

## Fact Sheet on Australia Military Justice<sup>1</sup>

**1. Introduction.** Some commentaries have suggested that the Australian military justice system may be a good model for the United States because of its centralization of military tribunal prosecutions under the authority of a military prosecutor, rather than military commanders. This fact sheet traces the recent changes in the Australian military justice system, describes the Australian rationale for centralizing the referral decision in the Director of Military Prosecutions (DMP), notes the problems resulting from the 2006 structural changes, describes the magnitude of Australian military justice prosecutions, briefly discusses the findings of the 1,567 page 2011 DLA Piper Review, and compares the disposition of U.S. courts-martial and Australian courts-martial with an emphasis throughout on disposition of sex offenses.

### **2. The Australian System.**

a. **Australian Armed Forces Strength.** In May 2012, the Australian active duty strength was 56,856 including 7,903 (13.9%) women.<sup>2</sup>

b. **Authority for Australian Military Justice System.** In addition to the Australian Constitution, the Defence Force Discipline Act 1982 (Cth) (DFDA) provides specific legal authority for the Australian military justice system along with implementing rules and regulations.<sup>3</sup> 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, and rights of review and appeal.”<sup>4</sup> The Discipline Law Manual instructs Australian Defense Forces (ADF) members on the law.<sup>5</sup>

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<sup>1</sup> This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School.

<sup>2</sup> Australian Government, Department of Defense, *Roles of Women in the ADF*, Fairness and Resolution, <http://www.defence.gov.au/fr/RR/Womenindefence/Roles.html>.

<sup>3</sup> Report for Congress, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom* (Law Library of Congress File No. 2013-009638, July 2013) at 2 [hereinafter 2013 Report for Congress] (citing Defence Force Discipline Act 1982 (Cth), <http://www.comlaw.gov.au/Details/C2012C00181> [hereinafter DFDA]; Defence Force Discipline Regulations 1985 (Cth), <http://www.comlaw.gov.au/Details/F2011C00695>).

<sup>4</sup> *Id.* at 2-3 (citing Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia’s Military Justice System* [hereinafter Senate Report] (June 2005) at ¶ 2.7, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=fadt\\_ctte/miljustice/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/report/index.htm)).

<sup>5</sup> *Id.* at 3. (citing Discipline Law Manual, <http://www.defence.gov.au/adfwc/ADFP.html>). See also, 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](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).

**c. Rationale for Changing the Australian Military Justice System.** In June 2005, the Foreign Affairs, Defence and Trade References Committee of the Senate delivered a report recommending change in the Australian military justice system.<sup>6</sup> In 2006, the Australian Parliament changed the Australian military justice system to make it more like the systems in the United Kingdom and Canada.<sup>7</sup> Those changes were based on decisions in 1997 and 2003 by the European Court of Human Rights (ECHR). The ECHR required structural changes in the role of the convening officer in United Kingdom cases because the convening officer had a role in the prosecution of cases.

The [convening] officer . . . appointed the members of the court martial, who were subordinate in rank to him and fell within his chain of command. He also had the power to dissolve the court martial before or during the trial and acted as “confirming officer”, with the result that the court martial’s decision as to verdict and sentence was not effective until ratified by him.<sup>[8]</sup>

The ECHR found United Kingdom courts-martial lacked independence and impartiality because of the convening officer’s roles in the process. In response, the United Kingdom eliminated the “convening officer” requirement and divided his main roles between “the higher authority, the prosecuting authority and the Court-Martial Administration Officer.”<sup>9</sup> The goal was to increase the “appearance of fairness” for the accused and not to enhance justice for victims or to increase prosecutions.<sup>10</sup>

**d. Changes to the Australian Military Justice System.** In 2005, the *Defence Legislation Amendment Act (No. 2) 2005 (Cth)* provided for the offices of Director of Military Prosecutions (DMP), who decide which accused and offenses will be referred to trial, and the Registrar of Military Justice, who received some of the other powers of a

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<sup>6</sup> *Lane v Morrison* (2009) 239 CLR 230, [2009] HCA 29 at ¶ 15 (citing Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's military justice system*, (June 2005), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=fadt\\_ctte/miljustice/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=fadt_ctte/miljustice/report/index.htm)).

<sup>7</sup> *Id.* at ¶¶ 13, 16, 62 (citing *Findlay v. the United Kingdom*, (1997) 24 EHRR 221, [1997] ECHR 22107/93 and *Grievs v. the United Kingdom*, (2003) 39 EHRR 52, [2003] ECHR 57067/00).

<sup>8</sup> *Morris v. the United Kingdom*, (2002) 34 EHRR 1253, [2002] ECHR 38784/97. at ¶ 60 (citing *Findlay v. the United Kingdom* (judgment of Feb. 25, 1997, *Reports of Judgments and Decisions* 1997-I)), <http://www.bailii.org/eu/cases/ECHR/2002/162.html>.

<sup>9</sup> *Morris*, *supra* note 8, at ¶ 50.

<sup>10</sup> See also Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 Mil. L. Rev. 212, 224 (Fall 2012), [https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/\\$FILE/By%20Major%20Conway.pdf](https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/$FILE/By%20Major%20Conway.pdf).

convening authority.<sup>11</sup> On October 1, 2007, the Australian Government replaced general and restricted courts-martial and trial by a Defense Force Magistrate (DFM) with trial by a military tribunal called the Australian Military Court (AMC).<sup>12</sup> The Australian Parliament created the AMC to “satisfy the principles of impartiality, judicial independence and independence from the chain of command.”<sup>13</sup> Key features to meet these goals are tenure for trial judges (10-year fixed term appointments), security of salary, and appointment and termination by the Governor-General.<sup>14</sup> On August 26, 2009, the High Court of Australia invalidated the provisions establishing the AMC because the legislation creating the AMC was unconstitutional.<sup>15</sup> The Parliament responded by enacting the *Military Justice (Interim Measures) Act (No. 1) 2009* and *Military Justice (Interim Measures) Act (No. 2) 2009*, re-establishing the pre-2007 regime of Defence Force magistrates (DFM), restricted courts-martial, and general courts-martial.<sup>16</sup>

**e. Levels of Australian military tribunals.** The DFM and restricted courts-martial have the same jurisdiction and powers.<sup>17</sup> They do not have authority to impose more than six months of imprisonment or restriction.<sup>18</sup> A general court-martial may

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<sup>11</sup> Morrison, *supra* note 3, at ¶ 91; 2011 Annual Report of the Director of Military Prosecutions to Parliament, Ch. 1, ¶ 1.2, [http://www.aph.gov.au/parliamentary\\_business/committees/senate\\_committees?url=fact\\_ctte/annual/2012/report2/c01.htm#c01f1](http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fact_ctte/annual/2012/report2/c01.htm#c01f1) [hereinafter 2011 DMP Report] (citing Defence Force Discipline Act 1982 (DFDA), Section 188G).

<sup>12</sup> Chief Military Judge, Australian Military Court (AMC), *Report for the period 1 January to 31 December 2008*, Annex A-1, [http://www.defence.gov.au/publications/AMC\\_AnnualReport\\_08.pdf](http://www.defence.gov.au/publications/AMC_AnnualReport_08.pdf) [hereinafter 2008 AMC Report].

<sup>13</sup> Australian Government, Department of Defense, *Frequently Asked Questions on the Australian Military Court*, Military Justice Inquiry FAQ, 1-2, <http://www.defence.gov.au/mjs/resources/AMCFAQs.pdf>.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.10(d) (citing *Lane v Morrison* (2009) 239 CLR 230, [2009] HCA 29 (invalidating Division 3, Part VII of the DFDA)), <http://www.clrg.info/2011/02/lane-v-morrison-2009-hca-29-26-august-2009/>.

<sup>16</sup> *Id.* at Ch. 1, ¶ 1.10(d) (citing *Haskins v the Commonwealth* [2011] HCA 28 and *Nicholas v the Commonwealth* [2011] HCA 29). See also Australian Department of Defense Director of Military Prosecutions, *Report for the period 1 January to 31 December 2012*, Annex A-1, [http://www.defence.gov.au/publications/DMP\\_Annual\\_Report\\_2012.pdf](http://www.defence.gov.au/publications/DMP_Annual_Report_2012.pdf) [hereinafter 2012 DMP Report].

<sup>17</sup> Peter Heerey, *The Role of the Commander in Military Criminal Procedure*, Presentation to the 6th Budapest International Military Law Conference, June 14-17, 2003, <http://www.defenceappeals.gov.au/papersheerey.html>.

<sup>18</sup> *Id.*; DFDA, *supra* note 3, Schedule 2, § 67.

impose up to the maximum punishment for the offence as prescribed by statute.<sup>19</sup> Generally, the accused has the right to make a forum election, either trial by DFM (judge alone trial) or court martial (jury trial).<sup>20</sup> The president of a general court martial is a colonel or higher and has at least four additional members; the president of a restricted court martial is a lieutenant colonel or higher and has at least two other members.<sup>21</sup>

#### f. Offense Report Statistics.

Two Australian Defence databases include records of sex offense complaints in the ADF as shown in the following table:<sup>22</sup>

	2008	2009	2010	2011
Australian Defence Force Investigative Service (ADFIS) <sup>23</sup>	58	82	86	84
Broderick Report <sup>24</sup>	87	74	50	42
Average	72	78	68	63

On June 20, 2013, the Australian Minister of Defense indicated:

Of particular concern is research which indicates that approximately 80 percent of victims do not report their experience. The 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 ADF increased from 624 in 2009 to 631 in 2012 and in the Australian Public Service in Defence

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<sup>19</sup> International Society for Military Law and the Law of War, *Conference on Military Jurisdiction*, Doc. No. ISMLLW 468 E 4 (Sept. 28, 2011 - Oct. 2, 2011) at 2, 20, <http://www.ismllw.org/conferences/QUESTIONNAIRE%20RHODES/Australian.pdf>.

<sup>20</sup> DFDA, *supra* note 3, §§ 111B, 111C.

<sup>21</sup> *Id.* at §§ 114, 116.

<sup>22</sup> 2013 Report for Congress, *supra* note 3, at 18 (citations omitted).

<sup>23</sup> *Id.* (citing 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>).

<sup>24</sup> *Id.* (citing Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force Academy and Australian Defence Force*, <http://defencereview.humanrights.gov.au/>).

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.<sup>[25]</sup>

**g. Absence of Military Prosecution of Serious Sex Crimes.** The 1994 Report of the Senate Standing Committee on Foreign Affairs, Defence and Trade on Sexual Harassment in the Australian Defense Force recommended that sex offenses be removed from the jurisdiction of Defence Forces and instead be referred to the civil police for investigation and civilian authorities for prosecution.<sup>26</sup> The Committee concluded the Defence handling of the investigation and prosecution of sex offenses was inadequate, and civil authorities were better equipped to carry out such investigations and prosecutions.<sup>27</sup>

Currently, the only sex offenses likely to be prosecuted under the DFDA are indecency offenses in the second and third degree and indecency without consent.<sup>28</sup> Sexual assault offenses are more serious and are referred to civil police and resolved in civilian courts. The 2012 Australian Human Rights Commission, Review into the Treatment of Women in the Australian Defence Force, Phase 2 explains:

In relation to offences that may also constitute a criminal offence under the ordinary criminal law of the Commonwealth, States and Territories, jurisdiction under the DFDA in Australia may be exercised only where proceedings under the DFDA can reasonably

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<sup>25</sup> 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/> [hereinafter 2013 Smith Press Release].

<sup>26</sup> Senate Foreign Affairs, Defence and Trade References Committee, *Sexual Harassment in the Australian Defense Force* 320 (August 2004), [http://www.aph.gov.au/parliamentary\\_business/committees/senate\\_committees?url=fadt\\_ctte/completed\\_inquiries/pre1996/harassment/index.htm](http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fadt_ctte/completed_inquiries/pre1996/harassment/index.htm) [hereinafter 1994 Senate Report].

<sup>27</sup> *Id.*; Gary A Rumble et al., *Report of the review of allegations of sexual and other abuse in Defence facing the problems of the past, Vol. 1, General findings and recommendations* 136 (Oct. 2011), <http://www.defence.gov.au/pathwaytochange/Docs/DLAPiper/Volume1.pdf> [2011 DLA Piper Review]. The entire version of the 1,567 page 2011 DLA Piper review can be found at the National Library of Australia's online website Trove at <http://trove.nla.gov.au/version/178785904>. See also Australian Government, Department of Defence, *Pathway to Change – Evolving Defence Culture*, Pathway to Change, <http://www.defence.gov.au/pathwaytochange/index.htm>.

<sup>28</sup> Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force, Phase 2 Report* 451 (2012), <http://defencereview.humanrights.gov.au/sites/default/files/adf-complete.pdf> (citing Crimes Act 1900 (ACT), sections 58-60).

be regarded as substantially serving the purpose of maintaining or enforcing service discipline. It is a matter for the Director of Military [P]rosecutions to decide whether the maintenance of discipline requires that DFDA charges be laid in a particular case.

In addition, the DFDA specifically excludes military jurisdiction for dealing with a number of serious offences unless consent is provided by the Commonwealth Director of Public Prosecutions (DPP). These offences include murder and manslaughter and certain sexual offences, namely, sexual assault in the first, second and third degree, sexual intercourse without consent and sexual assault with a young person. [A] Defence Instruction . . . notes, however, that “due to the seriousness of these offences, it is unlikely the DPP would give the ADF consent to deal with these offences” and that, as a matter of policy, these sexual offences should be referred to civilian authorities in the first instance.

Since 1985, the Commonwealth DPP has consented on only two occasions to the DFDA prosecution of sexual assault offences which were alleged to have occurred in Australia. A number of other sexual offences contained in section 3 of the Crimes Act 1900 (ACT) are also “imported” into the DFDA. Whilst prosecution under the DFDA for these offences does not require the consent of the Commonwealth DPP, the Defence Instruction . . . recommends the immediate referral of some of these offences to civilian authorities, where the offence occurs in Australia, because of their seriousness.<sup>[29]</sup>

h. **Director of Military Prosecutions (DMP).** The Australian Parliament created the Office of the DMP effective June 12, 2006.<sup>30</sup> The Director is a Brigadier and DMP is has 14 positions for prosecutors.<sup>31</sup> The DMP has three pertinent 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;

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<sup>29</sup> *Id.* at 452 (internal footnotes omitted; emphasis added).

<sup>30</sup> 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.2 (citing Defence Force Discipline Act 1982, Section 188G).

<sup>31</sup> *Id.* at Ch. 1, ¶ 1.5.

(b) to seek the consent of the Directors of Public Prosecutions as required by section 63; . . . and

(e) to do anything incidental or conducive to the performance of any of the preceding functions.<sup>[32]</sup>

#### **i. Australian Military Prosecution Statistics.**

(1) In 2008, the Director of Military Prosecutions referred 114 matters for trial, and 92 trials were conducted, including 64 guilty pleas and 28 contested cases.<sup>33</sup> There were 15 jury trials—two with 12-person juries and 13 with 6-person juries. No trials were conducted outside of Australia.<sup>34</sup> Although two felony-level trials (Class 1 trials) were held, both cases resulted in acquittals.<sup>35</sup>

(2) From January 1, 2009 to August 26, 2009, there were 5 jury trials, 9 judge alone trials, and 19 sentencing hearings, and after *Lane v Morrison* invalidated the AMC system, there were 10 Defence Force Magistrate (DFM) hearings, 1 Restricted Courts-Martial (RCM) and 5 General Courts-Martial (GCM) hearings.<sup>36</sup> The DMP did not prosecute 69 matters because they believed there “was no reasonable prospect of success or that to prosecute would not have enhanced or enforced discipline.”<sup>37</sup> Forty-five matters were referred back for summary disposal; 11 matters were referred to civilian Directors of Public Prosecution; and ODMP had 90 open matters at the end of the calendar year.<sup>38</sup>

(3) In 2011, the DMP listed five general courts martial and three involved sex offense cases: (1) The DMP obtained a conviction involving “an act of indecency.”; (2) a GCM of a lieutenant commander resulted in guilty findings for seven counts of “indecent conduct upon an Able Seaman without her consent” and one count of “attempting to destroy service property.” The lieutenant commander-accused was sentenced to among

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<sup>32</sup> *Id.* at Ch. 1, ¶ 1.3 (citing Defence Force Discipline Act 1982, Section 188GA (1)).

<sup>33</sup> 2008 AMC Report, *supra* note 12, at 6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at Annex A-F.

<sup>36</sup> 2010 Annual Report of the Director of Military Prosecutions to Parliament, Ch. 1, ¶ 1.18, [http://www.aph.gov.au/parliamentary\\_business/committees/senate\\_committees?url=fadt\\_ctte/annual/2010/report2/c01.pdf](http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=fadt_ctte/annual/2010/report2/c01.pdf) [2010 DMP Report].

<sup>37</sup> *Id.* at Ch. 1, ¶ 1.18.

<sup>38</sup> *Id.*

other punishments 18 months imprisonment with 6 months suspended; and (3) Sailor W was acquitted at a GCM of one charge of sexual intercourse without consent.<sup>39</sup> In the offense category table, DMP listed 13 counts of sexual assault and related offenses (7 pertained to the lieutenant commander) out of a total of 130 charged offenses.<sup>40</sup>

(4) In 2012, the DMP prosecuted 13 charges of sexual assault and related offenses out of a total of 125 charges.<sup>41</sup> The only GCM in 2012 was not related to a sex crime; the case involved larceny of housing allowance by fraud and resulted in a fine.<sup>42</sup>

(5) The following table depicts the DMP prosecution actions in 2011 and 2012:

	2011 <sup>43</sup>	2012 <sup>44</sup>
<b>Defense Force Magistrate Hearings</b>	38	38
<b>Restricted Courts Martial</b>	14	11
<b>General Courts Martial</b>	5	1
<b>Total Misdemeanor and Felony-Level Trials</b>	57	50
<b>Matters Not Proceeded</b>	36	32 <sup>45</sup>
<b>Referred to Command for Summary Disposal</b>	42	35
<b>Referred to Directors of Public Prosecution</b>	7	62
<b>Total Cases Not Prosecuted</b>	85	9
<b>Open Matters</b>	47	51

**h. Perceptions Resulting from Lack of Military Justice Prosecution of Sex Crimes.** In April 2011, after an Australian military sexual abuse scandal, Australian Minister for Defence Stephen Smith announced two important reviews of sexual abuse in the Australian military by the Australian Human Rights Commission, and the 2011 DLA Piper Review.<sup>46</sup> The 2011 DLA Piper Review at 144 states:

<sup>39</sup> 2011 DMP Report, *supra* note 11, at Ch. 1, ¶¶ 1.10-1.13 (citing *Low v Chief of Navy* [2011] ADFDAT 3, General Court Martial Trial of Lieutenant Commander Alan John Jones (Dec. 2011) and General Court Martial Trial of Sailor W (Oct. 31, 2011)). See also 2012 DMP Report, *supra* note 16, at ¶¶ 25-27 (appeals dismissed).

<sup>40</sup> *Id.* at Ch. 1, ¶ 1.17.

<sup>41</sup> 2012 DMP Report, *supra* note 16, at Annex B.

<sup>42</sup> 2012 DMP Report, *supra* note 16, at ¶¶ 36-38.

<sup>43</sup> 2011 DMP Report, *supra* note 11, at Ch. 1, ¶ 1.9.

<sup>44</sup> 2012 DMP Report, *supra* note 16, at ¶¶ 20, 21.

<sup>45</sup> The DMP did not refer 32 matters to trial “due to the determination that there was no reasonable prospect of success, or that to prosecute would not have enhanced or enforced service discipline.” *Id.* at ¶ 20.

The removal of the role of Defence in the investigation and prosecution of sex offences as recommended by that Committee was based on the Committee's perception that sex offences were being badly handled by Defence. Defence met this criticism by requiring the immediate referral of complaints of sexual assault to the civil police. This "complied" with the Committee's recommendation. . . . Further, not only does it seem that Defence hands over the management of the investigation of sex offences to the civil police, Defence also seems to withdraw from taking any part in the process.<sup>[47]</sup>

At page 106, the 2011 DLA Piper Review states:

What the Review can say (based on the information before it) is that when considering past abuse in the ADF, the Review has found:

- high levels of under-reporting
- a substantial number of people who have been dissatisfied and disillusioned with the ADF's application of military justice processes and approach to complaint handling
- inconsistent (and in many cases, flawed) applications of the military justice procedures (see Chapter 7) in place at particular points in time
- 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 behavior (including serious instances of assault).<sup>[48]</sup>

The 2011 DLA Piper Review further states at 136, "The combined effect of unwillingness to report, ADF's reliance upon civilian prosecutors to commence actions and the notoriously low rate of prosecutions or convictions for sex offences results in a

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<sup>46</sup> 2013 Smith Press Release, *supra* note 25.

<sup>47</sup> 2011 DLA Piper Review, *supra* note 27, at 144. See also Appendix 34 for the Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions dated 22 May 2007 in relation to prosecution of sex offenses.

<sup>48</sup> 2011 DLA Piper Review, *supra* note 27, at 106.

very low number of convictions of members of the ADF who have committed a sexual assault.”<sup>49</sup>

Australian Minister for Defence Stephen Smith noted that the “DLA Piper Review identified a range of allegations from 775 people which fell within the Review’s Terms of Reference, the overwhelming majority of which were said to be plausible allegations of abuse.”<sup>50</sup> A task force was commissioned to address the DLA Piper Review, and as of May 31, 2013, there were 2,410 complaints of sexual abuse or harassment, which included 1,535 new complaints.<sup>51</sup>

#### 4. Analysis.

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 24 times as large as the Australian active duty forces total of 56,856.<sup>52</sup> In 2009, 2011, and 2012, Australia averaged 47 military trials for all offenses; however, most of them were Defence Force Magistrate hearings with a maximum punishment of six months confinement or detention. In 2011 there were only 5 Australian general courts-martial (GCM), and in 2012, there was only 1 Australian GCM. In FY 2012, the DoD completed 2,510 courts-martial for all offenses, including 1,183 GCM and 1,327 special courts-martial. Without including the 1,346 summary courts-martial tried in FY 2012, the Australian military prosecution rate per thousand of .83 is less than half as high as the U.S. military prosecution rate per thousand of 1.81.

b. In FY 2012, 302 DoD military personnel were tried by courts-martial for sexual assault offenses, and 238 (79%) were convicted.<sup>53</sup> The rate per thousand of DoD personnel tried by courts-martial for sexual assault offenses was .22 (302/1,388,000). The Australian Government rarely tries serious sex offenses. In the last two years, there

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<sup>49</sup> 2011 DLA Piper Review, *supra* note 27, at 136. See also Global Legal Research Center, Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom, The Law Library of Congress, July 2013, at 18 (citations omitted) (noting the Values, Behavior and Resolution Branch of the Defence Report listed “sexual offence complaints” from 2008 to 2011 ranged from 42 to 87, and the initial reports of “sexual assaults and related offenses” from the Service Police Central Records Office of the Australian Defence Force Investigative Service from 2008 to 2011 ranged from 58 to 84).

<sup>50</sup> 2013 Smith Press Release, *supra* note 25.

<sup>51</sup> *Id.*

<sup>52</sup> On September 30, 2012, the total U.S. Defense Department population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm> (click “Total DoD - December 31, 2012 (DMDC data)).

<sup>53</sup> Department of Defense, *1 Annual Sexual Assault Report 73* (2012), [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

were only three Australian general courts martial for sex crimes with two convictions. A U.S. soldier who commits a serious sex crime is far more likely to receive a GCM and substantial confinement from a U.S. court-martial than an Australian soldier who commits the same offense. The entire Australian military justice system prosecuted an average of three felony-level prosecutions the last two years; as compared to the U.S. military justice system that prosecutes approximately 400 times as many felony-level cases.

c. The Australians followed the United Kingdom's lead and changed to a system of centralized prosecutions handled by military lawyers in the aftermath of decisions by the European Court of Human Rights and a 2005 legislative committee review. Those appellate court decisions addressed protecting the rights of the accused. The 2011 DLA Piper Review found that once the military passed the investigation and prosecution of serious sex offenses to the civilian sector, the military often washed their hands of the matter and withdrew from the process. The 2011 DLA Piper Review collected 775 complaints; a 2012 follow-up review collected 1,535 new complaints of sexual abuse or harassment. With several thousand sex offense allegations currently under assessment and very rare prosecutions of serious sex offenses in Australian military tribunals, the Australian model does not seem to be a framework that the United States Armed Forces should adopt.