included in the Defence Force Discipline Appeals Act 1955 (Cth), http://www.comlaw.gov.au/Details/C2011C00593; *and* Defence Force Discipline Appeals Regulations 1957 (Cth), http://www.comlaw.gov.au/Details/F2009C01292.

and rights of review and appeal."[7] It regulates the conduct of all ADF personnel at all times and in all places, both in peacetime and in war.[8]

The DFDA is complemented by the Discipline Law Manual, which provides guidance to ADF members on the law.[9] Several Defence Instructions, which detail various ADF procedures and policies, are also relevant to the operation of the military justice system, including in the context of resolving potential jurisdictional conflicts with the civilian justice system.[10]

A. Service Tribunals

The system includes three types of "service tribunals"[11] that can be convened to try ADF members for offenses that come under military jurisdiction:

- Summary authorities,
- Courts-martial, and
- Defence Force magistrates.

Only officers of the ADF may be appointed as summary authorities, with appointments made through the chain of command. Summary authorities are generally used to try less serious offenses and have limited powers of punishment.[12] A summary authority must give an accused person the opportunity to elect to have a charge tried by a court-martial or Defence Force magistrate tribunal.[13]

The DFDA provides for two different types of courts-martial:[14] a general court-martial and a restricted court-martial. The two differ in the rank of the president and the number of other panel

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[7] SENATE REPORT, *supra* note 4, ¶ 2.7.

[8] *See Military Justice System*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/mjs/mjs.htm (last visited July 8, 2013). As noted on this website, the military justice system includes both a discipline system and an administrative system. This report is primarily concerned with the discipline system, which includes the investigation of prosecution of offenses, rather than the administrative system, which involves organizational controls related to performance issues.

[9] The three volumes of the *Discipline Law Manual* are available at *Australian Defence Force Warfare Centre: Joint Doctrine Library*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/adfwc/ADFP.html (last visited July 8, 2013).

[10] Several Defence Instructions are available at *Values, Behaviours and Resolutions: Publications*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/fr/frpublications.htm, and at *Audit and Fraud Control: Policy*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/oscdf/afc/policy.htm (both last visited July 8, 2013). *See*, *e.g.*, DI(G) ADMIN 45-2, The Reporting and Management of Notifiable Incidents (26 March 2010), http://www.defence.gov.au/oscdf/afc/pdf/GA45_02.pdf (outlining the primary requirements and common procedures for the reporting, recording, and investigation of alleged offences).

[11] *See* DFDA s 3 for a definition of "service tribunals."

[12] *See* SENATE REPORT, *supra* note 4, ¶ 2.19. There are three levels of summary authority: a superior summary authority, a commanding officer, and a subordinate summary authority. DFDA s 3.

[13] DFDA s 111B.

[14] *Id.* s 114.

members that can be appointed.[15] Court-martial panel members must be military officers, and a legal officer acting as a Judge Advocate must be present throughout the proceedings.

In terms of the third type of service tribunal, the Judge Advocate General (JAG) may appoint officers to be Defence Force magistrates.[16] The magistrates have the same jurisdiction and powers as a restricted court-martial,[17] therefore essentially providing an alternative for dealing with serious offenses.

B. Director of Military Prosecutions

The position of the Director of Military Prosecutions (DMP) was created on an interim basis by a Defence Instruction issued in July 2003.[18] This action followed the completion of an independent inquiry into the military justice system in 2001. In his report, after examining approaches in other countries and considering points in favor and against, the lead investigating officer for the inquiry recommended that an independent DMP position be established.[19] At that time, under the DFDA, "convening authorities" (which were part of the chain of command) made determinations on whether a court-martial or Defence Force magistrate tribunal should be convened in the individual cases referred to them.

Until 2006, when amending legislation came into effect,[20] the Australian DMP acted in an advisory capacity to the convening authorities. The formalization of the role through statute and other aspects relating to the DMP were included in the Senate Report recommendations, although the government had already introduced the relevant legislation by the time the report was completed. As a result of the amendments, the statutorily independent DMP took over the roles of the convening authorities, which were abolished, thus removing prosecution decisions from the chain of command.

Part XIA of the DFDA contains provisions relating to the appointment and functions of the DMP. The functions of the DMP are listed in section 188GA as follows:

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[15] *Id.* ss 114 & 116. A general court-martial comprises a president, who is not below the rank of Colonel, and at least four other members. A restricted court-martial comprises a president, who is not below the rank of Lieutenant Colonel, and at least two other members.

[16] *Id.* s 127.

[17] *Id.* s 129.

[18] Press Release, Hon. Danna Vale, MP, First Australian Director of Military Prosecutions (June 3, 2003), http://www.defence.gov.au/minister/15tpl.cfm?CurrentId=2915; DEPARTMENT OF DEFENCE, ANNUAL REPORT 2004–05, http://www.defence.gov.au/budget/04-05/dar/03_07_investigations06.htm.

[19] JAMES BURCHETT QC, REPORT OF AN INQUIRY INTO MILITARY JUSTICE IN THE AUSTRALIAN DEFENCE FORCE ¶ 206-36 (2001), http://www.defence.gov.au/media/DeptTpl.cfm?CurrentID=893.

[20] *Defence Legislation Amendment Bill (No. 2) 2005,* PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s483 (last visited July 8, 2013).

(1) The Director of Military Prosecutions has the following functions:
   (a) to carry on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate, whether or not instituted by the Director of Military Prosecutions;
   (b) to seek the consent of the Director of Public Prosecutions as required by section 63;
   (c) to make statements or give information to particular persons or to the public relating to the exercise of powers or the performance of duties or functions under this Act;
   (d) to represent the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal;
   (e) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) In addition to his or her functions under subsection (1), the Director of Military Prosecutions also has:
   (a) the functions conferred on the Director of Military Prosecutions by or under this Act or any other law of the Commonwealth; and
   (b) such other functions as are prescribed by the regulations.

The ADF website explains the general role of the DMP with regard to the assistance that can be provided to ADF commanders as follows:

> The DMP will provide advice on matters of a legal nature that are serious allegations under the DFDA. These matters relate to offences that are unable to be tried at the commanding officer level and includes those offences which carry a potential maximum punishment of more than two years imprisonment. These matters are referred to the DMP by commanders within the various commands and units of the ADF requesting advice on a matter. The DMP also provides advice to commanders on the evidence disclosed in investigations and makes recommendations on the evidence disclosed and possible courses of action commanders may utilise.[21]

In order to be appointed as the DMP, a person must have been enrolled as a legal practitioner for at least five years; be a permanent member of the navy, army, or air force, or be a member of the reserves "who is rendering continuous full-time service"; and hold a rank "not lower than the naval rank of commodore or the rank of brigadier or air commodore."[22]

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[21] Military Justice: Organisations Within the Military Justice System that can Provide Assistance to ADF Members – Director of Military Prosecution, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/mjs/organisations.htm#F (last visited July 8, 2013). Further information on how the DMP performs its role can be found in the following documents: Director of Military Prosecutions Directive 02/2009 – Prosecution and Disclosure Policy, http://www.defence.gov.au/legal/pdf /ddcs/dmp-2-2009.pdf; DEPARTMENT OF DEFENCE, DIRECTOR OF MILITARY PROSECUTIONS REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2012 (2012), http://www.defence.gov.au/ publications/DMP_Annual_Report _2012.pdf.

[22] DFDA s 188GG.

C. Interaction with the Civilian Justice System

1. Categories of Offenses

There are currently three categories of offenses under Part III of the DFDA:

- "Military discipline offenses for which there are no civilian counterparts,"
- "Offenses with a close civilian criminal law equivalent," and
- "Civilian criminal offences imported from the law applicable in the Jervis Bay Territory."[23]

In terms of the third category of offenses, section 61 of the DFDA makes all ADF members subject to the criminal laws of the Jervis Bay Territory regardless of where the offense occurred.[24] This provision is essentially a legal device that allows for the application of civilian criminal laws both within Australia and when ADF personnel are deployed overseas (i.e., they have extraterritorial application), particularly "in circumstances where an adequate criminal law framework is absent, or the application of host country law is otherwise undesirable."[25] Such offenses may therefore be tried by ADF service tribunals sitting outside Australia.

2. Referral of Criminal Offenses to Civilian Authorities

Where, in relation to suspected criminal offenses by a member or members of the ADF, there is an overlap between the civilian and military jurisdictions, the Australian High Court has determined that "jurisdiction under the DFDA may only be exercised in Australia during peacetime where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining Service discipline."[26] Otherwise, "criminal offences or illegal conduct is referred to civilian authorities for investigation and prosecution."[27] If prosecution takes place within the civilian justice system, the accused cannot then be subjected to the DFDA for the same or a similar offense.[28]

Some offenses *must* be referred to civilian authorities for consideration. Section 63 of the DFDA requires that permission be obtained from the Director of Public Prosecutions (DPP) in order for proceedings relating to certain serious criminal offenses committed within Australia to be instituted within the military justice system.[29] These offenses include treason, murder,

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[23] SENATE REPORT, *supra* note 4, ¶ 2.13.

[24] DFDA s 61. This provision relates to the application of the Crimes Act 1900 (ACT), the Crimes Act 1914 (Cth), and the Criminal Code Act 1995 (Cth). In addition, provisions of the DFDA refer to the application of chapter 2 of the Criminal Code 2002 (ACT), which sets out general principles of criminal responsibility.

[25] SENATE REPORT, *supra* note 4, ¶ 2.14.

[26] *Id.* ¶ 3.7. *See also* Defence Legislation Amendment Bill 2006: Explanatory Memorandum, http://www.comlaw.gov.au/Details/C2006B00145/Explanatory%20Memorandum/Text.

[27] SENATE REPORT, *supra* note 4, ¶ 2.15.

[28] Id.

[29] DFDA s 63.

manslaughter, bigamy, and sexual assault offenses.[30] The role of the DMP, outlined above, includes consulting the civilian DPP in each instance where one of these offenses is alleged to have occurred. The handling of sexual assault allegations and other sexual offenses is further discussed in part IV below.

Jurisdictional considerations and issues arising from the interaction of the DFDA with the civilian criminal justice system were considered in detail in the Senate Report and more recently as part of a 2011 review of the management of incidents and complaints by the ADF Inspector General. The Inspector General summarized the nature of the service jurisdiction as follows:

> The jurisdiction of Service tribunals for offences under the DFDA derives from the defence power in the Constitution of Australia. The High Court has ruled that the DFDA may not impair civilian jurisdiction but may empower Service tribunals to maintain or enforce discipline. Civilian criminal jurisdiction should be exercised when it can conveniently and appropriately be invoked. The jurisdiction of Service tribunals should not be invoked except for the purpose of maintaining and enforcing service discipline.[31]

3. Rejection of Recommendation to Refer All Criminal Offenses to Civilian Authorities

The Senate Report noted that "[t]he control and exercise of discipline, through the military justice system, is an essential element of the chain of command. This has not been challenged during the Inquiry and remains a significant distinguishing feature of military justice."[32] However, the committee made a series of recommendations that would have the effect of requiring the automatic referral of all suspected criminal activity, both within and outside Australia, to appropriate civilian authorities for investigation and prosecution before civilian courts.

The ADF, in the Government Response to the Senate Report, rejected these recommendations entirely and set out detailed reasons for doing so.[33] The reasons included that "[t]he maintenance of effective discipline is indivisible from the function of command in ensuring the day-to-day preparedness of the ADF for war and the conduct of operations" and "[r]ecourse to the ordinary criminal courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the Defence Force."[34]

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[30] The sexual assault offenses are included by virtue of section 63(1)(a)(ia), which refers to sections 51 to 55 of the Crimes Act 1900 (ACT), http://www.legislation.act.gov.au/a/1900-40/default.asp.

[31] Inspector General Australian Defence Force, Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction ¶ 147 (2011), http://www.defence.gov.au/pathwaytochange/docs/incidentscomplaints/Review%20of%20the%20Management%20of%20Incidents%20and%20Complaints%20in%20Defence_complete%20report.pdf.

[32] SENATE REPORT, *supra* note 4, ¶ 2.8.

[33] Department of Defence, Government Response to the Senate Foreign Affairs, Defence and Trade References Committee: Report on the Effectiveness of Australia's Military Justice System (Government Response) 13–15 (Oct. 2005), http://www.defence.gov.au/mjs/docs/mji_government_response_4oct052.pdf.

[34] *Id.* at 14.

III. Proposed Military Court System

A. Establishment of the Australian Military Court in 2006

In response to the 2005 Senate Report, the government agreed to establish "a permanent military court to be known as the Australian military court [AMC], to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates."[35] The Explanatory Memorandum for the resulting Defence Legislation Amendment Bill 2006[36] noted that the concerns about the existing system "stemmed from the location of judge advocates and DFMs within the military chain of command and the implications for their (actual and perceived) independence."[37] The bill was enacted in late 2006 and the AMC commenced operations on October 1, 2007.[38] In addition to the AMC provisions, the bill provided for improvements to the summary authority system, restructured the military offenses in the DFDA into three classes, and stated how these offenses were to be dealt with.[39]

B. High Court Decision and Legislative Response

In August 2009, the High Court upheld a challenge to the validity of the AMC,[40] finding that the establishment of the AMC in the 2006 Amendment Act went beyond what is authorized by the "defence power" in section 51(vi) of the Constitution,[41] and that it did not comply with provisions in the Constitution relating to the appointment of judges.[42] As a result of this decision, the Parliament enacted the Military Justice (Interim Measures) Act (No. 1) 2009,[43] which essentially reinstated the pre-2007 DFDA by bringing back the courts-martial and Defence

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[35] *Id.* at 5.

[36] *Defence Legislation Amendment Bill 2006*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2621 (last visited July 7, 2013).

[37] Defence Legislation Amendment Bill: Explanatory Memorandum ¶ 2, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2621_ems_ae33dcae-40a8-4b85-8cad-42ac048f9f2e/upload_pdf/305074.pdf;fileType=application%2Fpdf.

[38] *See* Department of Defence, Frequently Asked Questions on the Australian Military Court, http://www.defence.gov.au/mjs/resources/AMCFAQs.pdf.

[39] Sue Harris Rimmer & John Moremon, Defence Legislation Amendment Bill 2006, at 13–15 (Parliamentary Library Bills Digest No. 48, 2006–07, Oct. 31, 2006), http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/TCCL6/upload_binary/tccl64.pdf;fileType=application/pdf.

[40] *Lane v Morrison* [2009] HCA 29, http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html. For media reaction to the case, *see*, *e.g.*, Joel Gibson & Brendan Nicholson, *Military Justice System in Tatters*, THE SYDNEY MORNING HERALD (Aug. 27, 2009), http://www.smh.com.au /national/military-justice-system-in-tatters-20090826-ezso.html.

[41] AUSTRALIAN CONSTITUTION s 51(vi), http://www.comlaw.gov.au/Details/C2004C00469.

[42] Chapter III of the Australian Constitution outlines the requirements for the exercise of judicial power, providing for the creation of judicial tribunals, the appointment of judges, and judge's conditions of tenure. *See* Paula Pyburne, Military Justice (Interim Measures) Amendment Bill 2013, at 4 (Parliamentary Library Bills Digest No. 98, 2012–13, Apr. 9, 2013), http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2359197/upload_binary/2359197.pdf;fileType=application/pdf.

[43] Military Justice (Interim Measures) Act (No. 1) 2009 (Cth), http://www.comlaw.gov.au/Details/C2009A00091.

Magistrate processes and associated roles.[44] The improvements to the summary authority system were retained, but the new system for classifying offenses was not.

This legislation was intended to be a temporary measure. However, Parliament subsequently passed an extension bill in 2011[45] and a second extension bill was passed in June 2013.[46] The passage of the most recent bill was necessitated by the fact that a 2012 bill that would re-establish a military court system has not yet been enacted.

C. Current Proposal

The Minister for Defence introduced the Military Court of Australia Bill 2012 in June 2012.[47] It is accompanied by the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012,[48] which would "provide arrangements for transition to the new Military Court and include[] additional enhancements to the Australian Defence Force military discipline system, not directly associated with the establishment of the Military Court."[49]

The primary bill would establish the Military Court of Australia (MCA) in accordance with Chapter III of the Constitution and would remove the determination of proceedings for more serious offenses from the chain of command. Less serious service offenses would continue to be heard by summary authorities at the unit level, while the General Division of the MCA would try "certain less serious service offences at the request of an accused and/or upon referral by the Director of Military Prosecutions."[50] The Appellate and Superior Division of the MCA would

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[44] *See* Military Justice (Interim Measures) Bill (No. 1) 2009: Explanatory Memorandum, http://www.comlaw.gov.au/Details/C2009B00170/Explanatory%20Memorandum/Text; Cth, Parliamentary Debates, House of Representatives, 14 September 2009, 9446 (Mike Kelly MP, Parliamentary Secretary for Defence Support), http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-09-14/0071/hansard_frag.pdf;fileType=application%2Fpdf.

[45] *Military Justice (Interim Measures) Amendment Bill 2011*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4566 (last visited July 7, 2013).

[46] *Military Justice (Interim Measures) Amendment Bill 2013,* PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5030 (last visited July 3, 2013).

[47] *Military Court of Australia Bill 2012*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4853 (last visited July 3, 2013).

[48] *Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4854 (last visited July 8, 2013).

[49] Press Release, Stephen Smith MP & Nicola Roxon MP, Legislation to Establish Military Court of Australia (June 21, 2012), http://www.minister.defence.gov.au/2012/06/21/minister-for-defence-and-attorney-general-joint-media-release-legislation-to-establish-military-court-of-australia/. *See also* Ian McCluskey, Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012, at 2 (Parliamentary Library Bills Digest No. 101, 2012–13, Apr. 16, 2013), http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2375861/upload_binary/2375861.pdf.

[50] Ian McCluskey & Paula Pyburne, Military Court of Australia Bill 2012, at 10 (Parliamentary Library Bills Digest No. 71, 2012–13, Feb. 8, 2013), http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd071.

try the serious service offenses that are set out in a schedule to the bill, and would also hear appeals from first instance decisions.[51]

The two 2012 bills have now been considered by two Senate committees.[52] While it appears that there is broad cross-party support for the proposals, the fact that the primary bill does not contain a right to trial by jury, even for the most serious offenses, appears to remain under discussion at this time. A second issue relates to the inability, under the bill as currently drafted, for reservists and standby reservists to be appointed as judicial officers of the new court.[53]

IV. Handling of Sexual Offense Complaints

A. Defence Instruction on the Management and Reporting of Sexual Offenses

In November 2011, the Chief of the Defence Force issued a revised Defence Instruction on the handling of sexual offense complaints.[54] This Instruction replaced the previous one on the same topic that had been promulgated in 2004,[55] as well as superseding two other related instructions.[56] It sets out the overarching principles and detailed policies relating to the management of complaints involving different types of sexual offenses, including reporting requirements, determining the correct jurisdiction for offenses, investigating complaints, maintaining confidentiality, and providing support to the parties.

1. Principles Governing the Handling of Sexual Offense Complaints

The overarching principles of the Instruction are stated as follows:

> a. commanders and managers are to take reasonable steps to prevent sexual offences and have a responsibility to manage sexual offence complaints, including the appointment of a case manager;
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> b. the disclosure of an alleged sexual offence to a commander or manager by any person or through any other means constitutes a complaint for the purpose of this Instruction;

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[51] Id.

[52] Senate Legal and Constitutional Affairs Legislation Committee, Report on Military Court of Australia Bill 2012 [Provisions] and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 [Provisions] (Oct. 2012), http://www.aph.gov.au/ Parliamentary_ Business/Committees/Senate_Committees?url =legcon_ctte/completed_inquiries/2010-13/military_court_ 2012/report/index.htm; Senate Foreign Affairs, Defence and Trade Legislation Committee, Report on Provisions of the Military Court of Australia Bill 2012 and the Provisions of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (Aug. 2012), http://www. aph.gov.au/Parliamentary_Business/ Committees/Senate_Committees?url=fadt_ctte /completed_inquiries/2010-13/military_court/report/report.pdf.

[53] McCluskey & Pyburne, *supra* note 50.

[54] DI(G) PERS 35-4 AMDT 1, Management and Reporting of Sexual Offences (Nov. 22, 2011), http://www.de fence.gov.au/fr/Policy/GP35_04.pdf.

[55] *Id.* (title page).

[56] *Id.* ¶ 3.

c. reporting of sexual offences to ADFIS [Australian Defence Force Investigative Service] is mandatory, irrespective of the complainant's wishes;

d. appropriate confidentiality must be maintained for the protection of privacy and the limiting of trauma for all involved parties;

e. commanders and managers are to initiate crisis intervention and the provision of a long-term support strategy in order to appropriately manage sexual offence complaints;

f. people are able to seek advice from counsellors. This does not constitute a complaint unless there are reasons for mandatory reporting to the commander or manager;

g. sexual offence complaints are to be investigated by the State/Territory or Defence Investigative Authorities, as appropriate—administrative inquiries are not to be used to investigate sexual offences; and

h. reporting of sexual offences to ADFIS as stipulated in DI(G) ADMIN 45–2—The reporting and management of notifiable incidents, and to the Fairness and Resolution (FR) Branch via Form 875–1—Initial Complaint Report—Unacceptable Behaviour or Sexual Offence (see annex C), is mandatory.[57]

2. Determining Jurisdiction for Sexual Offenses

In terms of the process for reporting complaints of sexual offenses and determining whether to refer matters to civilian authorities, the Instruction states that

> [a]ll alleged sexual offences involving Australian Public Service (APS) employees [i.e. civilian employees], Australian Defence Force (ADF) members, and/or external service providers which occur in the Defence workplace, or which have any association to the Defence workplace (eg conferences, work related social gatherings etc) must be immediately reported to the Australian Defence Force Investigative Service (ADFIS), who will coordinate and determine the appropriate jurisdiction for the handling of the matter. In those cases where the alleged sexual offences cannot be prosecuted under the Defence Force Discipline Act 1982 (DFDA) the alleged offence must still be reported to ADFIS. Reporting to ADFIS must not be delayed as a consequence of any Unit administrative action such as a Quick Assessment.[58] ADFIS must take into account the range of jurisdictional and operational considerations and, where appropriate, report the alleged offence to civilian police regardless of the wishes of the complainant.[59]

Where ADFIS determines that the ADF has jurisdiction in relation to a sexual offense complaint involving ADF members, the Instruction states that the relevant manager or commander "should seek legal advice" from the DMP.[60] Certain offenses listed in Annex A to the Instruction that

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[57] *Id.* ¶ 10.

[58] For Defence policies on Quick Assessments *see* DI(G) ADMIN 67-2, Quick Assessment (Aug. 7, 2007), http://www.defence.gov.au/fr/Policy/ga67_02.pdf.

[59] DI(G) PERS 35-4 AMDT 1, *supra* note 54, at ¶ 2.

[60] *Id.* ¶ 79.

have a maximum punishment of more than two years of imprisonment must be referred to the DMP for legal advice.[61]

Where ADFIS finds that the ADF does not have jurisdiction, it will refer the matter to the relevant state or territory prosecution authorities, which will determine whether to initiate criminal proceedings.[62] Complaints of sexual offenses against civilian Defence employees or contracted staff members are also referred to ADFIS, which will then always refer the matter to the relevant civilian prosecution authorities.[63]

Annex A of the Instruction lists the six offenses that are contained in Part IIIA of the Crimes Act 1900 (ACT) for which permission must be sought from the DPP (i.e., under section 63 of the DFDA, referred to above) in order for proceedings to take place under the DFDA. The Instruction notes that, "due to the serious nature of the [. . .] offences, it is unlikely the DPP would give consent for the Australian Defence Force to deal with them."[64] These offenses are: sexual assault in the first degree, sexual assault in the second degree, sexual assault in the third degree, sexual intercourse without consent, sexual intercourse with a young person, and maintaining a sexual relationship with a young person.[65]

Annex A then lists three Crimes Act offenses that do not require DPP approval for proceedings to occur under the DFDA, but where legal advice should be obtained from the DMP before charges are brought within the military justice system: act of indecency in the second degree, act of indecency in the third degree, and act of indecency without consent.[66]

Several offenses are then listed that are considered to be of such a serious nature that, where they are committed in Australia, "[i]n most cases it will be appropriate to immediately refer allegations of these offences to civilian investigation and prosecution agencies."[67] Commanders are advised to consult the relevant Defence Instruction on DFDA jurisdiction and seek legal advice before charging any of these offenses under the DFDA: act of indecency in the first degree, acts of indecency with young persons, incest and similar offenses, abduction, employment of young persons for pornographic purposes, possession of child pornography, and "using the Internet etc to deprave young people."[68]

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[61] Id.

[62] *Id.* ¶ 80.

[63] *Id.* ¶ 83.

[64] *Id.* at A-1.

[65] *Id.* at A-2.

[66] Id.

[67] Id.

[68] Id.

3. Possible Actions

The Instruction clarifies that a member of the ADF can be suspended from duty while an alleged sexual offense is being investigated, after he or she has been charged with a civilian or service offense, or after conviction, pending the decision of a reviewing authority.[69]

If the behavior of a respondent falls short of an offense, consideration may be given to initiating formal adverse administrative action.[70] No such action can be taken while criminal or disciplinary proceedings are pending.[71] Where a respondent is acquitted of a sexual offense following the proceedings, no adverse administrative action can be taken against the person in relation to the specific offense itself. However, the behavior that was the subject of the complaint may still result in such action being taken.[72]

Where an ADF member is convicted of an offense, adverse administrative action may be taken against that person, including termination of service.[73] In the context of civilian employees, various sanctions are available where the facts and circumstances that gave rise to the offense amount to a breach of the APS Code of Conduct.[74] Defence contracted staff may also have their contract terminated.[75]

B. Recent Reviews Relating to Sexual Abuse and the Treatment of Women

As noted in the introduction to this report, the ADF has faced criticism and controversy in recent years regarding standards of conduct and aspects of the culture of the ADF, including its handling of complaints that involve accusations of sexual abuse. Following allegations involving a female cadet at the ADF Academy being filmed having consensual sex and the video being broadcast over Skype,[76] the Minister of Defence announced a range of reviews in April 2011.[77] Then, in March 2012, the Minister of Defence, Secretary of Defence, and Chief of the Defence Force jointly announced an overarching strategy for implementing the various recommendations arising from these reviews. This strategy, called *Pathway to Change – Evolving Defence Culture*, relates to the following completed reviews and associated reports:[78]

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[69] *Id.* ¶ 82.

[70] *Id.* ¶ 84.

[71] *Id.* ¶ 85.

[72] *Id.* ¶ 86.

[73] *Id.* ¶ 88.

[74] *Id.* ¶ 90.

[75] *Id.* ¶ 92.

[76] For the latest on this case, *see*, *e.g.*, Elizabeth Byrne, *ADFA Skype Scandal Trial to Go Ahead*, ABC NEWS (June 27, 2013), http://www.abc.net.au/news/2013-06-27/skype-scandal-trial-to-go-ahead/4784974.

[77] *See* Peter Veness, *ADFA Scandal Leads to Six Reviews*, THE AGE (Apr. 11, 2011), http://news.theage.com.au/breaking-news-national/adfa-scandal-leads-to-six-reviews-20110411-1daks.html.

[78] *See Pathways to Change – Evolving Defence Culture*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/pathwaytochange/ (last visited July 8, 2013).

- DLA Piper Report of the Review of Allegations of Sexual and other forms of abuse in Defence
- Review of Personal Conduct of ADF Personnel
- Review of the Use of Alcohol in the ADF
- Review of Social Media and Defence
- Review of the Management of Incidents and Complaints
- Review of Employment Pathways for APS Women in the Department of Defence
- Review into the Treatment of Women in the Australian Defence Force Academy (Phase 1)
- Review into the Treatment of Women in the Australian Defence Force (Phase 2)

The implementation of these reviews through the *Pathway to Change* strategy has recently come under further scrutiny due to new allegations, made public in June 2013, that ADF personnel and contractors were involved in a ring that exchanged explicit material using ADF computer systems over a number of years.[79] In the same month, a further scandal was also revealed in relation to hazing of recruits involving sex acts.[80]

1. Establishment of the Defence Abuse Response Taskforce

As part of the response to the first review listed above,[81] in late 2012 the government established an independent Defence Abuse Response Taskforce to receive and assess allegations of sexual and other abuse (e.g., bullying, harassment, and intimidation) that occurred before April 11, 2011 (the date that the DLA Piper review was announced).[82] The Taskforce will then determine an appropriate response in individual cases, which may include the following:

- referral to counselling
- a Reparation Payment of up to $50,000
- referral of appropriate matters to police or military justice authorities for formal criminal investigation and assessment for prosecution
- referral to the Chief of the Defence Force for administrative action

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[79] *See* Dan Box & Joe Kelly, *Sex Films Revive Defence Scandal*, THE AUSTRALIAN (June 14, 2013), http://www.theaustralian.com.au/national-affairs/defence/sex-films-revive-defence-scandal/story-e6frg8yo-1226663517637; Max Blenkin, *Defence Force Outraged at Sex Scandal*, ADELAIDE NOW (June 21, 2013), http://www.adelaidenow.com.au/news/national/army-faces-appalling-situation-chief/story-e6frea7l-1226663241840.

[80] Alys Francis, *ADF Recruits Performed Sex Acts in Hazing, Sources Say*, 9NEWS NATIONAL (June 22, 2013), http://news.ninemsn.com.au/national/2013/06/22/12/11/adf-recruits-performed-sex-acts-in-hazing-sources.

[81] *See generally Pathway to Change: DLA Piper Review of Allegations of Sexual Abuse and Other Abuse in Defence*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/pathwaytochange/Docs/DLAPiper/index.htm (last visited July 8, 2013).

[82] Press Release, Department of Defence, Govt Responds to Review into Allegations of Abuse in Defence (Nov. 26, 2012), http://www.defence.gov.au/defencenews/stories/2012/nov/1126.htm; Press Release, Stephen Smith MP, Government Response to the Review into Allegations of Sexual or Other Forms of Abuse in Defence (Nov. 26, 2012), http://www.minister.defence.gov.au/2012/11/26/minister-for-defence-government-response-to-the-review-into-allegations-of-sexual-or-other-forms-of-abuse-in-defence/.

- restorative engagement, possibly including apologies from appropriate senior Defence officers.[83]

In addition to establishing the Taskforce, in November 2012 the Defence Minister made a general apology in Parliament to ADF members and Defence employees who had suffered sexual or other forms of abuse in the course of their employment.[84] The Chief of Defence also issued a formal apology.[85]

V. Effectiveness of the Military Justice System

The various reviews conducted in recent years considered a range of information and evidence, including personal accounts, expert advice, interviews, submissions, and statistics. Some of the findings in a selection of the reports completed since the 2005 Senate Report are highlighted below.

In addition to the below reviews, senior Defence personnel are currently conducting an inquiry titled "Re-thinking systems of inquiry, investigation, review and audit in Defence," which includes the examination of aspects of the military justice system as well as other areas. A report on the research and analysis stage of this inquiry was published in August 2012.[86]

1. Independent Review of the Reformed System (2009)

In early 2009, an independent report that assessed the health of the military justice system was published.[87] This report related to the 2006 reforms that established the Australian Military Court (AMC), which was subsequently abolished later in 2009, as discussed above. The report noted that of the thirty recommendations in the Senate Report that had been accepted by the

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[83] *Frequently Asked Questions: How Exactly is the Government Responding to DLA Piper's Review of Abuse in Defence?*, DEFENCE ABUSE RESPONSE TASKFORCE, http://www.defenceabusetaskforce.gov.au/about/Pages/Frequently-asked-questions.aspx#responding (last updated July 1, 2013). The Taskforce recently released its *Second Interim Report*, which the Minister of Defence presented to Parliament on June 20, 2013. Reports are available on the Taskforce's website, at http://www.defenceabusetaskforce.gov.au/reports/Pages/default.aspx (last visited July 8, 2013). *See also* Press Release, Stephen Smith MP, Paper Presented on the Defence Abuse Response Taskforce (June 20, 2013), http://www.minister.defence.gov.au/2013/06/20/minister-for-defence-stephen-smith-paper-presented-on-the-defence-abuse-response-taskforce/.

[84] Press Release, Stephen Smith MP, Ministerial Statement in the House of Representatives – Apology to People Subjected to Sexual or other Forms of Abuse in Defence (Nov. 26, 2012), http://www.minister.defence.gov.au/2012/11/26/minister-for-defence-ministerial-statement-in-the-house-of-representatives-apology-to-people-subjected-to-sexual-or-other-forms-of-abuse-in-defence/.

[85] Transcript, Department of Defence, Statement from General David Hurley, Chief of the Defence Force (Nov. 26, 2012), http://news.defence.gov.au/2012/11/26/statement-from-general-david-hurley-chief-of-the-defence-force/.

[86] Department of Defence, Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence: Report on Stage A (Research and Analysis Stage), *supra* note 2. A report on the second stage of the project, concerning possible models for a new system of inquiry, investigation, and review, was scheduled to be presented in February 2013.

[87] Street & Fisher, *supra* note 1.

government, all but six had been implemented.[88] It further noted that there had been a total of 382 recommendations relating to the system in reviews conducted over the previous ten years, with only twenty-eight of these still needing to be addressed.[89]

The report examined various processes and arrangements at a detailed level and came to the overall assessment that "the MJS [military justice system] is delivering and should continue to deliver impartial, rigorous and fair outcomes; has greater transparency and enhanced oversight; is substantially more independent from the chain-of-command; and is effective in maintaining a high standard of discipline both domestically and in the operational theatre."[90] The two main areas of concern were that the reformed DFDA investigations and AMC hearings were "incurring delays in delivery of discipline."[91]

2. Inspector-General's Review of the Management of Incidents and Complaints (2011)

In 2011 the Inspector-General of the ADF conducted a review of the current system for managing complaints and incidents. The review involved "specific reference to the treatment of victims making complaints, transparency of processes and the jurisdictional interface between military and civil law."[92]

The review considered both domestic and international benchmarks for managing complaints and incidents of "unacceptable behavior." It found that the existing arrangements satisfied the requirements of the various domestic benchmarks, although there could be improvements around timeliness and training. It further found that, compared to systems in various other countries, "it appears that the ADF's system of complaints and incident handling for dealing with unacceptable behaviour is amongst the most comprehensive and detailed. The ADF's policies are comparable to those utilised by the United Kingdom, New Zealand and Canadian military."[93]

The Inspector-General recommended various improvements to clarify certain policies and concluded that

> the fundamental underpinnings of the ADF's complaint handling system remain valid. Structurally, the ADF processes reflect best practices, and this review has found no compelling reason to support radical structural change. The most productive opportunities for improvement lie in better implementation of the present policy and the review's recommendations have wherever possible reflected this.[94]

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[88] *Id.* at 5–6.

[89] *Id.* at 8.

[90] *Id.* at viii.

[91] Id. See also id. at 9, 16–17.

[92] *Pathway to Change: Review of the Management of Incidents and Complaints in Defence*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/pathwaytochange/docs/incidentscomplaints/index.htm (last visited July 8, 2013).

[93] Inspector General Australian Defence Force, *supra* note 31, at 33.

[94] *Id.* at 49.

3. DLA Piper Review of Allegations of Sexual and Other Abuse in Defence (2011)

The DLA Piper report contained several findings and statements relating to the military justice system in the context of the handling of sexual abuse complaints over a number of years, including the following:

- There has been a history of underreporting of sexual and other abuse in the ADF, which in past years was exacerbated by aspects of ADF culture as well as aspects of the military justice system.[95]
- A "substantial number of people" have been "dissatisfied and disillusioned with the ADF's application of military justice processes and approach to complaint handling."[96]
- In the past, the ADF failed to use the full range of options to take actions against perpetrators of abuse. Instead, particularly in the mid- to late-1990s, the practice was to refer all sexual offenses, including minor indecencies, to the civilian authorities without investigating or considering possible concurrent (or subsequent) disciplinary or administrative action.[97] Furthermore, there have been "low levels of prosecutions and/or inaction by civilian police or the ADF (including failure to take administrative or DFDA action) in failing to call perpetrators to account for unacceptable behaviour (including serious instances of assault)."[98]
- The Fairness and Resolution Database of Unacceptable Behaviour has not been kept up to date.[99]

The Defence Annual Report for 2011–12 states that the Department of Defence "has initiated action to improve information systems dealing with unacceptable behaviour" in response to the DLA Piper review and the *Pathway to Change* strategy.[100]

On June 20, 2013, the Minister for Defence made a statement relating to the first interim report of the Defence Abuse Response Taskforce. In his statement he noted that "[a]nalysis by ADFIS shows that there have been on average 80 reports of sexual assault per year over the last five years."[101] In addition, he stated that research indicates that about 80% of victims do not report their experience. Furthermore,

> [t]he number of unacceptable behaviour complaints is also higher than one would want to see, increasing since 2009 in the ADF and Defence more generally. Complaints in the

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[95] GARY RUMBLE ET AL., REPORT OF THE REVIEW OF ALLEGATIONS OF SEXUAL AND OTHER ABUSE IN DEFENCE: FACING THE PROBLEMS OF THE PAST 105, 119–21 (Vol. 1, Oct. 2011), http://www.defence.gov.au/culturereviews/docs/DLAPiper/Volume1.pdf.

[96] *Id.* at 106.

[97] *Id.* at 111, 116, 139–45, 152.

[98] *Id.* at 106.

[99] *Id.* at 135.

[100] DEPARTMENT OF DEFENCE, ANNUAL REPORT 2011–12, at 282 (2012), http://www.defence.gov.au/budget/11-12/dar/dar_1112_3.pdf.

[101] Press Release, Stephen Smith MP, Paper Presented on the Defence Abuse Response Taskforce, *supra* note 83.

> ADF increased from 624 in 2009 to 631 in 2012 and in the Australian Public Service in Defence increased from 124 in 2009 to 180 in 2012. Pathway to Change encourages a reporting culture; one in which people are not afraid to come forward and report unacceptable behaviour in the confidence that it will be dealt with.[102]

4. Broderick Report on the Treatment of Women in the ADF (2012)

The review into the treatment of women in both the ADF Academy and ADF was conducted by Elizabeth Broderick, the Sex Discrimination Commissioner within the Australian Human Rights Commission.[103] In terms of statistics, the Broderick Report included information obtained from a database containing records of all sexual offense complaints in the ADF, which is maintained by the Values, Behaviour and Resolution Branch of the Defence Department.[104] The complaint numbers were as follows:

- 2008: 87
- 2009: 74
- 2010: 50
- 2011: 42

The report also presented the following figures for the number of "initial reports to ADFIS of sexual assault and related offences,"[105] which were obtained from the Service Police Central Records Office of ADFIS:

- 2008: 58
- 2009: 82
- 2010: 86
- 2011: 84

The Broderick report therefore concluded that

> [i]t is difficult to reconcile the data provided by the Values, Behaviour and Resolution Branch, ADFIS and the IGADF 2011 report. This is concerning, as it means that trends cannot be followed, offenders and repeat offenders cannot be tracked and areas in which

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[102] Id.

[103] *See generally, Review into the Treatment of Women in the Australian Defence Force Academy and Australian Defence Force,* AUSTRALIAN HUMAN RIGHTS COMMISSION, http://defencereview.humanrights.gov.au/ (last visited July 8, 2013). For information on the government's response to the review, *see* Press Release, Stephen Smith MP & Warren Snowdon MP, Review into the Treatment of Women in the Australian Defence Force (Aug. 22, 2012), http://www.minister.defence.gov.au/2012/08/22/minister-for-defence-and-minister-for-defence-science-and-personnel-joint-media-release-review-into-the-treatment-of-women-in-the-australian-defence-force/; Press Release, Stephen Smith MP, Treatment of Women in the ADF (Nov. 26, 2012), http://www.minister.defence.gov.au/2012/11/26/minister-for-defence-treatment-of-women-in-the-adf/.

[104] AUSTRALIAN HUMAN RIGHTS COMMISSION, REVIEW INTO THE TREATMENT OF WOMEN IN THE AUSTRALIAN DEFENCE FORCE: PHASE 2 REPORT 254 (2012), http://defencereview.humanrights.gov.au/sites/default/files/adf-complete.pdf.

[105] Id.

> sexual abuse are occurring cannot be identified with accuracy. It also means that targeted preventative strategies cannot be properly put in place. Of considerable concern is that the failure to capture incidents of sexual abuse accurately can place ADF members at risk of harm from undetected or untracked offenders.[106]

Furthermore, the report states that most state and territory police forces were unable to provide information concerning the number of reports, charges, and convictions relating to sexual and indecent assault involving ADF members, as these jurisdictions do not record whether an offender or victim is a member of the ADF.[107]

The recommendations made in the Broderick Report included the establishment of a dedicated Sexual Misconduct Prevention and Response Office "to coordinate timely responses, victim support, education, policy, practice and reporting for any misconduct of a sexual nature, including sexual harassment and sexual abuse in the ADF."[108] This recommendation was accepted by the government, as were recommendations related to allowing personnel to make confidential reports of sexual harassment, discrimination, or abuse (also recommended by the DLA Piper review[109]), and the introduction of waivers that would allow victims of sexual assault or harassment to discharge from the ADF expeditiously and without financial penalty.[110]

5. Senate Committee Report on DLA Piper Review (2013)

Most recently, on June 27, 2013, the Senate Foreign Affairs, Defence and Trade Committee released its own report on the DLA Piper Review and the government's response to it.[111] The Committee made several recommendations, including the following:[112]

- Defence should "actively encourage senior officers to participate in the Defence Abuse Response Taskforce's restorative engagement program with victims of abuse."
- Following the conclusion of the Taskforce's operation, the Minister for Defence should facilitate the "productive use" of the depersonalized statistical database of information regarding reported incidents of abuse.

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[106] Id.

[107] *Id.* at 255.

[108] Australian Human Rights Commission, *supra* note 104, at 36.

[109] *Id.* at 135–39.

[110] Press Release, Stephen Smith MP, Treatment of Women in the ADF, *supra* note 103.

[111] See generally, The Report of the Review of Allegations of Sexual and Other Abuse in Defence, Conducted by DLA Piper, and the Response of the Government to the Report, SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/dla_piper/index.htm (last visited July 8, 2013).

[112] The full list of recommendations can be found in the Committee's report: SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE, REPORT OF THE DLA PIPER REVIEW AND THE GOVERNMENT'S RESPONSE xi-xii (June 2013), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/dla_piper/report/index.htm.

- There should be an independent review to determine whether any functions of the Taskforce should continue in another form.
- The Inspector-General's recommendation that the appointment of case officers to support complainants and respondents be required in all cases should be implemented.
- At the completion of the implementation of the *Pathway to Change* strategy, the government should conduct an independent review of its outcomes and the need for further reform.

VI. Conclusion

There has been considerable, and ongoing, discussion and analysis of aspects of Australia's military justice system over the past decade. Some significant changes have been made in that time, including the introduction of an independent Director of Military Prosecutions, adjustments to procedures and requirements for reporting and handling complaints, and amendments to the Defence Instruction on the management of sexual offenses. At this time, work is underway to address concerns across a range of areas, including renewed attempts to remove proceedings for serious offenses from the ADF chain of command through the establishment of a Military Court.

It is difficult to assess the impact of the various changes individually, as these may have been grouped together or implemented over longer and overlapping periods. In addition, work related to improving the military justice system may be accompanied by efforts to address cultural issues. For example, apart from the significant restructuring that could occur should a Military Court be reestablished, some of the current areas of work that may impact the effectiveness of the military justice system, particularly in relation to sexual offenses, in the coming years include:[113]

- The assessment of, and restorative engagement processes related to, historic abuse complaints through the Defence Abuse Response Taskforce;
- The implementation of the *Pathway to Change* strategy, which seeks to address a wide range of cultural issues and includes a focus on encouraging a "reporting culture" for unacceptable behavior;
- The establishment of a Sexual Misconduct Prevention and Response Office as part of the *Pathway to Change* strategy;
- Initiatives to improve information systems for recording complaints;
- An inquiry by senior Defence personnel that may result in changes to internal systems of inquiry, investigation, review, and audit; and
- Changes to allow confidential reports of sexual harassment, discrimination, or abuse (i.e., restricted reporting).

[113] For a more complete list of current activities in this area, *see* Press Release, Stephen Smith MP, Paper Presented on the Defence Abuse Response Taskforce, *supra* note 83.

Canada

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SUMMARY Since the 1990s Canada has been reducing the role of commanders in its military disciplinary and justice system. In reaction to public scrutiny and legal challenges to the system, Bill C-25 was enacted in 1998, which made various amendments to the National Defence Act and other Acts in order to institutionally separate the functions and responsibilities of the main actors in the military justice system. Bill C-25 also established the requirement for an independent review authority to evaluate the changes it made to the system as well as to examine the military justice system as a whole. In addition, Bill C-25 lifted the restriction that sexual offenses are to be dealt with exclusively by civilian courts. Sexual offenses committed in Canada by military personnel can now be handled by military service tribunals. In 2007, the Sex Offender Information Registration Act was amended to include the requirement for military sexual offenders to register with authorities. At present, the Minister of National Defence is actively engaged in implementing recommendations for changes to the military justice system that were made by the second independent review authority in 2012. Bill C-15, which was assented to by Parliament in June 2013, also makes amendments to the National Defence Act in order to bring the military justice system more in line with the Criminal Code as well as to maintain the unique structure of the military system.

I. Introduction

The Constitution Act of 1867 grants the Parliament of Canada exclusive authority to legislate in matters related to the "militia, military and naval service and defence."[1] The military justice system is predominantly regulated by the federally enacted National Defence Act (NDA)[2] and its subordinate regulations, namely the Queen's Regulations and Orders for the Canadian Forces (QR&Os).[3] The NDA creates a separate system of military justice, including a system of military courts.

The Code of Service Discipline, found in Part III of the NDA, consists of approximately one-half of the Act and sets out "the foundation of the Canadian military justice system including

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[*] This report was prepared with the assistance of Law Library intern Ashley Munro.

[1] Constitution Act, 1867, 30 & 31 Victoria, c. 3, § 91(7), http://laws-lois.justice.gc.ca/eng/Const/FullText.html. *See also* Judge Advocate General (JAG), Military Justice at the Summary Trial Level 2.2, Chapter 3: Framework of the Canadian Military Justice System, http://www.forces.gc.ca/jag/publications/training-formation/miljustice-justmil-v2-2/chap3-eng.asp (last updated Feb. 15, 2013).

[2] National Defence Act (NDA), R.S.C., 1985, c. N-5, http://laws-lois.justice.gc.ca/eng/acts/n-5/.

[3] Queen's Regulations and Orders for the Canadian Forces (QR&Os), http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/index-eng.asp (last updated Dec. 22, 2011).

disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, appeals, and post-trial review."[4]

The Judge Advocate General (JAG) acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces in respect to military law.[5] Also, JAG "has the superintendence of the administration of Military Justice"[6] in the Canadian Forces, "which includes regular reviews of the administration of military justice and the provision of an annual report to the Minister on its administration."[7]

In 1998, the Minister of National Defence established an external independent authority to review the effectiveness of Canada's military justice system. [8] The authority reports directly to the Minister and is known as the Bill C-25 Five-Year Independent Review Authority.[9]

II. Canada's Current Military Justice System

A. Canada's Service Tribunals

The NDA established "a two-tier system of military justice."[10] The first tier, "where most disciplinary matters are dealt with, is the summary trial system."[11] The second tier of Canada's military justice system is a formal court-martial system. Both tiers are referred to as Service Tribunals.[12]

1. Summary Trials

The jurisdiction of summary trials is listed in section 163 of the NDA. A commanding officer (CO) may only try an accused by summary trial if

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[4] JAG, *supra* note 1, ch. 3.

[5] NDA § 9.1.

[6] *Id*. § 9.2.

[7] *Department of National Defence – Reports on Plans and Priorities 2013–14*, VICE CHIEF OF THE DEFENCE STAFF, http://www.vcds.forces.gc.ca/sites/internet-eng.aspx?page=15309 (last updated Mar. 21, 2013).

[8] Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts (S.C., 1998, c. 35), received Royal Assent in December 1998 and came into force on 1 September 1999, clause 96, http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=2329899&File=6. For an overview of the military justice system and the changes made to the military regime, see David Goetz, Bill C-25: An Act to amend the National Defence Act, Publication no. LS-311E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 November 1998, http://publications.gc.ca/Collection-R/LoPBdP/LS/361/c25-e.htm#2%29%20%20Sexual%20Assault%20to%20be%20Triable%20as%20Service%20Offence-text.

[9] *Id*.

[10] JAG, *supra* note 1, ch. 3.

[11] *Id*.

[12] *Id*.

> (*a*) the accused person is either an officer cadet or a non-commissioned member below the rank of warrant officer;
>
> (*b*) having regard to the gravity of the offence, the commanding officer considers that his or her powers of punishment are adequate;
>
> (*c*) if the accused person has the right to elect to be tried by court martial, the accused person has not elected to be so tried;
>
> (*d*) the offence is not one that . . . the commanding officer is precluded from trying; and
>
> (*e*) the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.[13]

According to the Office of the JAG, "[t]he summary trial is the overwhelmingly predominant and most important form for the trial of disciplinary proceedings."[14] Where a member is charged with a service offense, "a summary trial permits the case to be tried and disposed of, as a general rule, at the unit level. Summary trials are presided over by superior commanders, CO's of bases, units or elements, or delegated officers."[15] According to the *Guide for the Accused* by the Directorate of Defence Counsel Services (DDCS),

> [t]he vast majority of charges under the *Code of Service Discipline* are dealt with by summary trial. Prior to holding a summary trial, the accused is given the opportunity to elect to be tried by court martial, except in the case of certain disciplinary offences where the circumstances surrounding the commission of the offence charged are considered to be minor in nature.[16]

2. Court-Martial System

The court-martial system "is a formal military court presided over by a legally qualified military judge."[17] According to the Office of the JAG, "[t]he procedures followed by a court martial are formal and similar to those followed by civilian criminal courts."[18] There are two types of courts-martial: the General Courts Martial and the Standing Courts Martial.

The General Courts Martial, which consists of a military judge and a panel of five military members, has jurisdiction over service offenses.[19] The Standing Courts Martial also has

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[13] NDA § 163(1).

[14] JAG, *supra* note 1.

[15] *Id*.

[16] Directorate of Defence Counsel Services, Guide for Accused and Assisting Officers: Pre-trial Proceedings at the Summary Trial Level (DDCS Guide) (Oct. 6, 2009), http://www.forces.gc.ca/jag/publications/defence-defense/guide-accused-accuses-eng.asp.

[17] JAG, *supra* note 1.

[18] *Id*.

[19] NDA §§ 166, 167(1).

jurisdiction over service offenses.[20] However, unlike the General Courts Martial, the Standing Courts Martial is presided over by only one military judge. Moreover, "[t]he military judge makes both a finding on the charges and imposes sentence if there is a finding of guilt."[21]

The Canadian Military Prosecution Service (CMPS) is a special entity within the Canadian Forces that "review[s] cases referred for court-martial, to decide which cases should proceed, and to prosecute those cases in the courtroom."[22] It was established through "amendments to the National Defence Act that followed the 1997 Report of the Special Advisory Group on Military Justice and Military Police Investigative Services, led by the late Chief Justice Brian Dickson. That group recommended that the court-martial prosecution process be separated from the chain of command."[23] A Directorate of Defense Counsel Services[24] made up of military defense lawyers also exists, which "provides, and supervises and directs the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline."[25]

When a charge proceeds to court-martial, "either because the accused has so elected or because the nature of the offence so requires,"[26] the CO or Superior Commander must forward an application to the Referral Authority for disposal.[27] According to notes to chapter 109 of the QR&Os, in certain circumstances a commanding officer or superior commander is required to refer a charge to a referral authority and in some cases the decision is discretionary.[28] The Referral Authority's role

> is to ensure the views of the senior chain of command are taken into account in deciding whether to proceed with the charges. He or she has a broader perspective and a clearer

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[20] *Id*. § 173.

[21] JAG, *supra* note 1.

[22] *Director of Military Prosecutions*, JAG, http://www.forces.gc.ca/jag/dmp-dpm/index-eng.asp (last updated Feb. 27, 2013).

[23] Id.

[24] *See Directorate of Defence Counsel Services*, JAG, http://www.forces.gc.ca/jag/ddcs-dsad/index-eng.asp (last updated Jan. 28, 2013).

[25] NDA § 249.19.

[26] The Honorable Patrick J. Lesage, C.M., O. Ont., Q.C., Report of the Second Independent Review Authority to the Honourable Peter G. Mackay Minister of National Defence 32 (Dec. 2011), http://www.forces.gc.ca/site/reports-rapports/patrick-lesage/_pdf/DND-Final-English-Report.pdf.

[27] "Referral Authority" is defined as "[t]he Chief of the Defence Staff and any officer having the powers of an officer commanding a command are the officers that can forward an application for disposal of a charge to the Director of Military Prosecutions." *Military Justice at the Summary Trial Level 2.2: Military Justice at the Summary Trial Level 2.2, Annex N: Guide for Referral Authorities*, NATIONAL DEFENCE AND THE CANADIAN FORCES, http://www.forces.gc.ca/jag/publications/training-formation/miljustice-justmil-v2-2/annex-annexe-n-eng.asp (last modified Aug. 31, 2012).

[28] QR&Os: Volume II – Chapter 109, Application for Referral Authority for Disposal of a Charge, http://www.admfincs.forces.gc.ca/qro-orf/vol-02/chapter-chapitre-109-eng.asp.

> picture of all issues in the units and formations to be considered when determining to continue with the prosecution.[29]

The Referral Authority also represents the Canadian Forces in prosecuting the charge against the individual. If a CO or superior commander decides not to proceed with a charge referred by the Military Police, the Military Police may refer the charge directly to the Referral Authority.[30]

The Referral Authority forwards applications for disposal to the Director of Military Prosecutions (DMP) along with any recommendations regarding the disposal of the charge. The Referral Authority is required to forward the referred charge to the DMP unless the Referral authority directs the commanding officer or superior officer to try the accused by summary trial.[31] The DMP "is responsible for deciding whether a charge is suitable for court martial based on the sufficiency of the evidence and whether a prosecution is in the public interest and the interest of the Canadian Forces."[32] If the DMP concludes that a court martial is warranted the DMP will "prefer" the charge against the accused by signing the charge sheet and referring it to the Court Martial Administrator, who is responsible for convening the court martial.[33]

The DMP is the head of the CMPS. When a case is referred to the CMPS, as noted above, the CMPS first decides which cases should proceed and then prosecutes those cases in court.[34]

According to subsection 249(1) of the NDA, "[t]he review authority in respect of findings of guilty made and punishments imposed by courts martial is the Governor in Council" (i.e., the Governor General). Thus, the Command and Control structure does not appear to have the power to review findings of guilt or quash a decision of a Court Martial.

Lastly, a decision by a Court Martial is only appealable to the Courts Martial Appeal Court, "a body of civilian judges drawn from the superior courts across Canada."[35] The right of appeal

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[29] Report of the Second Independent Review Authority, *supra* note 26, at 32.

[30] QR&Os: Volume II – Chapter 107, Preparation, Laying and Referral of Charges art. 107.12, http://www.admfincs.forces.gc.ca/qro-orf/vol-02/chapter-chapitre-107-eng.asp#cha-107-09.

[31] QR&Os: Volume II - Chapter 109 Application for Referral Authority for Disposal of a Charge, art. 109.05, http://www.admfincs.forces.gc.ca/qro-orf/vol-02/chapter-chapitre-109-eng.asp.

[32] REPORT OF THE SECOND INDEPENDENT REVIEW AUTHORITY, *supra* note 26, at 32. For more information on referral and preferral processes, *see* NDA §§ 165.12–165.13, http://laws-lois.justice.gc.ca/eng/acts/n-5/page-55.html#docCont. *See also* QR&Os: Volume II – Disciplinary chs. 109–111, http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/vol-02/index-eng.asp.

[33] Report of the Second Independent Review Authority, *supra* note 26, at 32.

[34] *Id*.

[35] *Director of Military Prosecutions*, *supra* note 22.

belongs to either the offender or the Minister of National Defence.[36] The decision of the Courts Martial Appeal Court is only reviewable by the Supreme Court of Canada.[37]

B. Jurisdiction over Offenses

1. Service Offenses

A service offense is defined in the NDA as "an offence under the *NDA*, the *Criminal Code* or any other Act of Parliament committed by a person while subject to the *Code of Service Discipline*."[38]

The Code of Service Discipline includes a number of offenses "that are uniquely military in nature."[39] However, where a crime or offense is committed under the Criminal Code or other federal law by a person subject to the Code of Service Discipline, the NDA establishes jurisdiction over such offenses to be dealt with under the military justice system.[40] Subsection 130(1) of the NDA provides that there can be a service trial for offenses punishable by "ordinary law."[41] According to section 71 of the NDA, nothing in the Code of Service Discipline, apart from a preemptory plea, can bar a civil court from trying a person for an offense over which it has jurisdiction.[42]

The place where the offense occurred is an important factor in determining whether it will dealt with by the military or civilian justice system. According to the JAG,

> [w]here such an offence is committed on Canadian territory, as a general rule the civilian justice system and the military justice system have concurrent jurisdiction to prosecute the matter. However, certain criminal offences that are committed in Canada cannot be prosecuted in the military justice system. These offences include murder, manslaughter and child abduction. Any offence under the *Criminal Code* or other Federal law, allegedly committed by a person subject to the *Code of Service Discipline* outside Canada (including murder, manslaughter and child abduction) can be dealt with under the military justice system.[43]

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[36] *Military Justice at the Summary Trial Level 2.2, Chapter 3: Framework of the Canadian Military Justice System*, NATIONAL DEFENCE AND THE CANADIAN FORCES, http://www.forces.gc.ca/jag/publications/training-formation/miljustice-justmil-v2-2/chap3-eng.asp (last modified Feb. 15, 2013).

[37] *Structure of the Courts*, CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION, http://www.cscja-acjcs.ca/structure_of_courts-en.asp?l=4 (last visited July 10, 2013).

[38] NDA § 2.

[39] JAG, *supra* note 1, ch. 3. "Examples of such offences include misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, drunkenness, negligent performance of duty and conduct to the prejudice of good order and discipline." *Military Justice at the Summary Trial Level 2.2*, *supra* note 36, ¶ 26.

[40] JAG, *supra* note 1, ch. 3.

[41] NDA § 130(1).

[42] NDA § 71.

[43] JAG, *supra* note 1, ch. 3.

It is also important to note that at the summary trial level, "[t]he jurisdiction to try offences is limited."[44] Moreover,

> [o]ffences of a military nature that a CO or superior commander are authorized to deal with at a summary trial are prescribed by the *QR&O*. A very limited number of offences that are breaches of the *Criminal Code* or *Controlled Drugs and Substances Act* can be tried by a CO or superior commander.[45]

As noted, a service tribunal may not try any person charged with murder, manslaughter, or an offense listed under sections 280–283 of the Criminal Code (the taking of an unmarried minor without parental consent, etc.).[46]

2. Sexual Offenses

With regard to sexual offenses that have been committed in Canada, the Prosecutor may communicate with the civilian authorities, which have concurrent jurisdiction, in order to determine whether charges should proceed in the military or civilian justice system.[47] It is the policy of the Department that the Prosecutor consults with the Deputy Director of Military Prosecutions (D/DMP) prior to any such communication.[48]

Prior to September 1, 1999, such offenses had to be tried by a civilian court rather than a service tribunal.[49] As a result of Bill C-25, sexual assault offenses committed in Canada by persons subject to the Code of Service Discipline can now be handled by service tribunals. As explained in an article on the subject by Brigadier-General Jerry Pitzul and Commander John Maguire,

> [t]o the extent that sexual assault offences have the potential to undermine morale and unit discipline, lessen mutual trust and respect, and ultimately impair military efficiency, the Canadian Forces' inability to deal promptly with such offences was considered problematic. Bill C-25 therefore removed this limitation on jurisdiction.[50]

Special provisions are in place to deal with the reporting, investigation, and career consequences of sexual misconduct by members of the Canadian Forces (CF).[51] CFAO 19-36 is the CF policy

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[44] *Id*.

[45] *Id*.

[46] NDA § 70.

[47] Director of Military Prosections Policy Directive, Sexual Offences, Directive # 004/00 (Mar. 1, 2000), http://www.forces.gc.ca/jag/publications/cmps-scpm/policy-politiques-004-eng.pdf.

[48] *Id*.

[49] Jerry S.T. Pitzul & John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 AIR FORCE L. REV. 1, 15 (2002), http://www.afjag.af.mil/shared/media/document/AFD-081204-027.pdf.

[50] Id.

[51] *Military Administrative Law Manual, Chapter 23 – Sexual Misconduct*, NATIONAL DEFENCE AND THE CANADIAN FORCES, http://www.forces.gc.ca/jag/publications/mal-dam/miladminlaw-droitadminmil/chap23-eng.asp (last modified Feb. 15, 2012).

directive for handling cases of sexual misconduct.[52] Under the CFAO, an act must meet two requirements in order to be considered "sexual misconduct": it must have a sexual purpose or indecent nature, and it must qualify as an offense either under the Criminal Code or the Code of Service Discipline.[53] When sexual misconduct is alleged, the CO must ascertain that a proper investigation is conducted by contacting the military police.[54] Depending on the nature of the allegations, the military police may involve civilian police authorities.[55]

In 2007, the Act to Amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act, and the Criminal Records Act was adopted, which requires offenders who have committed service offenses of a sexual nature to provide information for registration under the Sex Offender Information Registration Act.[56] The purpose of the Sex Offender Information Registration Act is to "help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders."[57] Every person who commits an offense with relation to the Sex Offender Information Registration Act and is found guilty is liable to imprisonment of less than two years or a lesser punishment on conviction.[58]

According to the *2010 Annual Report of the Canadian Forces Provost Marshal*, 584 incidents were reported to the MP over the four years preceding the report (2007–2010).[59] These appear to be the most recent statistics available. According to a recent news report, "[m]ilitary members made 290 harassment complaints between 2006 and 2013 resulting in 87 investigations."[60]

During the 2009–2010 reporting period, eighty-four charges of a sexual nature were brought against fifty-one accused, all of whom were dealt with by summary trial.[61]

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[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] Act to Amend the National Defence Act [etc.], S.C. 2007, c. 5, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2007_5/; Sex Offender Information Registration Act, S.C. 2004, c. 10, http://laws-lois.justice.gc.ca/PDF/S-8.7.pdf.

[57] *Id.* § 2.

[58] NDA § 119.

[59] Canadian Forces Provost Marshal, 2010 Annual Report 8, http://www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/ar-ra/2010/doc/ar-ra-10-eng.pdf. The annual tally of offenses were as follows: 2007 – 176, 2008 – 166, 2009 – 166, and 2010 – 176. *Id*.

[60] Sue Bailey & Alison Auld, *Canadian Forces Survey Asks Troops to Shed Light on Sexual Assault, Harrassment*, THE NATIONAL POST (June 9, 2013), http://news.nationalpost.com/2013/06/09/canadian-forces-survey-asks-troops-to-shed-light-on-sexual-assault-harassment/.

[61] Office of the Judge Advocate General, Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces – A Review from 1 April 2009 to 31 March 2010, at 15, http://www.forces.gc.ca/jag/publications/office-cabinet/annrep-rappann-09-10-eng.pdf.

III. Changes Made to Reduce the Influence of the Military Chain of Command

A. Historical Overview

Prior to the amendments and changes made to Canada's military justice system in the late 1990s, the role of the commanding officer (CO), particularly as convening authority, was central to the military justice system. As described in a Commission of Inquiry Report, a CO had

> both disciplinary powers and powers like those available to a judge. These include[d] the power to issue arrest and search warrants, cause investigations to be conducted, dismiss any charge of any disciplinary or criminal offence, try most military personnel, delegate some powers of trial and punishment to junior officers, and apply for the convening of courts martial.[62]

However, since the 1990s Canada has been "greatly reducing the role of commanders in its military disciplinary system."[63] This was done as a result of "legal changes, court challenges, and public opinion."[64] A major impetus for change came after the enactment of the Canadian Charter of Rights and Freedoms in 1982, which forced the Canadian Forces to reconcile Canada's military justice system with the constitutional protections introduced by the Charter.[65] Moreover, increased public scrutiny resulted from "high profile cases involving particularly egregious acts of misconduct committed by members of the Canadian Forces involved in peacekeeping operations in Somalia, and to a much lesser extent, Bosnia."[66] In 1992, the Supreme Court of Canada, in the *Généreux* decision,[67] held that the General Courts Martial system violated paragraph 11(d) of the Charter, which guarantees a fair and public hearing by an independent and impartial tribunal. According to Pitzul and Maguire, the Court "concluded that it was unacceptable for anyone in the chain of command to be in a position to interfere in matters which are directly and immediately relevant to the adjudicative function."[68] The Report of the Somalia Commission of Inquiry stated that the Court felt "the appointment of the members of the court by the military authority ordering the trial" diminishes its impartiality and independence.[69] In *Généreux*, the SCC was also required to examine the constitutionality of various aspects of the Code of Service Discipline. The SCC affirmed the constitutionality of the Code and the need to maintain a separate justice system for the military, in order to meet the requirements of military

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[62] REPORT OF THE SOMALIA COMMISSION OF INQUIRY, THE MILITARY JUSTICE SYSTEM (1997), http://www.dnd.ca/somalia/vol1/v1c7e.htm.

[63] Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 175 (2006), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1110&context=djcil.

[64] *Id*.

[65] *Id*.

[66] Pitzul & Maguire, *supra* note 49, at 9.

[67] R. v. Généreux, [1992] 1 S.C.R. 259, *available at* http://www.law.yale.edu/Genereaux.pdf.

[68] Pitzul & Maguire, *supra* note 49, at 9.

[69] Report of the Somalia Commission of Inquiry, *supra* note 62.

discipline.[70] The SCC also added that a separate military justice system is necessary due to the unique nature of military offenses that do not exist as civil offenses.[71]

B. Regulatory Changes to the Summary Trial System

One year before the adoption of Bill C-25, regulatory changes were also made to the summary trial system in response to reports and studies by a Summary Trial Working Group and a Special Advisory Group. Those changes included amendments that

- "precluded commanding officers from trying any case which they have personally investigated";[72]
- "enhanced the right to elect trial by court martial," which must now "be extended to the accused in cases involving all but the most minor disciplinary offences";[73]
- "reduce[d] the offence jurisdiction of commanding officers and delegated officers to those offences that are more minor in nature and over which offence jurisdiction is demonstrably necessary for the maintenance of unit discipline," while at the same time reducing the severity of punishments that may be awarded at summary trial and restructuring the framework for punishments in keeping with the summary trial's disciplinary character;[74] and
- "provid[ed] a mechanism, separate and apart from the redress of [the] grievance process, by which an accused found guilty at summary trial is able to request that the findings and sentence be reviewed."[75]

C. An Act to Amend the National Defence Act (Bill C-25)

As a result of the *Généreux* trial (but before the actual Supreme Court decision was issued), amendments to the NDA and the QR&Os were made in order to address some of the problems noted by the Supreme Court. These amendments constitute the last comprehensive legislative reform of Canada's military justice system, which occurred in 1998 with the passage of Bill C-25.[76] The Act made significant changes to the NDA. Bill C-25 was a response to many recommendations made in several commission reports on the military justice system.[77]

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[70] *Military Justice System*, THE CANADIAN ENCYCLOPEDIA, http://thecanadianencyclopedia.com/articles/military-justice-system (last visited July 9, 2013).

[71] *Id*.

[72] Pitzul & Maguire, *supra* note 49, at 10.

[73] *Id*.

[74] Id.

[75] *Id*. at 11.

[76] Library of Parliament, Bill C-15: An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts, Pub. No. 41-1-C15-E (Apr. 24, 2012, rev'd May 2, 2013), at 2, http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c15-e.pdf.

[77] *Id*. *See also* Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, Department of National Defence (Dickson Report I) (Mar. 1997); Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Dishonoured Legacy: The Lessons of the Somalia Affair (Somalia Report) (June

The main purpose of the amendments made in Bill C-25 was to "promote integrity and fairness" within the military justice system established by the NDA.[78] One of the major changes made under the reform was that the Minister of National Defence no longer has to "make decisions pertaining to individual disciplinary cases such as convening courts-martial, approving punishments of dismissal from Her Majesty's service, or acting as a review authority in respect of summary trial and court-martial findings and sentences."[79] According to Pitzul and Maguire, "[b]y devolving such responsibilities to other authorities, the potential conflict of interest between such matters and the Minister's duties in respect of the overall management of the Department of National Defence and Canadian Forces" was greatly reduced.[80]

In order to strengthen the independence of courts-martial and to "reduce the exercise of discretionary powers by the military hierarchy,"[81] provisions regulating the courts-martial system were also amended. Changes included

- "[S]eparating the functions of convening courts martial and appointing judges and panel members;
- [A]dopting a random methodology for selecting courts-martial panel members; and
- [I]mplementing reforms to ensure the protection of tenure, financial security and institutional independence of military judges, including appointing judges for fixed terms, adopting the civilian 'cause-based' removal standard and discontinuing the use of career evaluations as a measure of judicial performance."[82]

One amendment removed the power of the Commanding Officer, as a convening authority, "to appoint the President and members of the court."[83] The convening authority "also lost the power to vary the number of officers on the panel"[84] by fixing the number of panelists in the General Court Martial and Disciplinary Court Martial, which was set at five and three members respectively (at the time, Canada had four types of Courts Martial instead of two). Appointment of panel members was centralized under the independent Office of the Chief Military Trial Judge,[85] whose personnel include military judges, the Court Martial Administrator, and the Deputy Court Martial Administrator. The amendments gave the Court Martial Administrator the power to convene courts-martial and a random methodology was introduced for selecting panel

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1997); Minister of National Defence, Report to the Prime Minister on Leadership and Management in the Canadian Forces (Young Report) (Mar. 1997).

[78] Library of Parliament, *supra* note 76, at 2.

[79] Pitzul & Maguire, *supra* note 49, at 12.

[80] Id.

[81] MICHEL ROSSIGNOL, NATIONAL DEFENCE ACT: REFORM OF THE MILITARY JUSTICE SYSTEM (rev'd Jan. 22, 1997), http://publications.gc.ca/Collection-R/LoPBdP/CIR/961-e.htm.

[82] Alleman, *supra* note 63, at 177 (quoting Pitzul & Maguire, *supra* note 49, at 8).

[83] ROSSIGNOL, *supra* note 81 (construing Bill C-25 clause 42).

[84] *Id*.

[85] *Id*.

members.[86] Moreover, the military judges were no longer responsible to the chain of command.[87]

Bill C-25 also clarified "the roles and responsibilities of the principal actors in the military justice system, including the Minister [of National Defence] and the [JAG], and the establishment of clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions."[88] The creation of a separate Director of Military Prosecutions (DMP) and Director of Defence Counsel Services (DDCS) by Bill C-25 was intended to establish prosecutorial and defense independence. Most significantly, "the prosecutorial function was removed from the commander's control."[89]

The bill also made jurisdictional changes involving sexual assault offenses committed in Canada by persons subject to the Code. The limitation that these offenses be tried exclusively by civilian jurisdictions was removed.[90]

D. An Act to Amend the National Defence Act (Bill C-60)

Bill C-60, An Act to Amend the National Defence Act and to make a consequential amendment to another Act, which came into force in July 2008, simplified the structure of the court-martial system, by reducing the types of such courts from four to two. The amending legislation also allowed "the possibility for accused persons, in certain cases, to select the type of court martial to be convened."[91] In addition, it required "that military panels, which act like juries in General Courts Martial, reach unanimous rather than majority verdicts of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder."[92]

E. The Strengthening Military Justice in the Defence of Canada Act (Bill C-15)

The Strengthening Military Justice in the Defence of Canada Act, otherwise known as Bill C-15, was assented to by Parliament on June 19, 2013.[93] The bill amends provisions of the NDA to, among other things,

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[86] *Id*.

[87] *Id*.

[88] The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25 (Lamer Report), *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998 c.35 at 3 (Sept. 3, 2003), http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf.

[89] Alleman, *supra* note 63, at 177.

[90] Pitzul & Maguire, *supra* note 49, at 15.

[91] Library of Parliament, *supra* note 76, at 4.

[92] *Id*.

[93] An Act to amend the National Defence Act and to make consequential amendments to other acts, S.C. 2013, c. 24, http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6246510.

> (*a*) provide for security of tenure for military judges until their retirement;
> (*b*) permit the appointment of part-time military judges;
> (*c*) specify the purposes, objectives and principles of the sentencing process;
> (*d*) provide for additional sentencing options, including absolute discharges, intermittent sentences and restitution;
> (*e*) modify the composition of a court martial panel according to the rank of the accused person; and
> (*f*) modify the limitation period applicable to summary trials and allow an accused person to waive the limitation periods.[94]

Bill C-15 not only "makes the Canadian military justice system more consistent with the justice system established in the Criminal Code [but] also takes into account the unique nature of the military justice system."[95] The goal of Bill C-15 is to maintain a degree of flexibility in the military justice system that is deemed necessary for maintaining discipline.[96] The bill also aims to "enhance the effectiveness of the military justice system and provides greater independence and impartiality for the key players in that system, in particular military judges and the Director of Defence Counsel Services."[97]

IV. Independent Reviews of the Military Justice System

A. First Independent Review Authority for Bill C-25

Bill C-25 introduced a new grievance process and established the Canadian Forces Grievance Board, which is independent of the chain of command.[98] Section 96 of the Bill also required the Minister of National Defence to undertake an independent review of the amendments to the NDA every five years following the bill's coming into force.[99] The Five-Year Independent Review Authority was therefore established, with the mandate of evaluating the changes brought about by Bill C-25.[100]

The *First Independent Review*, conducted by the Right Honourable Antonio Lamer (the Lamer Report),[101] "related solely to the provisions and operation of Bill C-25, and did not encompass the NDA as a whole."[102] According to the Lamer Report,

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[94] *Id*., Summary.

[95] Library of Parliament, *supra* note 76, at 1.

[96] *Id*.

[97] *Id*.

[98] *About the Board*, CANADIAN FORCES GRIEVANCE BOARD, http://www.cfgb-cgfc.gc.ca/English/AtB.html (last updated July 27, 2011).

[99] *Id*.

[100] Report of the Second Independent Review Authority, *supra* note 26, at 1.

[101] LAMER REPORT, *supra* note 88.

[102] Library of Parliament, *supra* note 76.

> [t]he primary functions of the DMP as set forth in the *NDA* are the preferral of all charges to be tried by court martial and the conduct of all prosecutions at courts martial. Because the DMP is outside of the chain of command, conflicts of interest in the convening of courts martial are avoided. The DMP is given the express authority to withdraw a charge that has been preferred, an authority not previously enjoyed by the prosecution.[103]
>
> . . .
>
> The creation of the DDCS was a great step forward in affording members of the Canadian Forces the protection of legal advice and representation that is intended to be independent of the chain of command.[104]

The report made a total of eighty-eight recommendations, which, in large part, related to designing better guarantees of the independence of key players such as military judges and the Director of Counsel Services, and improving the grievance and military police complaints process. In addition, "the proposed amendments to the Code of Service Discipline reflected a desire to incorporate certain Criminal Code rules into the military justice system."[105]

Bill C-60 responded to recommendations made in the Lamer Report and made three significant adjustments to the military justice system:

- Reduced the types of court-martial to two (General Court Martial and Standing Court Martial),
- Introduced the possibility for the accused to elect the type of court martial to be convened, and
- Put forth the requirement that military panels reach unanimous verdicts (rather than simply majority verdicts).[106]

B. Equal Justice: Reforming Canada's System of Courts Martial

In May 2009, the Minister of National Defence commissioned the Standing Senate Committee on Legal and Constitutional Affairs to study the provisions and applications of Bill C-60 and provide the Minister with observations and recommendations.[107] In its final report, entitled *Equal Justice: Reforming Canada's System of Courts Martial*,[108] the Senate Committee issued nine recommendations relating to the conduct of courts martial and sentencing in the military

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[103] LAMER REPORT, *supra* note 88, at 12.

[104] *Id*. at 14.

[105] Library of Parliament, *supra* note 76, at 3.

[106] *Id*. at 4.

[107] *Id*.

[108] Standing Senate Committee on Legal and Constitutional Affairs, Equal Justice: Reforming Canada's System of Courts Martial, Final Report: A Special Study on the Provisions and Operation of An Act to amend the National Defence Act and to Make a Consequential Amendment to Another Act, S.C. 2008, c. 29 (May 2009), http://www.parl.gc.ca/Content/SEN/Committee/402/lega/rep/repfinalmay09-e.pdf.

courts.[109] The government's response to this report indicated that the government accepted in principle all of these recommendations.[110]

Bill C-15, which further amended the NDA, was put forth in response to the 2003 Lamer Report and the May 2009 Report by the Standing Committee on Legal and Constitutional Affairs.[111]

C. Second Independent Review Authority for Bill C-25

Former Chief Justice LeSage was appointed by Minister of National Defence Peter G. MacKay in March 2011 to conduct the second independent review of the amendments to the NDA made by Bill C-25, as well as a review of Bill C-60.[112] This review specifically involved consideration of the operation of aspects of the military justice system, the military police complaints process, and the Canadian Forces grievance process.[113] The report is a follow-up on the work of two of Canada's most eminent jurists, former Chief Justices of the Supreme Court of Canada Brian Dickson and Antonio Lamer.[114]

In December 2011, the Honourable Patrick J. Lesage published the *Report of the Second Independent Review Authority* (the SIRA Report). The document was introduced in the House of Commons on June 8, 2012.[115]

The SIRA report makes fifty-five recommendations for both the military justice system and the Canadian Forces grievance process.[116] Approximately two-thirds of the recommendations in the SIRA report are related to the military justice system, the remaining third dealing with the Canadian Forces Military Police Group, the Military Police Complaints Commission, and the Canadian Forces grievance process.[117]

The federal government has accepted the majority of the recommendations made in the report and, as a result, the Department of Defence and the Canadian Forces are "actively engaged in

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[109] *Id*. *See* App. B for a detailed list of the nine recommendations.

[110] Library of Parliament, *supra* note 76, at 5.

[111] *Amendments to the* National Defence Act – Strengthening Military Justice in the Defence of Canada Act – *Background and Amendment Highlight*, NATIONAL DEFENCE AND THE CANADIAN FORCES, http://www.forces.gc.ca/jag/publications/initiatives-mesures/background-contexte-c-15-eng.asp (last updated Sept. 6, 2012).

[112] Press Release, National Defence and the Canadian Forces (Mobile Version), Minister MacKay Releases Results of the Second Independent Review of Amendments to the National Defence Act, NR 12.128 (June 8, 2012), http://www.forces.gc.ca/site/mobil/news-nouvelles-eng.asp?id=4253.

[113] *Id.*

[114] *Id.*

[115] HOUSE OF COMMONS DEBATES, 1st Session, 41st Parl., June 8, 2012, at 9093, http://www.parl.gc.ca/content/hoc/House/411/Debates/137/HAN137-E.PDF.

[116] For a detailed list of recommendations, *see* REPORT OF THE SECOND INDEPENDENT REVIEW AUTHORITY, *supra* note 26, at 76.

[117] Press Release, National Defence and the Canadian Forces, *supra* note 112.

implementing those recommendations as well as conducting further study on many of the recommendations that require additional consideration."[118]

[118] *Id*.

Germany

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SUMMARY When Germany reestablished its Armed Forces after World War II, a deliberate decision was made to have criminal offenses committed by soldiers tried in the ordinary courts and this principle remains in force today. The only existing military courts are disciplinary courts, which have jurisdiction over disciplinary offenses of members of the Armed Forces only. Even though the Basic Law (Constitution) allows for the creation of a military court to serve during war time, no legislation has ever been enacted to create such a court. The only significant change to the existing system was enacted in January 2013, when venue for the criminal offenses of soldiers under certain deployments was centralized in the courts of Kempten, a city in Bavaria. This serves the purpose of facilitating prosecution by allowing the prosecutors of that district to gain expertise in the investigation of offenses committed abroad and in combat situations.

I. Historic Development

In Germany, military justice has not been a function of command since 1946 when military courts were abolished by the Allied Powers,[1] after the end of World War II. In the early 1950s, with the outbreak of the Korean War, Germany reestablished its military forces and the legal framework for the German military was created anew in 1954, when Germany joined NATO.[2] In 1956, the constitutional underpinnings of the new law for the military were created.[3] At that time, the issue of military courts was debated, yet the opinion prevailed that in a new democratic Germany, soldiers had to be treated as ordinary citizens in criminal prosecutions and trials. Since then, German soldiers (both officers and enlisted men) have been tried for ordinary crimes in the courts of ordinary jurisdiction[4] and special military courts have tried only disciplinary offenses that are peculiar to the military, such as malingering or insubordination.[5] A constitutional amendment was enacted in 1956 that allows for the creation of a military court for times of war and deployments abroad, which was to be established by legislation.[6] To date,

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[1] Control Council Law No. 34, Aug. 20, 1946, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/04LAW31.pdf.

[2] Friedhelm Krueger-Sprengel, *The German Military Legal System*, 57 MIL. L. REV. 17 (1972), http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277C7B~1.pdf.

[3] Bruno Schmidt-Bleibtreu et al., Grundgesetz Kommentar 2027 (2010).

[4] Krueger-Sprengel, *supra* note 2.

[5] Wehrstrafgesetz [Military Offenses Act], repromulgated May 24, 1974, BUNDESGESETZBLATT [BGBL.)] I at 1213, as amended, up-to-date version *at* http://www.gesetze-im-internet.de/wstrg/index.html.

[6] Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] art. 96(2), translation *at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. The paragraph is therein translated as follows:

however, no legislation has been passed to implement this provision, and this is ascribed to the continued German aversion to military courts.[7]

II. Recent Changes

The German system of administering criminal justice to the military has undergone little change since its creation, and none of these changes have eliminated the fundamental principle of subjecting military personnel to the courts of ordinary jurisdiction for the trial of ordinary criminal offenses. In 2008, the rules governing disciplinary proceedings against soldiers were reformed.[8] This reform, however, had no impact on the prosecution of criminal offenses committed by military personnel.[9]

A more significant change was enacted in 2013, through the Act for Venue for Armed Forces Especially Deployed Abroad.[10] This Act establishes a special venue for the criminal offenses of soldiers thus deployed.[11] Such offenses are now to be tried in the courts of the city of Kempten (in Bavaria). The qualifying special deployment within the meaning of this provision is described in section 62 of the Soldier's Act as having occurred on the basis of an international agreement and upon a formal decision of the Federal Cabinet.[12]

This special venue for the offenses of deployed soldiers was created after Germany had encountered much difficulty in trying offenses committed abroad, particularly because prosecutors had difficulty investigating such offenses in that they lacked the necessary experience and understanding of the circumstances under which offenses were committed, often in combat settings.[13] This difficulty began to be noticed after German soldiers were first deployed abroad, beginning in the early 1990s. An interim solution was found in 1994 by entrusting the prosecutors of the City of Potsdam with the investigation of the offenses of the

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The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defense or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. Their full-time judges shall be persons qualified to hold judicial office.

[7] SCHMIDT-BLEIBTREU, *supra* note 3, at 2028.

[8] Wehrrechtsänderungsgesetz 2008 [Military Law Reform Act 2008], July 3, 2008, BGBL. I at 1629.

[9] Klaus Dau, Die Neuregelungen der Wehrdisziplinarordnung durch das Wehrrechtsänderungsgesetz 2008 [The Reform of the Military Discipline Act through the Military Reform Act 2008], NEUE ZEITSCHRIFT FÜR WEHRRECHT 51 (2009).

[10] Gesetz für einen Gerichtsstand bei besonderer Auslandsverwendung der Bundeswehr [Act on Venue for Armed Forces Under Special Deployment Abroad], Jan. 21, 2013, BGBL. I at 89, effective Apr. 1, 2013. *See also* Till Zimmermann, *Der neue Gerichtsstand bei besonderer Auslandsverwendung der Bundeswehr*, NEUE JURISTISCHE WOCHENSCHRIFT 905 (2013).

[11] Strafprozessordnung [Code of Criminal Procedure], repromulgated Apr. 7, 1987, BGBL. I at 1074, as amended, § 11a, up-to-date version *at* http://www.gesetze-im-internet.de/stpo/BJNR006290950.html.

[12] Soldatengesetz [Soldiers' Act], repromulgated May 30, 2005, BGBL. I at 1482, as amended, up-to-date version *at* http://www.gesetze-im-internet.de/sg/BJNR001140956.html.

[13] Gesetzesentwurf der Bundesregierung [Draft Law of the Federal Cabinet], May 18, 2012, DEUTSCHER BUNDESTAG DRUCKSACHE 17/9694, http://dipbt.bundestag.de/dip21/btd/17/096/1709694.pdf.

deployed forces. This was done on the basis of an agreement of the chief prosecutors of the German states. A statutory solution was deemed preferable, however.[14]

III. The Current System

A. Disciplinary Offenses

The Military Offenses Act describes the types of disciplinary offenses that apply to soldiers, within the German meaning of the term—that is, all members of the Armed Forces, be they enlisted men or officers—and to civilians with command powers.[15] The offenses that can be committed by these persons fall into the categories of offenses against military duty, offenses of subordinates, offenses of supervisors, and miscellaneous other offenses. Offenses against military duty include desertion, absence without leave, and malingering;[16] offenses of subordinates include insubordination and mutiny;[17] and offenses of supervisors include various abuses of the power of command and the failure to supervise diligently if this results in serious harm.[18] These offenses are punishable with imprisonment of two weeks to six months, to be served in a military facility that emphasizes training. Serious forms of some of these offenses, however, are criminal offenses with much more severe punishment frameworks (see subpart B, below).

Military offenses are adjudicated by troop service courts.[19] These are disciplinary courts, similar to those existing for civil servants that are foreseen in the Basic Law as disciplinary courts for civil officials and employees.[20] The troop service courts are composed of professional judges and lay judges; the latter are usually soldiers that are appointed by the commanding officer of the troop.[21] Decisions of the troop service courts are appealable to the Federal Administrative Court.[22]

B. Criminal Offenses

Germany exercises criminal jurisdiction over all offenses perpetrated by German soldiers while they are deployed abroad. Consequently, German criminal law is applied to these offenses,

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[14] Zimmermann, *supra* note 10.

[15] Wehrstrafgesetz [Military Offenses Act], repromulgated May 24, 1974, BGBL. I at 1213, as amended, up-to-date version *at* http://www.gesetze-im-internet.de/wstrg/BJNR002980957.html.

[16] *Id.* §§ 15–18.

[17] *Id.* §§ 19–29.

[18] *Id.* §§ 30–41.

[19] Wehrdisziplinarordnung [Military Discipline Act], Aug. 16, 2001 BGBL. I at 2093, as amended, §§ 69–79, http://www.gesetze-im-internet.de/wdo_2002/index.html.

[20] Basic Law art. 96(4).

[21] Military Discipline Act § 74.

[22] *Id.* § 80.

irrespective of the law of the place of commission.[23] German criminal law consists of offenses governed by the Criminal Code,[24] among them offenses specifically applicable to soldiers, such as mutilation to avoid military service[25] and sabotage.[26] Penalties for such acts include up to five years of imprisonment. In addition, the criminal provisions found in other laws are also applied to soldiers—for instance, offenses involving narcotic drugs.[27] Sexual offenses are governed by the Criminal Code, and the penalties are commensurate with the severity of the offenses.[28] War crimes and similar offenses against international law are also adjudicated according to German law, through application of the German International Criminal Code.[29]

All criminal offenses perpetrated by soldiers are adjudicated by the courts of ordinary jurisdiction,[30] and the ordinary rules for jurisdiction and venue apply, except for the newly enacted venue for deployed soldiers, described above (see Part II, "Recent Changes"). The trial court jurisdiction for a criminal offense depends on the severity of the offense, with some offenses being tried by local courts and more serious ones by regional courts, and certain offenses related to treason by selected regional courts.[31] Venue is determined according to several criteria, including the place of commission of the offense, place of residence of the accused, and place of apprehension; following the reform of 2013, venue for the trial of offenses committed by deployed soldiers now lies in the courts of Kempten. The selection of applicable venues is often made by higher courts. The venue for offenses of deployed soldiers is of importance primarily for determining the investigating prosecutor, and it is now expected that the prosecutor of Kempten will have the necessary expertise to deal with these offenses committed abroad.[32]

IV. Evaluation of the German System

Although the German system of military justice is at times mentioned in passing in law reviews and newspapers as an example of a truly democratic system,[33] little has been written in English

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[23] Military Offenses Act § 1a.

[24] Strafgesetzbuch [Criminal Code], repromulgated Nov. 13, 1998, BGBL. I at 3322, translation *at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[25] *Id.* § 109.

[26] *Id.* § 109e.

[27] Betäubungsmittelgesetz [Narcotic Drugs Act], repromulgated Mar. 1, 1994, BGBL. I at 358, as amended, §§ 29–30b.

[28] Criminal Code §§ 174–184g.

[29] Völkerstrafgesetzbuch [International Criminal Code], June 26, 2002, BGBL. I at 2254, http://www.gesetze-im-internet.de/vstgb/BJNR225410002.html.

[30] Military Offenses Act § 3.

[31] Gerichtsverfassungsgesetz [Court Organization Act], repromulgated May 9, 1975, § 120.

[32] Zimmerman, *supra* note 10.

[33] Hurdles Before Independence, Impartiality of Military Judiciary, TODAY'S ZAMAN (Jan 22, 2012) (accessed via Lexis).

of a more analytical nature. In his article on the German Military Legal System,[34] Friedhelm Krueger Sprengel points out that the German system was "an extreme reaction against illegal behavior and decisions during the last World War," yet he also states that the vigorous attacks against this system when originally enacted may have lost some of their meaning with the world-wide increased emphasis on treating soldiers like civilians in criminal prosecutions. Krueger Sprengel finds that the German system does not offer a perfect solution and he questions the workability of a total breach between peace-time and war-time military justice.

A concise but useful description of the military justice system was given in 1994 by Kenneth S. Kilimik, in an article dealing with the merger of the Armed Forces of the two Germanys following German unification in 1990.[35] Captain Kilimik points out that Germany had its first troop deployment abroad in 1991.[36]

V. Incidence of Sexual Offenses

According to an article in the German newspaper *Süddeutsche Zeitung*, some four hundred suspected sexual offenses allegedly perpetrated by military personnel were under investigation during the period August 2007 through August 2012.[37] Among these were thirty offenses allegedly committed by soldiers against soldiers. According to Helmut Könighaus, then Ombudsman for the Military (Wehrbauftragter des Bundestages), these figures do not indicate that sexual misconduct is a serious problem in the German Armed Forces.[38]

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[34] Kruegel-Sprengel, *supra* note 2.

[35] Kenneth Kilimnik, *Germany's Army After Reunification: The Merging of the Nationale Volksarmee into the Bundeswehr, 1990–1994*, 145 MIL. L. REV. 113 (1994), http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/276875~1.pdf.

[36] *Id*. at 130 & n.66.

[37] *Fast 400 mutlmassiliche Sexualdelikte seit 2007*, SÜDDEUTSCHE.DE (Aug. 22, 2012), http://www.sueddeutsche.de/politik/bundeswehr-fast-mutmassliche-sexualdelikte-seit-1.1447243.

[38] Id.

Israel

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SUMMARY Israel's military justice system has not been significantly changed by statutory amendment since the Military Justice Law (MJL) first went into effect in 1955. This Law established two mechanisms for military adjudication, namely, a system of court-martial adjudication, and a system of disciplinary adjudication. New circumstances arising from changing times, the passage of the Law for the Prevention of Sexual Harassment, 5758-1998, and requirements introduced by the Supreme Court have resulted in the need to adopt new policies. The Israel Defense Forces (IDF) has therefore issued a number of military orders that deal with disciplinary adjudication. The IDF has also established a school for military justice and requires adjudication officers to complete training offered by the school.

Some important changes in IDF disciplinary adjudication of less serious sexual offenses (which are generally not adjudicated by courts-martial) include the removal of determination of adjudication from the chain of command by requiring such decisions to be made by the Military Advocate General's (MAG's) attorneys, new requirements for IDF adjudication officers to pass special training on dealing with offenses of sexual harassment, and the establishment of a database of graduates of the training from which the MAG can select adjudicators in such matters.

A bill calling for a major reform of the MJL is currently pending before the Knesset (Parliament). The bill proposes to establish new military disciplinary courts that would operate in addition to the existing systems of courts-martial and disciplinary adjudication. The proposed military disciplinary courts would be authorized to adjudicate matters involving any soldier, except for high-ranking officers at a rank of Lieutenant Colonel or higher, accused of perpetrating offenses under the MJL or under the Law for the Prevention of Sexual Harassment, 5758-1998.

I. Introduction

Israel's Military Justice Law (MJL), 4715-1955,[1] as amended, established a system for the adjudication of IDF active service soldiers, reservists, and military contractors accused of having committed military or criminal offenses while in service.[2] The MJL provides for adjudication by military courts or alternatively through disciplinary proceedings depending on the gravity of the offense and the rank of the accused. Although the MJL has been amended numerous times,[3] there have not been any significant statutory changes to the IDF adjudication system since the

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[1] Military Justice Law (MJL), 4715-1955, 9 LAWS OF THE STATE OF ISRAEL [LSI] 184 (1956).

[2] Israeli citizens, both men and women, who are eighteen years of age are subject to the military draft and to reserve service duties following completion of the initial draft. *See* Defence Service Law (Consolidated Version) 5746-1986, 40 LSI 112 (5746-1985/86).

[3] For an up-to-date text of the MJL, *see* the Nevo Legal Database (by subscription; in Hebrew), http://www.nevo.co.il.

MJL's entry into effect in 1955. Reform of the IDF's adjudication in disciplinary proceedings, and especially in cases involving sexual offenses, has instead evolved through changes in military policies in response to new challenges posed with the passage of time and requirements imposed by Israel's Supreme Court. Some important changes to the adjudication system include the removal of the determination of adjudication from the chain of command in some cases and new requirements for legal training or IDF-specific training in dealing with sexual harassment offenses.

This report provides a general overview of the law and policies governing military justice adjudication in Israel and particularly the evolution of adjudication of sexual offenses.

II. Reform of the Military Justice System

Several changes have taken place in recent years that impacted the adjudication of sexual offenses within the IDF. These include the way in which the determination of whether to pursue an adjudication is made and the forum for such a determination. Unlike the adjudication of other violations of military law, the decision of whether to adjudicate sexual offenses in disciplinary proceedings can only be made by the MAG's attorneys and not by commanders.[4]

An additional development in adjudication of "lighter" sexual offenses in disciplinary proceedings is the requirement that presiding adjudication officers (AOs) be at least at the rank of Lieutenant Colonel and have either a legal education or special training in handling sexual harassment cases at the IDF School of Military Justice.[5] Israel's Military Advocate General (MAG) maintains a database of AOs who are qualified to adjudicate sexual harassment cases. The selection of the AO for such disciplinary proceedings from the database is made by the MAG and not by a commander.[6]

Additional changes occurred based on the Supreme Court's judicial review and the requirements established by the Court to follow rules that exist in criminal litigation. Whereas decisions of the Appeals Court Martial (ACM) may be subjected to review by the Israeli Supreme Court upon special authorization only when there arises "[a] legal question [that presents an] important, difficult or novel [legal issue],"[7] the MJL does not expressly provide for Supreme Court review of commanders' decisions in disciplinary proceedings. However, the Supreme Court has extended its jurisdiction to disciplinary decisions based on general principles of due process. In a case involving IDF disciplinary adjudication, the Court voided a commander's decision to convict and sentence a soldier based on procedural defects found in the disciplinary

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[4] IRENA FINE & MAAYAN SAGIE, SCHOOL FOR MILITARY JUSTICE, IDF, ADJUDICATION UNDER DISCIPLINARY LAW, para. 2.4, at 14 (May 2011), http://www.law.idf.il/sip_storage//FILES/2/982.pdf (in Hebrew).

[5] General Staff Order (GSO) 33.0145, Prohibition on Inflicting Harm of a Sexual Nature (1979, as amended on 10/16,79), § 39, IDF, http://dover.idf.il/IDF/pkuda/330145.doc (in Hebrew); FINE & SAGIE, *supra* note 4.

[6] *Id.* § 39A & B.

[7] MJL § 440I(b) (translated by author, R.L.).

adjudication—defects that, according to the Court, deprived the soldier of his right to due process.[8]

The IDF has faced new challenges as a result of an increased focus on holding disciplinary adjudications to the same requirements that apply to criminal adjudications. A private member bill by Knesset Member (KM) Miri Regev to reform the MJL and meet these challenges is now pending. The bill proposes to establish a third mechanism for military adjudication by establishing military disciplinary courts in addition to the existing military courts and disciplinary proceedings.[9] The bill proposes that offenses under the Law for the Prevention of Sexual Harassment, 5758-1998,[10] be adjudicated by the proposed military disciplinary courts.

III. Military Justice System: Current Structure and Adjudication Authorities

A. General Overview

The MJL established two mechanisms for the adjudication of cases involving soldiers suspected of committing offenses during their military service: adjudication by military courts, and disciplinary adjudication by AOs and commanders.

Military courts serve as courts of criminal adjudication and are authorized to impose penalties of long-term imprisonment and even death, as well as rank demotion.[11] Military courts conduct their hearings in accordance with Israeli criminal law and comply with criminal procedure requirements and general rules of evidence.[12]

The second mechanism established by the MJL is disciplinary adjudication. This type of adjudication is primarily intended to provide commanders in the field with an effective tool for disciplining their subordinates.[13] Disciplinary adjudication differs from criminal adjudication. Unlike criminal proceedings, soldiers are not entitled to legal representation in disciplinary proceedings. In addition, decisions in disciplinary proceedings are made by commanders who usually do not have a legal education. Moreover, the levels of sentencing that can be imposed by commanders in disciplinary proceedings are limited compared to those available to military judges.[14]

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[8] *See*, *e.g.*, HCJ 266/05 Flint v. Colonel Efroni (decision rendered Jan. 12, 2005), http://elyon1.court.gov.il/files/05/660/002/O03/05002660.o03.pdf (in Hebrew); *see also* discussion in Part V(B) of this report.

[9] MJL (Amendment – Establishment of a Disciplinary Court) Bill, 5773-2013 (submitted Mar. 13, 2013 in the 19th Knesset), http://www.knesset.gov.il/privatelaw/data/19/483.rtf (in Hebrew). The bill is identical to an earlier bill submitted by KM Miri Regev and KM Aryeh Bibi in the 18th Knesset.

[10] Law for Prevention of Sexual Harassment, 5758-1998, SEFER HAHUKIM [SH] No. 1661, p. 166.

[11] MJL § 21 .

[12] MJL §§ 373A & 476.

[13] *See* Explanatory Notes to the Military Justice Law (Amendment – Establishment of a Disciplinary Court) Bill, 5773-2013, *supra* note 9, at 4.

[14] *See* MJL § 22.

B. Adjudication by Military Courts

The decision as to whether to adjudicate a matter by military court is made by the MAG. The MAG is appointed by the Minister of Defense and therefore is not subordinate to the General Staff Commander.[15]

Based on the MJL,

> [m]ilitary courts are authorized to hear all cases that involve IDF service members, in the regular and reserve services. Indictments relating to all offences against the laws of the State of Israel, including general jurisdiction relating to offenses committed anywhere in the world in times of war and peace. In the case of non-military offenses, parallel jurisdiction exists between the civilian and military court systems.
>
> Under such circumstances, the forum of trial rests in the discretion of the Military Advocate General, and is determined according to the degree of correlation between the offense and military service. In certain cases, military courts also hold jurisdiction over civilians employed specifically by the military under contract; those who have received weapons from the army under certain conditions and restrictions; and those belonging to the reserve forces.[16]

There are five courts of first instance: a District Court Martial, a Naval Court Martial, a Special Court Martial, a Field Court Martial, and a Traffic Court Martial.[17] The MJL also established an Appeal Court Martial,[18] which hears appeals from all of the first-instance courts.

According to information posted on the IDF website,

> Military Courts of first instance are generally comprised of three judge panels. The head of the panel is a professional judge, with a legal education and judicial experience. The judge belongs to the military courts unit and is appointed by the president of the State of Israel, in a process that is similar to the appointment of judges in the State's civilian legal sector.
>
> The two other members of the panel generally do not have a legal background and are officers who serve in the units belonging to the court's regional district. Court decisions are passed by a majority and are subject to appeal.
>
> Hearings held in the Military Court of Appeals are generally presided over by a three judge panel, with at least two of the judges having a legal background. Most judges at

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[15] MJL § 177.

[16] *Summary, Criminal Proceedings in the Military Courts*, IDF MAG CORPS, http://www.law.idf.il/647-2350-en/Patzar.aspx (last visited July 11, 2013).

[17] MJL § 183.

[18] *Id*.

> the Military Court of Appeals have a great deal of judicial experience acquired while previously sitting in a military court of first instance.[19]

Examples of offenses that must be adjudicated by military courts include treason,[20] assistance to the enemy,[21] mutiny,[22] looting,[23] and rape.[24]

According to the MJL, "[i]n judicial matters, a military judge is not subject to any authority save that of the law, and is not subject in any way to the authority of his commanders."[25]

C. Disciplinary Adjudication

Except for cases involving sexual offenses, the determination of whether to adjudicate a matter in disciplinary proceedings is generally made by commanders and not by the military prosecutor.

1. Type of Offenses That May Be Adjudicated in Disciplinary Proceedings

According to the MJL, "where a soldier below the rank of Lieutenant General is charged with a military offense the penalty for which does not exceed three years' imprisonment, and which was perpetrated either in Israel or outside of it, a disciplinary officer shall have power to try him disciplinarily."[26]

Among offenses that are considered "a military offense" for the purpose of disciplinary adjudication are offenses under the Law for the Prevention of Sexual Harassment, 5758-1998.[27] Unlike offenses such as rape[28] or battery, which are adjudicated by military courts outside of the chain of command, other "lighter" offenses under the Law, such as treating a person in an offensive way because of her or his gender or sexual orientation, are usually handled in special disciplinary proceedings.[29]

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[19] IDF MAG Corps, *supra* note 16.

[20] MJL § 43.

[21] *Id.* § 44.

[22] *Id.* § 46.

[23] *Id.* § 74.

[24] *Id.* § 75.

[25] *Id.* § 184.

[26] *Id.* § 136(a), *as amended* (translated by author, R.L.).

[27] Law for Prevention of Sexual Harassment, 5758-1998, SH No. 1661, p. 166.

[28] Rape is punishable by twenty years of imprisonment under the MJL if committed by an individual, and by a life sentence if committed by three soldiers together. MJL § 75.

[29] For discussion of the handling of sexual offenses in the IDF, *see* discussion in Part III of this report.

Some military offenses that are usually adjudicated in summary disciplinary proceedings include offenses against IDF discipline, noncompliance with military uniform requirements, violations of requirements for the proper handling of weapons, and certain traffic violations.[30]

2. AO's Qualifications and Authorities

Unless otherwise authorized by the General Staff Commander, disciplinary adjudication is conducted by an AO of the same unit in which the defendant serves.[31] In addition to adjudicating complaints, AOs are also authorized to cancel[32] and transfer complaints to military courts for adjudication as long as no verdict has been rendered.[33]

While AOs are not required to have a legal education, they must successfully complete IDF military justice training.[34] The authority of an AO to adjudicate defendants of various military ranks depends on his or her own military ranking.[35] AOs who are unit commanders are authorized to adjudicate any soldier who serves in their unit.[36] Furthermore, AOs who were designated by the unit commander, subject to conditions established by that commander, may adjudicate soldiers serving in their unit even if these soldiers are not subordinate to them in the chain of command.[37]

The MJL recognizes the right of a soldier to request disciplinary adjudication by a higher-ranking AO or by a military court. A transfer of adjudication to the latter may, however, be redirected by the Military Advocate General upon his/her discretion.[38]

3. Handling of Complaints

A complaints against a suspected offender may be filed by his or her own commander, as well as by AOs and by tenured, non-officer personnel with a higher military rank than the suspected offender, subject to conditions enumerated in the General Staff Order (GSO) 33.0302.[39]

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[30] Superior Command (SC) Order No. 5.0301, Authorities of Adjudication Officers and Restrictions on Authorities of General Staff Commander (June 1, 1989, *as amended* Dec. 29, 2005), § 23, http://dover.idf.il/IDF/pkuda/h/050301.doc (in Hebrew).

[31] MJL § 139.

[32] GSO No. 33.0302, Disciplinary Law §§ 58–61.

[33] *Id.* § 57.

[34] *Id* § 20.

[35] Id.

[36] SC Order No. 5.0301, Disciplinary Law (June 1, 1989, *as amended* Dec. 29, 2005), § 9, http://dover.idf.il/IDF/pkuda/h/050301.doc (in Hebrew).

[37] *Id.* § 10.

[38] MJL §§ 148–51.

[39] GSO 33.0302, §§ 2–3.

Accordingly, a commander may file a complaint if "he knows or has a reasonable basis to assume that one of his subordinates committed an offense."[40] The commander may also file a complaint based on a report issued by the military police documenting reasonable suspicion that the unit's soldier committed an offense, where that report is transferred to him or her by the unit's adjutant.[41] AOs and tenured non-officer personnel are similarly authorized to file complaints.[42] A complaint filed against a soldier must be recorded in a digital system designated for this purpose by the IDF.[43]

Disciplinary adjudication is conducted by AOs subject to compliance with the following conditions:

- The AO rank is at least one rank higher than that of the defendant;
- The AO is the commander of the defendant or the commander of the unit that authorized him or her to adjudicate the defendant, subject to conditions and restrictions that were determined by the unit's commander; and
- The defendant serves in the same unit in which the AO is stationed.[44]

Special rules apply to the adjudication of specific groups of defendants, including military prisoners, lawyers, physicians, and officers who are direct subordinates of the Chief of Staff.[45]

IV. Handling of Sexual Offenses

Sexual offenses in the IDF are handled differently than other offenses. In accordance with GSO 33.0145,[46] sexual harassment constitutes both criminal offenses and civil wrongs and can be addressed by either criminal or disciplinary adjudication as well as by the filing of a claim for compensation.[47] The responsibility for the development and implementation of policies for the prevention of "harm of a sexual nature" is shared by the General Staff Command Advisor for

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[40] *Id*. § 2A, http://www.law.idf.il/sip_storage/FILES/1/561.doc.

[41] The Israeli Adjutant Corps is a support corps in the IDF Human Resources Directorate tasked with assisting IDF commanders in dealing with manpower issues. The Adjutant Corps is headed by a Superior Adjutant Officer. Adjutant Corps soldiers serve in all IDF units and serve as a liaison between individual soldiers and the ranking commands. For additional information, *see* the IDF website, http://www.idf.il/1361-10641-he/Dover.aspx (last visited July 11, 2013).

[42] GSO 33.0302, § 2A, http://www.law.idf.il/sip_storage/FILES/1/561.doc.

[43] *Id.* § 12.

[44] *Id.* § 21.

[45] *Id.* §§ 27–32.

[46] GSO 33.0145, Prohibition on Inflicting Harm of a Sexual Nature (1979, *as amended* Oct. 16, 2007), http://dover.idf.il/IDF/ pkuda/330145.doc (in Hebrew).

[47] *Id.* § 7.

Women's Matters through the Equal Employment Office (EEO),[48] by unit commanders, and by adjutant officers.[49]

A. Filing and Investigation of Sexual Offenses

GSO 33.0145 provides that victims of sexual offenses may seek assistance, treatment, and guidance by contacting their commanders (except where the commander is the alleged offender themselves[50]), soldiers appointed by the commander to handle sexual harassment complaints, or the unit's medical or mental health officers, as well as EEO personnel. Victims may be reassigned to a different unit after having being heard and following consultation with their commander.[51]

Commanders who have been informed of allegations of sexual offenses must report such complaints to adjutant officers and in their absence to the EEO, to their own unit commanders, and to the MAG.[52] A report alleging perpetration of sexual offenses will not be forwarded to a commander if the soldier requested confidentiality or when the commander is the subject of the complaint.[53]

Upon receipt of a complaint an adjutant officer must interview the complainant,[54] fill out a complaint form, and open a file for a sexual offense complaint.[55] The complainant may then choose[56] to have the complaint investigated either by an investigative officer[57] or by the Military Investigative Police (MIP).

When there is suspicion of violence, as in allegations of rape, forced sodomy, etc., the complaint file must be transferred to the MIP (or the Israeli police when the alleged perpetrator is a civilian), even in the absence of the complainant's consent.[58]

In addition to having their complaints investigated and adjudicated by the IDF, complainants are entitled to file a civil complaint against their alleged perpetrators.[59]

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[48] For information on the service of women in the IDF, *see General Staff Commander, Advisor for Matters Involving Women*, IDF, http://dover.idf.il/IDF/info/civilians/info_civilians_yohalan_he/default.htm (in Hebrew, last visited July 11, 2013).

[49] GSO 33.0145, §§ 3–5.

[50] *Id.* § 9G.

[51] *Id.* § 14.

[52] *Id.* § 15A–B.

[53] *Id.* § 15C.

[54] *Id.* § 25A.

[55] *Id.*, Addendum A.

[56] *Id.* § 18.

[57] GSO 33.0304, Inquiry and Investigation by Military Police (1962, *as amended*), IDF, http://dover.idf.il/IDF/pkuda/330304.doc addresses the authorities and the procedures that are followed by investigative officers.

[58] *Id.* § 16.

B. Determination of Adjudication and AOs Required Qualifications

All findings of investigations, either by the MIP or investigative officers, must be forwarded to the MAG. The determination of whether to adjudicate sexual offenses in disciplinary proceedings can only be made by the military advocate and not by commanders.[60]

Disciplinary proceedings in cases involving sexual offenses must always be presided over by AOs who have a rank of at least Lieutenant Colonel and legal education or specific training in handling sexual harassment cases from the IDF School of Military Justice.[61] AOs that adjudicate such matters are selected from a database that contains the names of graduates of that training.[62] AOs who preside over the adjudication of sexual harassment cases must usually not belong to the same unit as the alleged offender. With the MAG attorney's authorization, however, the defendant may be adjudicated by a Senior AO of a rank of Lieutenant Colonel or higher, who belongs to the same unit as that of the defendant, as long as the AO has had the training necessary to adjudicate such offenses.[63]

The removal of disciplinary determination authority from the military chain of command in lighter offenses by selecting AOs from the database was supported by defense attorneys specializing in this field.[64]

C. Proposals for Reforming the Military Justice System

A private Knesset Member bill was introduced by KM Miri Regev in March 2013 to reform the MJL by introducing a third venue for military adjudications in addition to the existing courts-martial and disciplinary adjudications. At the time this report was completed, this bill was still pending.[65]

KM Regev's bill proposes to establish military disciplinary courts that will be authorized to adjudicate every soldier, except officers at a rank of Lieutenant Colonel or higher, who are accused of perpetrating offenses under the MJL or under the Law for the Prevention of Sexual Harassment, 5758-1998.[66]

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[59] *Id.* § 19.

[60] FINE & SAGIE, *supra* note 4, para. 2.4, at 14.

[61] GSO 33.0145 § 39; *see* also FINE & SAGIE, *supra* note 4, para. 2.4, at 14.

[62] Reference to this database appears in Hanan Greenberg, *For the First Time: IDF Is Establishing a "Patrol" of Adjudication Officers*, MAARIV (Apr. 2, 2012), http://www.nrg.co.il/online/1/ART2/352/548.html (in Hebrew).

[63] GSO 33.0145, § 39b.

[64] Greenberg, *supra* note 62.

[65] MJL (Amendment – Establishment of a Disciplinary Court) Bill, 5773-2013, by KM Miri Regev (submitted Mar. 13, 2013), http://www.knesset.gov.il/privatelaw/data/19/483.rtf (in Hebrew).

[66] Law for Prevention of Sexual Harassment, 5758-1998, SH No. 1661, p. 166.

The bill proposes that disciplinary courts be composed of three judges: the president of the disciplinary court, who must be a lawyer with a rank of Lieutenant Colonel or higher and be selected directly by the General Staff Commander, and two military judges, who need not have legal educations.[67] According to the explanatory notes of the bill, the objective of ensuring that the president of the disciplinary court be a lawyer and selected by the highest commander is to strengthen both the commanding and the substantive character of this court.[68]

The proposed disciplinary courts will follow the procedural rules that apply in district courts-martial but will not entertain pretrial proceedings.[69] The bill further proposes[70] that the disciplinary courts, unlike courts-martial, not be bound by the law of evidence except in cases involving privileged evidence in accordance with Chapter three of the Evidence Ordinance (New Version), 5731-1971,[71] as amended.

According to the explanatory notes to the bill the need for the establishment for a third mechanism of military adjudication arises from the fact that reality has changed over time. The rigid division between purely criminal adjudications and disciplinary adjudications no longer provides an adequate response in a variety of cases, including sexual harassment cases, that exist in a "grey area."[72]

Proponents of the bill argue that this state of affairs has led to a situation in which offenses whose severity arguably made them subject to military discipline were nonetheless adjudicated by the military courts because of the "inadequacy of disciplinary law" under the circumstances of the case, whereas offenses that were investigated by the MIP and in which extensive and complicated investigative material was gathered were adjudicated in disciplinary proceedings, either because of evidentiary difficulties or because of their lesser degree of importance.[73]

V. The Role of Civilian Courts

A. Review of Military Court Decisions

In accordance with the MJL, a decision of the Appeals Court Martial (ACM) may be subjected to review by the Israeli Supreme Court if special permission for review in the ACM's decision itself or upon authorization by the President of the Supreme Court or his or her Deputy.[74] The

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[67] MJL (Amendment – Establishment of a Disciplinary Court) Bill, 5773-2013, proposed part C2.

[68] *Id.* at 4–5.

[69] *Id.*, proposed part D.

[70] *Id*.

[71] Evidence Ordinance (New Version), 5731-1971, 2 LSI (New Version) 198 (1972).

[72] MJL (Amendment – Establishment of a Disciplinary Court) Bill, 5773-2013, p. 4 (translation by author. R.L.).

[73] *Id*.

[74] MJL § 440I(a).

MJL provides that such authorization will be granted only when there arises "[a] legal question [that presents an] important, difficult or novel [legal issue]."[75]

The eligibility for review of ACM decisions was analyzed in the 2007 Supreme Court decision in Colonel Ataf Zahar's case.[76] Mr. Zahar was convicted in 2006 by a military court of five counts of rape and indecent acts and was sentenced to six years of imprisonment, payment of compensation to his victim, and demotion to the lowest military rank of private. Following the ACM's rejection of his appeal over both the conviction and the sentencing, Mr. Zahar requested authorization for appeal from the Supreme Court.

In rejecting the appeal request, Supreme Court President Dorit Beinish specifically addressed the authority of the Court to authorize an appeal of an ACM decision. She determined that by restricting authorization for appeal only to cases that presented an important, difficult, or novel legal issue, the legislature respected

> . . . the uniqueness of the military courts system as a whole judiciary system with both first and appeal instances that suit the army's special needs and behavior norms; and on the other hand, gave weight to the need to maintain harmony with principles of our [the Israeli] legal system, and maintain the unity that is necessary [based] on the system as a whole and the penal laws specifically, including uniformity in case law.[77]

Having reviewed the arguments of both parties, Beinish concluded that the ACM decision was based on well-established legal precedent and did not present any important, difficult, or novel legal question that justified an additional review by the Supreme Court.[78]

Expressing support for the appellant's demotion in rank and rejecting his claim for "injustice," Justice Edmond Levi added that

> . . . the appellant is not worthy of carrying any commanding rank, because his high rank and superior position enabled him to commit offenses that are excessive in their severity and which arouse disgust, and which may deprive of sleep anybody who sends his son or daughter to serve in the army.[79]

In October 2012 Mr. Zahar was released from prison after a military parole board reduced his sentence by nine months.[80]

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[75] *Id.* § 440I(b) (translated by author, R.L.).

[76] CrimA Permission Request 8731/06 Ataf Zahar v. Chief Military Prosecutor (decision rendered on Apr. 30, 2007), http://elyon1.court.gov.il/files/06/310/087/O04/06087310.o04.pdf.

[77] *Id.*, Beinish decision (translated by author, R.L.).

[78] *Id.*

[79] *Id.* para. 16.

[80] Gili Cohen, *IDF Colonel Who Raped Female Soldier to Be Released 9 Months Early*, HAARETZ (Oct. 24, 2012), http://www.haaretz.com/news/national/idf-colonel-who-raped-female-soldier-to-be-released-9-months-early.premium-1.471892.

B. Review of Decisions Adopted in Military Disciplinary Proceedings

Although not expressly authorized under the MJL, the Supreme Court has also extended judicial review to decisions made in the course of disciplinary proceedings. In a 2005 leading decision the Court voided a commander's decision in a disciplinary proceeding based on procedural defects. The case involved the adjudication of a soldier for unbecoming behavior for his refusal, while on vacation from his unit, to follow police orders to evacuate a mobile home bound for Judea and Samaria (the West Bank).

The Court noted, among other errors, that there was no record of "details regarding witnesses, testimony and/or documents presented" during the hearing, nor was there any written reasoning for the commander's decision.[81] The absence of these documents, the Court held, prevented the MAG from "exercising the authority acquired . . . under section 168(b) of the Law in an informed way . . . ."[82] While recognizing that the process in the case was subject to several procedural flaws, Justice Michael Cheshin in a minority opinion opined that only flaws that result in injustice may, under the MJL, void a legal process. Cheshin rejected the claim that such injustice had been proven in this case.[83]

VI. Effectiveness of the System of Adjudication of Sexual Offenses

In response to a request by the Movement for Freedom of Information, the IDF released a report in 2012 containing the following statistical data regarding filing and processing of sexual harassment complaints from 2007 to 2011. The report was issued in August 2012.

Table: IDF Sexual Harassment Data, 2007–2011

Year	No. of Complaints Received	No. of Files Opened
2007	318	94
2008	363	103
2009	483	131
2010	483	143
2011	583	144

Source: Noam Barkan, *Rise in Reporting of Sexual Harassment in IDF*, YEDIOT ACHARONOT, Aug. 5, 2012, at 8 (in Hebrew), also available on the Movement for Freedom of Information website, *at* http://www.meida.org.il/wp-content/uploads/ 2012/09/sexual-harassment-IDF.pdf.

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[81] HCJ 266/05 Flint v. Colonel Efroni, para. 7 (decision rendered Jan. 12, 2005), http://elyon1.court.gov.il/ files/05/660/ 002/O03/05002660.o03.pdf (in Hebrew).

[82] *Id.* para. 7.

[83] *Id.* paras. 10–11.

According to a senior IDF source cited in the report, it is hard to say whether this significant rise in the number of complaints signified an increase in the number of sexual harassment cases in the military, or whether it merely reflected rising awareness of the subject, resulting from a comprehensive IDF campaign to root out sexual harassment in its ranks. The campaign included the establishment of a special IDF support center that provides support for victims of sexual harassment.[84] A public campaign against sexual harassment in the military was reportedly initiated in February 2013.[85]

VII. Bibliography of Scholarly Articles

This report addresses the evolution of military adjudication in Israel and the current law that applies to handling cases involving sexual offenses. The report and the analysis of applicable law is based primarily on a review of primary legal sources, including statutes, military comments, and case law. Secondary sources such as publications of the IDF School of Military Justice, newspaper articles, and information posted online by organizations have also been reviewed. Several of these written sources are cited in the footnotes. The following articles, while not entirely current, provide additional information on the Israeli system of military justice:

(1) Lindsy Nicole Alleman, *Who Is In Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1110&context=djcil.

(2) Menachem Finkelstein & Yifat Tomer, *The Israeli Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137 (2002), http://www.afjag.af.mil/shared/media/document/AFD-081204-027.pdf.

(3) FIFTY YEARS FOR MILITARY JUSTICE – PROCEEDINGS OF A CONFERENCE HELD AT THE ISRAEL INSTITUTE FOR DEMOCRACY, COMMENCEMENT SESSION, *and* SECOND SESSION (DEVELOPMENT OF THE MILITARY; JUSTICE LAW) (1999), *in* 14 MISHPAT VE-TSAVA [LAW AND THE ARMY] 11 & 53, respectively, *also available at* http://www.law.idf.il/SIP_STORAGE/files/7/267.pdf *and* http://www.law.idf.il/SIP_STORAGE/files/9/269.pdf (both in Hebrew).

[84] *Id*.

[85] *See*, *e.g.*, Gili Cohen, *A Campaign Against Harassments in IDF: Are You Not Hot? Open a Button*, HAARETZ (Feb. 10, 2013), http://www.haaretz.co.il/misc/2.444/1.1926515 (in Hebrew).

United Kingdom

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SUMMARY The United Kingdom has operated a system of military courts-martial for centuries and, effective in 2009, created a Court Martial as a permanent, standing court for military matters. While UK law preserves the traditional military structure of discipline from within the chain of command for some offenses, these have been significantly narrowed by recent legislative acts. The Judge Advocate General is now a civilian lawyer and, as of 2009, the prosecution for serious crimes was removed from the chain of command and placed in the hands of the Director of Service Prosecutions, who may be a civilian lawyer. A new complaints procedure was introduced after the deaths of four soldiers at barracks in the UK. The procedure still involves the traditional chain of command, but provides an independent complaints commissioner that may hear complaints and refer them back to the complainants chain of command.

I. Introduction

English soldiers have been regulated by a separate justice system from civilians for centuries. Since 1521 a military courts-martial system has operated, and in 1666 the office of Judge Advocate General (JAG) was created to supervise these courts-martial.[1] Discipline and criminal conduct of members of the armed forces were governed by what were known as the Service Discipline Acts, with separate Acts applying to each branch of the armed forces.[2] Each of these Acts provided for its own system of discipline for its members, including for criminal offenses. Despite the separate Acts, the general structure of each of the systems was similar.[3]

In 2006, the Armed Forces Act established the Court Martial as a permanent, standing court effective October 31, 2009.[4] Prior to the 2006 Act, the Royal Navy courts-martial system was run separately from the JAG through the office of the Judge Advocate of the Fleet (JAF), which was established in 1661.[5] The 2006 Act merged these two offices and established a single system of armed services law.[6] One reason for the merger was the increase in joint operations

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[1] *Military*, JUDICIARY OF ENGLAND AND WALES, http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jurisdictions/military-jurisdiction (last visited May 29, 2013).

[2] Naval Discipline Act 1957, c. 53, 5 & 6 Eliz. II, http://www.legislation.gov.uk/ukpga/Eliz2/5-6/53/; Army Act 1955, c. 18, Regnal 3 & 4 Eliz. II, http://www.legislation.gov.uk/ukpga/Eliz2/3-4/18/contents; Air Force Act 1955, c. 19, Regnal. 3 & 4 Eliz. II, http://www.legislation.gov.uk/ukpga/Eliz2/3-4/19/contents.

[3] Armed Forces Act 2006, c. 52, Explanatory Notes, ¶¶ 5–6, http://www.legislation.gov.uk/ukpga/2006/52/notes.

[4] Judge Advocate General, *Guidance on Sentencing in the Court Martial* (version 3) ¶ 1.2 (2011), http://www.justice.gov.uk/downloads/courts/judge-advocate-general/guidance-sentencing-court-martial.pdf.

[5] Judiciary of England and Wales, *supra* note 1.

[6] *Id*.

by the different branches of the armed forces and the sentiment that "having them subject to different disciplinary systems cause[d] unnecessary complications."[7]

II. The Court Martial

The Court Martial has jurisdiction to hear cases on "service offences," which include both civilian criminal law offenses committed by members of the armed forces and military disciplinary offenses.[8] The Court Martial is not identical to the Crown Court, which comprises the criminal courts of England and Wales, but they are similar in many respects. For example, Rule 26 of the Armed Forces (Court Martial) Rules 2009 provides that the Court Martial proceedings should closely resemble those of the Crown Court in cases where the Court Martial hears an issue that is not specifically provided for by the Rules.[9] The Judge Advocate General's *Guidance on Sentencing in the Court Martial* notes that

> [t]he differences between the Service and civilian systems of justice exist only to reinforce and support the operational effectiveness of the Armed Forces, and are necessary because of the link between the maintenance of discipline and the administration of justice and the need to be able to hold trials anywhere in the world.[10]

III. Judge Advocate General

The Judge Advocate General is appointed by the Queen by Letters Patent upon the recommendation of the Lord Chancellor. The Judge Advocate General is an independent member of the judiciary and a civilian. However, having a military background does not prohibit a person from being appointed to this role.[11] In 2003 the European Court of Human Rights ruled that the presence of a civilian judge in a Court Martial

> with legal qualifications, judicial independence, and a pivotal role in conducting the proceedings, constitutes not only an important safeguard but one of the most significant guarantees of the independence of the Court Martial proceedings. This ruling explains and reinforces the rationale that proceedings in the Court Martial should be and are presided over by the Judge Advocate.[12]

The Judge Advocate General has a Vice-Judge Advocate General and seven Assistant Judge Advocates General, with the ability to call upon ten additional Deputy Judge Advocates. All of these judges are civilians that are appointed from among experienced lawyers. There are certain

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[7] Joshua Rozenberg, *Forces to Face Single Justice Body*, THE DAILY TELEGRAPH (London), July 28, 2005, at 27 (accessed via Lexis).

[8] Armed Forces Act 2006, c. 52, http://www.legislation.gov.uk/ukpga/2006/52/contents. *See* JUDICIARY OF ENGLAND AND WALES, *supra* note 1.

[9] Judge Advocate General, *supra* note 4, ¶ 1.2.

[10] *Id.*

[11] Judiciary of England and Wales, *supra* note 1.

[12] Cooper v. United Kingdom, ECHR App. No. 48843/99, ¶ 117 (2003), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61549, *cited in* Judge Advocate General, *supra* note 4, ¶ 2.2.

instances where a High Court judge can preside in the Court Martial as a Judge Advocate; however, this is reserved for serious or unprecedented cases.[13]

IV. Sentencing

The Court Martial has the same sentencing powers in relation to imprisonment as a Crown Court, and may impose sentences that include life imprisonment where appropriate and provided for in the law. Most of the sentencing powers in the Criminal Justice Act 2003 are also available in the Court Martial.[14]

Sentencing is not determined by the Judge Advocate alone; instead the Judge Advocate sits with a board of three to five lay service members in the Court Martial, with the Judge Advocate presiding over the sentencing deliberations.[15] A simple majority is required to pass a sentence, and the judge has the casting vote.[16] When determining sentences,

> . . . the Court Martial must take into account what is in the best interests of the Service, because the whole Services justice system is designed to underpin the operational effectiveness of the Armed Forces. This often makes the sentencing exercise different from that in the civilian courts. The close-knit structure of the Armed Forces means that sentences of the Court Martial are more widely disseminated than sentences in civilian courts, and thus deterrence is a more important factor in Court Martial sentencing. The specialist judges who preside over trials in the Court Martial understand and apply this principle well, which has been acknowledged by the Court of Appeal. Scott Baker LJ said:
>
>> It is, in our judgment, extremely important that due deference should be given by the courts to decisions of the military authorities in sentence in cases of this kind (in this case theft and criminal damage in barracks). They, and they alone, are best placed to appreciate the significance of an offence such as this in relation to questions of morale and maintenance of appropriate behaviour in their units.[17]

V. Summary Hearings by Commanding Officers

While the UK has a robust system for the hearing of serious criminal and disciplinary matters by the Court Martial, it maintains a system that allows a Commanding Officer to address both minor criminal and disciplinary matters from within the chain of command.[18] Specified criminal

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[13] Judiciary of England and Wales, *supra* note 1.

[14] *Id.*

[15] Armed Forces Act 2006, c. 52, § 155.

[16] Judge Advocate General, *supra* note 4, ¶ 2.4.

[17] *Id.* ¶ 2.7.

[18] Armed Forces Act 2006, c. 52, §§ 52–53. The offenses that may be tried summarily by a Commanding Officer are listed in Schedule 1 of this Act and include theft offenses, possession of illegal drugs, criminal damage, assault and battery, and driving a vehicle under the influence of alcohol. If permission is given, additional offenses may be

offenses and disciplinary issues may be dealt with summarily by the accused's Commanding Officer and, according to the Judiciary of England and Wales, this remains the method through which the majority of minor and disciplinary offenses by members of the armed forces are handled.[19] For these offenses the Commanding Officer retains the majority of rights to hear, amend charges relating to, determine punishment for, or dismiss such cases.[20] The explanatory notes to the Armed Forces Act 2006 emphasize the importance of the Commanding Officer's role in maintaining discipline within the Forces:

> A commanding officer (CO) has a central role in maintaining discipline and every member of the armed forces has a CO for disciplinary purposes. Accordingly COs in all the services have defined disciplinary powers to deal with certain disciplinary and criminal conduct offences.[21]

The Commanding Officer also has a duty to either report service offenses to the service police or conduct an "appropriate investigation" into them.[22] The explanatory notes to the 2006 Act state that in many instances an investigation other than by the service police will be appropriate, as many of the service offenses include "less serious disciplinary offences."[23]

The Commanding Officer has authority to impose up to twenty-eight days of detention, extendable to up to ninety days with approval from a higher-ranking authority. The accused may request that his or her case be heard before the Court Martial[24] and may appeal the matter to the Summary Appeal Court after the conclusion of the hearing before the Commanding Officer.[25]

While the Commanding Officer retains the authority to discipline his or her service members, the decision regarding whether or not to bring an accused before the Court Martial for serious criminal and disciplinary offenses lies with the prosecuting authority, the Director of Service Prosecutions (DSP). The DSP is independent of the chain of command and is an experienced lawyer appointed by the Queen. The DSP may be a civilian lawyer.[26]

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dealt with summarily by the accused's commanding officer including assault occasioning actual bodily harm, possession in public of an offensive weapon, or fraud.

[19] Judiciary of England and Wales, *supra* note 1.

[20] Armed Forces Act 2006, c. 52, § 123.

[21] *Id*., Explanatory Notes, ¶ 7.

[22] *Id*. § 115.

[23] *Id*., Explanatory Notes, ¶ 249.

[24] *Id*. § 129.

[25] Judiciary of England and Wales, *supra* note 1.

[26] Armed Forces Act 2006, c. 52, § 364.

VI. Human Rights Obligations

The UK has certain obligations that it must meet under the Human Rights Act 1998, which incorporated the European Convention on Human Rights[27] into its national law. One obligation under the Human Rights Act is to provide everyone with the right to a fair trial. The summary procedure through the Commanding Officer does not necessarily comply with the right to a fair trial, as the accused does not have the right to legal representation. The Ministry of Defence maintains that the system, when taken as a whole, complies with the Human Rights Act, as the accused does have a right of appeal and can also request that the case be heard before the Court Martial.[28]

VII. Complaints Procedure Within the Armed Forces

The Armed Forces Act 2006 introduced the current complaints system for members of the Armed Forces. The system aims to provide a "fair, effective and efficient method for obtaining redress for grievances."[29] The Armed Forces Act was the largest overhaul of military justice legislation in fifty years, and many of the processes put forth by the legislation were a result of calls for greater independence of the complaints system after scandals caused by bullying, harassment and other behavior led to the deaths of four soldiers at the Princess Royal Barracks, Deepcut.[30]

The Act provides all individuals subject to service law the right to make a complaint if they believe they have been wronged in any matter relating to their service.[31] The Service complaint may be raised in two ways— either directly to the individual's chain of command, or by notifying the Service Complaints Commissioner of the issues.[32] The Commissioner is not provided with authority under the Armed Forces Act to investigate complaints; instead the Commissioner may refer the matter to the complainant's chain of command.[33] The Service Complaints Commissioner serves two roles:

> … to provide an alternative point of contact for Service personnel, or someone acting on their behalf, such as a family member, a friend or MP, who for whatever reason does not have the confidence, or is not able, to raise allegations of bullying, harassment, discrimination or other improper behaviour directly with the chain of command; and to

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[27] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[28] Rozenberg, *supra* note 7.

[29] Defence Committee, *Eighth Report: The Work of the Service Complaints Commissioner for the Armed Forces*, 2012–13, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/720/72002.htm.

[30] *Id*. ¶ 2.2.

[31] Ministry of Defence, *Redress of Individual Grievances: Service Complaints*, Issue 2.2, June 201, JSP 831, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27866/jsp831_v22.pdf.

[32] Defence Committee, *supra* note 29, ¶ 2.3.

[33] Armed Forces Act 2006, c. 52, § 338.

> provide independent assurance on the fairness, effectiveness and efficiency of the Service complaints system to Ministers, the Services and Parliament by way of an annual report.[34]

If the complaint involves allegations of rape or sexual assault, it is put into the military justice system, and the service investigation is placed on hold.[35] The number of complaints reported by the Commissioner that involves allegations of rape or assault is low, and there are many concerns that this figure is due not to the low instance of these crimes but to underreporting. The Commissioner notes that

> [a] number of complainants—particularly female complainants—come to me with issues that are not actually about rape or sexual assaults, but they raise rape and sexual assaults as a matter in the past and a reason for not trusting the chain of command.[36]

VIII. Sexual Offenses and Harassment in the Armed Forces

The Sexual Offences Act 2003 applies to members of the armed forces in accordance with section 42 of the Armed Forces Act 2006. The recently established Service Prosecution Authority (SPA) follows a Code almost identical to that of its civilian counterparts in determining whether a case should be prosecuted, considering the strength of the evidence provided, combined with the public and service interest in prosecuting the case.[37] The Code for Service Prosecutors takes into consideration the "service interest" in prosecuting cases, but this "is simply another way of stating the public interest in prosecuting such offences."[38]

Sexual harassment is defined by the Ministry of Defence in the *MOD Bullying and Harassment Complaints Procedures* as

> - **unwanted verbal, non-verbal or physical conduct**
>
> - of a **sexual nature** which
>
> - has the **purpose or effect** of
>
> - violating the recipient's **dignity**
>
> - or of creating an intimidating, hostile, degrading, humiliating or offensive **environment** for the recipient.
>
> 6. Sexual harassment must involve conduct of a **sexual nature**, but it need not be on account of the recipient's gender or take place between members of the opposite sex. Examples of such conduct may include: inappropriate or over-familiar touching (groping, fondling, pinching, patting etc); pestering someone for a date, asking about their sex life or

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[34] *Id*.

[35] *Id*. ¶ 30.

[36] *Id*.

[37] *Code of Practice on Services to Be Provided by the Armed Forces to Victims of Crime*, JSP 839, Version 1.0, MINISTRY OF DEFENCE, ¶ 10.2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190877/jsp839.pdf.

[38] *SPA Policy for Prosecuting Cases of Rape*, SERVICE PROSECUTION AUTHORITY, ¶ 2.8, http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/20130301-spa-rape-policy-final.doc (last visited July 9, 2013).

> commenting on their anatomy; making suggestive remarks or obscene gestures; leering or wolf-whistling; displaying nude pin-ups; downloading, watching or reading pornographic images, films or magazines in a communal area; and, circulating e-mails, mobile telephone texts or multimedia messages containing 'dirty' jokes or other sexual content or images.
>
> 7. To amount to harassment, or sexual harassment, the conduct complained of must have the **purpose or effect** of violating the recipient's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It makes no difference whether the conduct was intended to have either of these effects. The fact that it was intended as a joke, or that no offence was meant, is no excuse. Where the conduct was unintentional, the test is whether in all the circumstances, including in particular the **perception of the Complainant**, the conduct could reasonably be considered as having either of the specified effects.[39]

A survey in 2006 found that almost all service women who responded had been in a situation that involved sexualized behaviors, with almost seventy percent responding that they had encountered sexual behavior directed at them that was unwelcome. The length of service was also found to play a role; the longer survey respondents had served, the more likely they were to perceive that there was a problem with sexual harassment in the military. Thirteen percent reported that they had been sexually assaulted, but only five percent of these made a formal written complaint.[40] Reasons given for not filing a formal complaint included wanting to handle the situation by themselves, concern over being labeled a troublemaker, concern that the complaint would have a negative impact on their career, and concern that nothing would be done about it.[41] For those who did make a formal complaint, almost half stated it took too long to resolve the issue, claimed they were not properly informed about the procedure, and were not satisfied with how the outcome was explained. Over half "stated that there had been negative consequences as a result of filing a complaint, with 64 per cent considering leaving the service."[42]

Despite these findings, the survey discovered that some respondents did not welcome a zero tolerance policy and feared that "too draconian an approach would lead to political correctness and people treading too carefully."[43]

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[39] Ministry of Defence, *The MOD Bullying and Harrassment Complaints Procedures*, JSP 763, July 2013, at 36, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209888/20130603-JSP_763-Version_1_July_2013-U.PDF (emphasis in original).

[40] Carrie Hunt et al., *Sexual Harassment in the Workplace: A Literature Review* 13 (Centre for Equality and Diversity at Work, Manchester Business School, Working Paper Series No. 59, 2006), http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/WPS59Sexualharassment.pdf.

[41] *Id*.

[42] *Id*.

[43] *Id*.

IX. Investigating Allegations of Sexual Assault

The Royal Military Police with its Royal Navy and Royal Air Force counterparts, known collectively as the Service Police,[44] investigate criminal offenses, including allegations of sexual assault within the military. The Service Police's role is investigative, and they operate independently of the chain of command and the Ministry of Defence.[45]

The Service Police are all trained in how to handle alleged sexual offenses until experienced investigators take control of the investigation. Serious sexual offenses are handled by the Service Police's Special Investigation Branch.[46] Personnel receive ongoing professional development training by external speakers and are frequently trained alongside civilian police officers.[47] The Service Police also have access to civilian facilities, including Sexual Assault Referral Centers, and in many places overseas, the Service Police may use the Joint Response Team, a specialist team that investigates offenses involving children and other vulnerable victims and witnesses.[48]

During investigations into sexual offenses, the investigator appointed to the case maintains contact with the victim during both the investigation and any judicial proceedings that may arise. The investigator not only informs the victim of any legal progress with the case, but also ensures that the victim receives information on help available, such as victim support.[49] Victims who are members of the armed forces are under no obligation to inform their chain of command about their case. However, if they provide consent for the details of their case to be disclosed to their chain of command or inform their chain of command themselves, they are provided further support in accordance with the Code of Practice on services to be provided to victims of crime.[50] They also then receive access to other professionals within the armed forces, such as the Medical Officer and Unit Welfare Officers.[51]

There are some jurisdictional elements that also come into play when allegations of criminal offenses arise within the military. When offenses occur in the United Kingdom, generally the civilian police force have primary jurisdiction. In cases where both the suspect and victim are members of the armed forces, the Service Police may take the lead in any investigation, although in more serious offenses the civilian police are more likely to retain jurisdiction. In cases that involve a civilian suspect, the civilian police always retain jurisdiction in the UK.[52] At an

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[44] April 25, 2013, PARL. DEB. H.C. (6th ser.) 1250W, *available at* http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130425/text/130425w0009.htm.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

overseas location, if both the suspect and victim are members of the UK armed forces, the Service Police generally conduct the investigation, even in instances where a Status of Forces Agreement provides for the local police force to retain jurisdiction.[53]

Several grassroots training methods are in place as a result of the recommendations of the 2006 report *Quantitative and Qualitative Research into Sexual Harassment in the Armed Forces*. These include raising awareness that sexual harassment is unacceptable, reviewing equality and diversity training, introducing a comprehensive complaints procedure, implementing a tracking system for individuals whose behavior falls below that expected, and issuing guidance that encourages the use of administrative action in harassment cases.[54]

X. Role of Commanding Officer and Director of Service Prosecutions in Serious Cases

The Commanding Officer is under a duty to inform the Service Police of any allegations of actions or circumstances in which he or she believes a "serious offence" (those listed in Schedule 2 of the Armed Forces Act 2006) has been committed.[55] The explanatory notes to the 2006 Act do not provide any examples of the types of offenses that should be referred, but instead state "the service offences listed in that schedule are all inherently serious, in that it is difficult to envisage a trivial example of any of them."[56] Despite the comprehensive list of offenses contained in Schedule 2, which specifically includes the offenses of rape and assault by penetration, a number of sexual offenses are excluded from the definition of serious offense, including the sexual offenses of sexual assault, exposure, and voyeurism.[57]

In cases where the service police conduct an investigation and determine there is enough evidence to charge the suspect with a Schedule 2 offense, the case must be referred to the DSP, and the Commanding Officer must be informed of the referral.[58] For these serious offenses, the authority of the Commanding Officer is effectively removed, and the decision whether or not charges should be brought rests with the DSP. When a case has been referred to the DSP, the Director has a number of options at his or her disposal, including directing the Commanding Officer to bring charges or sending the case to the Court Martial.[59] In all cases that are headed for a trial before the Court Martial, the DSP is the one who makes the determination whether to prosecute and the charges that should be brought.[60]

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[53] *Id*.

[54] *Id*.

[55] Armed Forces Act 2006, c. 52, § 113. A list of serious offenses are listed in Schedule 2 of the Act.

[56] *Id*., Explanatory Notes, ¶ 246.

[57] *Id*., c. 52, sched. 2, § 12.

[58] *Id*. § 116.

[59] *Id.* § 121.

[60] *Background and Change*, SERVICE PROSECUTING AUTHORITY, MINISTRY OF DEFENCE, http://spa.independent.gov.uk/test/about_us/index.htm (last visited May 29, 2013).

When determining whether to prosecute a case, the DSP reviews the evidence and applies the Code for Crown Prosecutors to determine whether to direct trial before the Court Martial and the charges that should be brought. The Code for Crown Prosecutors provides extensive guidance and stipulates that cases should only proceed if there is "sufficient evidence to provide a realistic prospect of conviction and a prosecution is in the public (including service) interest."[61]

In cases of rape, only the DSP may authorize the prosecution of such case and only prosecutors who are specially trained may be involved in these types of cases.[62] If a specially trained prosecutor is not available within the service justice system, the DSP can instruct a "specialist advocate approved to conduct such cases within the civilian system."[63] For cases that occur in the UK, there is a protocol between the DSP and the Director of Public Prosecutions that govern which justice system should hear the case. The civilian system generally has primary jurisdiction, unless a case involves both a suspect and victim who are subject to service law. [64]

An independent review of the SPA found that, aside from some minor issues, the prosecution system was operating successfully.[65]

XI. Statistics on the Investigation of Rape and Sexual Assault in the Armed Forces

The method in which sexual assault cases may be investigated by both local and Service Police has made is difficult to obtain statistics on how many allegations of sexual assault are made that involve a member of the armed forces.[66] In cases where the civilian police investigate crimes, there is a Notifiable Occupation Scheme that allows civilian police to inform the Service Police of investigations that involve a suspect who is a serving member of the military; however, this is dependent upon the suspect informing the police of his status, and there is no requirement for the civilian police to disclose any information about the victim.[67] Even in cases where the Service Police conducted the investigation, the database where these records are held is currently not set up to produce statistical data.[68] A Crime Statistics and Analysis Cell is being set up that aims to, among other things, produce statistical data relating to Service Police investigations.[69] The following statistics are compiled from data extrapolated from the investigations of the Service Police and published in Parliamentary debates:

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[61] THE INSPECTORATE'S REPORT ON THE SERVICE PROSECUTING AUTHORITY 12 (July 2010), http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/spa_dec10_rpt.pdf.

[62] *SPA Policy for Prosecuting Cases of Rape*, SERVICE PROSECUTION AUTHORITY, http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/20130301-spa-rape-policy-final.doc (last visited July 9, 2013).

[63] *Id*.

[64] *Id*.

[65] The Inspectorate's Report on the Service Prosecuting Authority, *supra* note 61.

[66] PARL. DEB. H.C., *supra* note 44.

[67] *Id*.

[68] *Id.*

[69] *Id.* 1251W.

	2009	2010	2011	2012
Sexual Assault Female	7	42	32	31
Sexual Assault Male	5	12	8	9
Rape	2	8	14	13

Source: April 25, 2013, PARL. DEB. H.C. (6th ser.) 1250W, http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130425/text/130425w0009.htm.

For sexual assault cases represented in the above table, there were 139 cases with 146 allegations. The Service Police handled 135 of these cases, with the following outcomes:

> 14 cases were not investigated because the complaint was not pursued;
>
> 15 cases were investigated but did not result in a person being referred to a prosecuting authority under the Armed Forces Act 2006;
>
> 34 cases resulted in persons being referred to a prosecuting authority under the Armed Forces Act 2006 but did not result in court martial or other disciplinary proceedings;
>
> 24 cases which resulted in a court martial or other disciplinary proceedings resulted in a conviction;
>
> 10 cases resulted in a court martial or other disciplinary proceedings which did not result in a conviction;
>
> 15 cases resulted in a court martial or other disciplinary proceedings which resulted in a conviction for a lesser offence;
>
> 23 cases are ongoing.[70]

XII. Examples of Courts-Martial

Despite the Judge Advocate's independence from the chain of command, there have been reported cases of failure, with blame being attributed to a closing of ranks within the military by one Judge Advocate, which resulted in insufficient evidence for the successful prosecution of a case.[71] One of the most high-profile cases is that of Baha Mousa, a civilian Iraqi who died in a detention center operated by British troops after he was detained in Iraq in 2003. The postmortem revealed that Mousa suffered ninety-three injuries while in the custody of British

[70] *Id.* 1253W.

[71] Sean Raymont, *Iraq Inquiry Clears Army of Systemic Brutality*, SUNDAY TELEGRAPH (London), Aug. 28, 2011, at 26 (accessed via Lexis).

soldiers and that his injuries were consistent with systematic beating over a period of time.[72] Despite a £20 million (approximately US$35 million) investigation into the circumstances of Mousa's death and a court-martial, the exact circumstances of his death have never emerged.[73] The court-martial did result in the conviction of one member of the armed forces, who admitted he treated the prisoners in the case inhumanely. He was dismissed from the army and jailed for a year. All others investigated in the case were cleared because of a lack of evidence.[74]

XIII. Criticisms of the System

As noted above, allegations of sexual assault, voyeurism, and exposure are not considered serious offenses that are subject to strict reporting requirements,[75] a fact which the Service Complaints Commissioner views as failing the members of the armed forces. The Commissioner stated that

> … allegations involving acts of violence present specific problems. Under the Armed Forces Act 2006, sexual assaults short of rape or penetration do not have to be reported to the Service police and thus to the Service Prosecuting Authority.
>
> So any incident that can be seen as a joke (e.g. exposure to or indecent touching of female soldiers) or Horse play (e.g. threats involving vacuum cleaners or "posed" sexual assaults for Facebook—which are talked about as jokes) may not get picked up.[76]

The Commissioner considers that the lack of action taken over such incidents undermines confidence in the chain of command and the Service Police, and considers as essential a change in the law to require all sexual assaults (including exposure and voyeurism, and the misuse of social media) to be reported to the police and Service Prosecuting Authority.[77]

The House of Commons Defence Committee has expressed frustration at the lack of accurate statistics on the occurrence of rape and sexual assault within the military:

> We are concerned that the number of sexual harassment and other sexual offences allegations made to the Commissioner remains low. Other evidence, such as the 2006 Equal Opportunities Commission and MoD Survey into sexual harassment in the Armed Forces, suggested that the incidence of such offences was a lot higher than the number of complaints would indicate … We note that the MoD is attempting to produce the most accurate information possible but it is inappropriate for them to fail to provide accurate

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[72] Audrey Gillan, Human Rights Law Protects Prisoners of UK Troops Abroad, Rule Lords in Landmark Case: Family Campaign: Ruling Raises Hopes for Public Inquiry, GUARDIAN (London), June 14, 2007, at 4 (accessed via Lexis).

[73] Raymont, *supra* note 71.

[74] *Id*.

[75] Armed Forces Act 2006, c. 52, sched. 2.

[76] SERVICE COMPLAINTS COMMISSIONER OF THE ARMED FORCES, ANNUAL REPORT 2012, at 22, http://armedforcescomplaints.independent.gov.uk/linkedfiles/afcindependent/426354_ssc_ar_2012.pdf.

[77] *Id*.

> figures in answers to Parliamentary Questions. Without accurate figures, the MoD is unaware of how severe a problem it is dealing with in relation to sexual offences within the Armed Forces or what measures it is required to take to rectify the offences committed. We recommend that the MoD instigate new research into the level of sexual offences in the Armed Forces and the actions required to tackle it and to encourage possible victims to report such allegations whether to the Commissioner, the Royal Military Police or the chain of command.[78]

The Complaints Commissioner has been highly critical of the armed forces complaints system, with the headline of the press release for her annual report stating, "After 5 years the Armed Forces complaints system is still inefficient and undermines confidence in the chain of command."[79] The Commissioner's 2012 annual report notes, "I am still unable to say that the Service complaints system is working efficiently, effectively or fairly. This is unacceptable."[80] At the beginning of 2013 the Commissioner's powers were strengthened through additional reviews of how complaints are handled once in the chain of command; however, the Commissioner continues to assert that she still does not have enough power to tackle complaints within the military and, since 2010, has been calling for the creation of an Ombudsman for the Armed Forces. Although this proposal has been endorsed by the House of Commons Defence Committee,[81] no action has yet been taken.

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[78] DEFENCE COMMITTEE – EIGHTH REPORT: THE WORK OF THE SERVICE COMPLAINTS COMMISSIONER FOR THE ARMED FORCES, 2012–13, ¶ 30, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/720/72002.htm.

[79] Press Release, Service Commissioner for the Armed Forces, SCC No. 3/2013 (Mar. 21, 2013), http://armedforcescomplaints.independent.gov.uk/linkedfiles/afcindependent/scc-annualreport2012.pdf.

[80] Service Complaints Commissioner of the Armed Forces, *supra* note 76, at 6.

[81] *Id*.