



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ROLE OF THE COMMANDER SUBCOMMITTEE
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November 6, 2013

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes

A Term of Reference established for this Subcommittee by the Secretary of Defense is to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes. . .” One focus of the Subcommittee’s work has been the authority assigned to designated senior commanders to refer criminal offenses for trial by courts-martial. A specific focus of our inquiry is assessing whether removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses, which are underreported when compared to reporting statistics for other serious crimes.

To examine the impact on reporting of sexual assault crimes in the militaries of our Allies, the Subcommittee reviewed extensive materials regarding the justice systems for military personnel and sexual assault reporting in other nations. The Subcommittee reviewed presentations to the Response Systems Panel by experts on Allied military justice systems and senior military representatives from Australia, Canada, Israel, and the United Kingdom. These representatives and experts provided overviews of their current military justice systems, described the evolution of their systems and the reasons that the systems were changed, provided statistics and information about sexual assault reporting and sexual assault response, and provided their opinions as to what if any effect the structure of their military justice systems had on sexual assault reporting. The Subcommittee also reviewed background materials provided by presenters and outside reports and hearing presentations referencing foreign military justice systems.

This information was provided to the Role of the Commander Subcommittee for consideration. On October 23, 2013, members of the Subcommittee met to review and discuss the materials and testimony on Allied systems. The following represents the findings and assessments of the Subcommittee regarding the information and materials reviewed:

Overview:

The changes our Allies have made to their military justice systems have occurred at different times and none of them was made in order to improve sexual assault reporting or prosecution.¹ Israel adopted the Military Justice Law in 1955, which vested prosecutorial discretion in an Independent Military Advocate General, and the adjudication system for

¹ *Public Session, Response Systems to Adult Sexual Assault Crimes Panel* 152 (Sept. 24, 2013); *Id.* at 181 (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); *Id.* at 244-45 (testimony of Commodore Andrei Spence, Commodore, Naval Legal Services and Senior Legal Officer, British Royal Navy); *Id.* at 238 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service).

members of the Israel Defense Forces (IDF) has remained largely the same since that date.² Canada removed the chain of command from the prosecutorial decision for serious criminal offenses and created a director of military prosecutions through the 1999 amendments to the National Defence Act.³ Changes to the Canadian military justice system were made subsequent to fundamental changes in the Canadian Charter of Rights and Freedoms which necessitated these changes and reflected general societal concern for the rights of the accused.⁴ In 2006, the Australian Parliament enacted legislation to establish the Director of Military Prosecutions as the convening authority to convene courts-martial under the Defence Force Discipline Act (DFDA).⁵ This legislation was also enacted out of concern that the public perceived the system as unfair to defendants.⁶ In the United Kingdom, the Armed Forces Act of 2006 became effective on November 1, 2009, thereby removing authority for prosecution of serious offenses from the chain of command and placing such authority in a new, independent Director of Service Prosecutions.⁷ These changes were also made out of a concern for the rights of defendants raised both within the United Kingdom and before the European Court of Human Rights – the rulings of which the United Kingdom is bound by treaty to follow.⁸

Sexual Assault Reporting, Investigation, and Prosecution Statistics:

Allied military partners provided statistics for the reporting, investigation, and prosecution of sexual assault crimes within their military services. The nature of the offenses described within the reported statistics varies by country based on the systems available for tracking sexual assault data and the specific statutory offenses encompassed within each country's definition of sexual assault. For example, sexual assault under the DFDA in Australia refers only to rape and attempted rape,⁹ while sexual offense reporting data provided by the IDF includes the offenses of rape and attempted rape, indecent assault, physical and/or verbal sexual harassment, and peeping.¹⁰ Likewise, the timeframes for reported information also varied. Data from Canada was provided for 2007 to 2010,¹¹ while the United Kingdom provided data from 2005 to 2012.¹² The variations in tracking methods, offenses reflected, and reporting periods make comparisons of the data of different countries difficult.

² L. LIBR. OF CONG., MILITARY JUSTICE: ADJUDICATION OF SEXUAL OFFENSES, 42-43 (July 2013).

³ *Public Session*, *supra* note 1, at 158 (statement of Major General Cathcart).

⁴ *Id.* at 156-57.

⁵ L. LIBR. OF CONG., *supra* note 2, at 4-5.

⁶ *Public Session*, *supra* note 1, at 223 (testimony of Air Commodore Cronan).

⁷ L. LIBR. OF CONG., *supra* note 2, at 55, 58 (citing Armed Forces Act 2006, c. 52, § 364).

⁸ *Public Session*, *supra* note 1, at 38-42 (statement of Lord Martin Thomas of Gresford QC); *see also* Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997).

⁹ *Public Session*, *supra* note 1, at 216 (statement of Air Commodore Cronan).

¹⁰ Email from Col. Eli Bar-On to COL Patricia Ham, Staff Director, Response Systems Panel, Statistical Tables relating to Sexual Assault within the IDF: 2007 – 2012 (Aug. 11, 2013) (on file with the Response Systems Panel).

¹¹ CANADIAN FORCES PROVOST MARSHAL 2010 ANNUAL REPORT 8 (2010); 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 2007 TO 31 MARCH 2008 at 132 (2008); 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 2008 TO 31 MARCH 2009 at 130-31 (2009); 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 100-01.

¹² Letter from Deputy Chief of Defence Staff (Personnel) Secretariat, Investigations into Sex Offences 2005-2010 (Oct. 12, 2013) (on file with the Response Systems Panel); Letter from Brigadier (ret.) Anthony Paphiti, Updated Stats in Response to Dean Schenck's Fact Sheet (Sept. 19, 2013) (on file with the Response Systems Panel).

However, it is possible to consider general tracking and reporting trends within each country and to assess the framework established by each nation's military organization for sexual assault reporting and response.

Effect of System Changes on Sexual Assault Reporting:

Current and former military officials from our Allied partners were asked to assess whether the structural changes that removed the commander from the prosecution of cases, implemented in their military justice systems, had a connection to reporting trends for sexual assault offenses. None of the representatives made this connection.¹³

The Deputy Military Advocate General for the IDF noted an increase in sexual assault complaints in the IDF between 2007 and 2011¹⁴ but attributed no specific reason for the increase.¹⁵ Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.¹⁶ The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.¹⁷ The Canadians were unable to present statistics addressing whether the change in the military justice system affected sex crime reporting.¹⁸ The Commodore of Naval Legal Services for Britain's Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had "no discernible" effect on the reporting of sexual assault offenses.¹⁹ The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and 2006 reforms.²⁰ He acknowledged, however, that the Australian Defence Force estimates that between 2008 and 2011, 80% of

¹³ Additional assessment by the Legal Counsel to the Chairman of the Joint Chiefs of Staff further reinforces the perspectives of the Allied military officials who provided information to the Response Systems Panel. In his discussions with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany, he learned that none of the nations changed their military justice systems in response to sexual assault prosecution or reporting. Further, none could correlate system changes to increased or decreased sexual assault reporting, and there was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. *Public Session, supra* note 1, at 207-09 (statement of Brigadier General Richard Gross, Legal Advisor to the Chairman of the Joint Chiefs of Staff).

¹⁴ Professor Amos Guiora, a former judge advocate in the IDF, also commented on this increase in sexual assault reporting in a letter to the SASC in advance of its June hearing. This letter stated in part: "There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers' confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the 'chain of command.'" Letter from Prof. Amos Guiora, Professor, Univ. of Utah, to Senate Armed Services Committee (undated) (on file with the Response Systems Panel).

¹⁵ Email from Col. Eli Bar-On, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Public Session, supra* note 1, at 163-64 (testimony of Major General Cathcart).

¹⁸ *Id.* at 181-82 (testimony of Major General Cathcart).

¹⁹ *Id.* at 282-83 (testimony of Commodore Andrei Spence).

²⁰ *Id.* at 238-39 (statement of Air Commodore Cronan).

sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.²¹

Conclusion:

The Subcommittee has completed its examination of the military justice systems of Israel, the United Kingdom, Australia, and Canada from the point of view of determining the impact of the role of the commander on the reporting of sexual assaults. We make no suggestions or recommendations to the panel at this point as to whether the commander should or should not be removed as the convening authority for sexual assaults and other serious crimes in our military justice system. We do find that none of the military justice systems of our Allies was changed or set up to deal with the problem of sexual assault and none of them can attribute any changes in the reporting of sexual assault as a result of changing the role of the commander. In other words, we have seen no indication that the removal of the commander from the decision making process has resulted in an increase in reporting and there is nothing in the experiences of our foreign Allies that suggests adopting their systems as a model will have any impact on the reporting of sexual assaults.



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Chair
Role of the Commander Subcommittee

²¹ Lisa M. Schenck, Fact Sheet on Australian Military Justice 4-5 (Sept. 18, 2013) (unpublished submission, on file with the Response Systems Panel).