Removal of Criminal Determinations from the Military Chain of Command

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Comparative Analysis

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This report addresses the laws that apply to the removal of criminal determinations from the military chain of command in the militaries of Australia, the United Kingdom, Canada and Israel. The report is composed of individual chapters on each of the countries surveyed.

A review of the current laws that apply in these countries indicates some similarities. For example, less serious offenses in all countries are usually tried by summary authorities who are presided over by superior commanders within the chain of command. In Canada and Israel presiding judges in courts-martial are in most cases required to be legally trained and are removed from the chain of command. In Australia, however, the presiding officers in courts-martial are appointed from the chain of command.

Several reforms have been adopted by the countries surveyed in an effort to reduce the exercise of discretionary powers by the military hierarchy in both the prosecutorial and adjudication process.

In the UK, for example, the traditional military structure of discipline from within the chain of command for some offenses has been significantly narrowed by recent Acts. Moreover, 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.

In order to strengthen the independence of courts-martial, Canada has amended several provisions regulating the process of selection and tenure of courts-martial panel members, as well as the grounds for their removal.

An interesting reform was reportedly adopted by Israel last year, requiring the removal of disciplinary adjudication authorities from the military chain of command in cases involving certain "lighter" offenses including sexual offenses. This was done following the establishment of a special reservists' adjudication unit that is comprised of reservists of high military rank who are qualified attorneys.

In Australia, the establishment in 2007 of a permanent military court that removed proceedings for more serious offenses from the chain of command was reversed following a constitutional challenge. Efforts are currently underway to pass new legislation that would establish the Military Court of Australia in a manner consistent with the Australian Constitution.

Australia

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SUMMARY In the mid-2000s, an Australian Senate committee conducted a detailed examination of the effectiveness of the military justice system of the Australian Defence Force (ADF). Based on the committee's recommendation that a permanent military court be created in order to remove proceedings for more serious offenses from the chain of command, the government introduced legislation that resulted in the establishment of the Australian Military Court in 2007. However, a legal challenge to the constitutional validity of the court was upheld in 2009, leading to the previous system of courts-martial and Defence Force magistrate trials being reinstated. Efforts are currently underway to pass new legislation that would establish the Military Court of Australia in a manner consistent with the Australian Constitution.

The current military justice system includes a Director of Military Prosecutions (DMP), who is independent from the ADF chain of command. The DMP determines whether to institute proceedings for offenses against the Defence Force Discipline Act 1982 (DFDA). The DFDA includes offenses that have a close civilian equivalent and also incorporates federal criminal offenses. The Australian courts have determined that, where there is an overlap with civilian jurisdiction, 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." Furthermore, under the DFDA, some serious federal offenses committed within Australia (e.g. treason, murder, manslaughter, some sexual offenses) require permission from the civilian Director of Public Prosecutions in order for prosecution to occur within the military system. The government rejected the Senate committee's recommendations that all suspected criminal offending by ADF personnel be referred to civilian authorities for investigation and prosecution.

I. Introduction

In 2003, an Australian Senate committee commenced an inquiry into the effectiveness of the military justice system of the Australian Defence Force (ADF) and in 2005 produced a detailed report with recommendations for significant changes (the Senate Report).[1] This followed various reviews, inquiries, and court decisions[2] in which concerns had been raised about the structure, jurisdiction, and operation of the system. In particular, the Senate Report

[1] 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.

[2] 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. R. 231 (2008), http://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Kennett.pdf.

recommended the creation of a permanent military court system that would replace the court-martial and ADF magistrate system and therefore separate proceedings for a number of offenses from the chain of command.

The Australian government accepted many of the committee's recommendations and legislation was subsequently enacted in 2007 that established the Australian Military Court. However, a legal challenge to the constitutional validity of the Court was upheld by the Australian High Court in 2009, and the government was forced to revert back to the previous system. Part III of this report below provides information on subsequent efforts to establish an independent military court in a manner consistent with the Australian Constitution.

The military justice system currently in operation is outlined in Part II of this report. This includes the tribunals that can be convened to try offenses, the role of the independent Director of Military Prosecutions (DMP), and the jurisdiction of the military justice system as well as its interaction with the civilian justice system.

II. Current Military Justice System

A. Overview

The military justice system currently operating in Australia is governed by the Defence Force Discipline Act 1982 (Cth)[3] (DFDA) and its subordinate rules and regulations. 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."[4] It regulates the conduct of all ADF personnel at all times and in all places, both in peacetime and in war.[5]

The DFDA is complemented by the Discipline Law Manual, which provides guidance to ADF members on the law.[6] Several Defence Instructions, which outline various ADF procedures and policies, are also relevant to the operation of the military justice system, including the resolution

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

[4] SENATE REPORT, *supra* note 1, at ¶ 2.7.

[5] *See Military Justice System*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/mjs/mjs.htm (last visited May 31, 2013).

[6] 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 May 31, 2013).

of jurisdictional conflicts.[7] One instruction specifically relates to handling sexual assault complaints.[8]

1. Service Tribunals and Key Roles

The system includes three types of "service tribunals"[9] that can be convened to try ADF members for offenses that come under military jurisdiction:

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

There are three levels of summary authority:[10] a superior summary authority, a commanding officer, and a subordinate summary authority. 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.[11] 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.[12]

The DFDA provides for two different types of courts-martial:[13] a general court-martial and a restricted court-martial. The two differ in the rank of the president and the number of other panel members that can be appointed.[14] 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 may appoint officers to be Defence Force magistrates.[15] The magistrates have the same jurisdiction and powers as a

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[7] 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 May 31, 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. This Instruction outlines the primary requirements and common procedures for the reporting, recording, and investigation of alleged offences.

[8] DI(G) PERS 35-4 AMDT 1, Management and Reporting of Sexual Offences (22 November 2011), http://www.defence.gov.au/fr/Policy/GP35_04.pdf. Part 2 and Annex A of this Instruction relate to determining jurisdiction for sexual offenses.

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

[10] *Id.*

[11] *See* SENATE REPORT, *supra* note 1, ¶ 2.19.

[12] DFDA s 111B.

[13] *Id.* s 114.

[14] *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.

[15] *Id.* s 127.

restricted court-martial,[16] therefore essentially providing an alternative for dealing with serious offenses.

The Judge Advocate General (JAG) is statutorily independent from the ADF chain of command. A person appointed to this role must be a judge of either a federal court or a state Supreme Court.[17] The JAG "has oversight and control over the operation of judicial aspects of the discipline system."[18] He or she is tasked with appointing the various legal officers involved in the system and making procedural rules for service tribunals. The JAG also acts as the final avenue of legal review for ADF proceedings.[19] There is also a Chief Judge Advocate who provides administrative support to the JAG.[20]

The Registrar of Military Justice is also an independent position that was established in 2006 at the same time as the formalization of the role of the Director of Military Prosecutions (DMP). The Registrar assists the JAG and Chief Judge Advocate "by providing administrative and management services in connection with charges and trials under this Act."[21] The establishment and role of the DMP is discussed further below.

2. Offenses and Jurisdiction

There are essentially three categories of offenses created by 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."[22]

With regard to the second category of offenses, where there is an overlap between the civil 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."[23] Otherwise, "criminal offences or illegal conduct is referred to civilian authorities for investigation and prosecution."[24] If prosecution takes place under the civilian criminal

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[16] *Id.* s 129.

[17] *Id.* s 180.

[18] SENATE REPORT, *supra* note 1, ¶ 2.34.

[19] *See About the Judge Advocate General*, DEPARTMENT OF DEFENCE, http://www.defence.gov.au/oscdf/jag/ (last visited May 31, 2013).

[20] DFDA s 188B.

[21] *Id.* s 188FA.

[22] SENATE REPORT, *supra* note 1, ¶ 2.13.

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

[24] SENATE REPORT, *supra* note 1, ¶ 2.15.

justice system, the accused cannot then be subjected to the DFDA for the same or a similar offense.[25]

Some offenses must be referred to civilian authorities. Section 63 of the DFDA requires permission from the Director of Public Prosecutions in order for proceedings relating to certain serious federal criminal offenses committed within Australia to be instituted within the military justice system.[26] These offenses include treason, murder, manslaughter, bigamy, and offenses involving sexual assault.[27]

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.[28] This is essentially a legal device that allows for the extraterritorial application of Australia's various federal criminal laws when ADF personnel are deployed overseas, particularly "in circumstances where an adequate criminal law framework is absent, or the application of host country law is otherwise undesirable."[29] Such offenses may therefore be tried by ADF service tribunals sitting outside Australia.

The interaction between the civilian and military justice systems is discussed further below.

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.[30] This action followed the completion of an independent inquiry into the military justice system in 2001. In his report, the lead investigating officer for the inquiry agreed with the then JAG that an independent DMP position should be established.[31] 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.

The investigator also considered developments in the United Kingdom and Canada with respect to the role of a DMP. After examining the advantages and disadvantages of establishing such a role, one of his several conclusions was that "the concept of an independent DMP appears to be

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[25] *Id.*

[26] DFDA s 63.

[27] *See* DI(G) PERS 45–2, *supra* note 7, ¶ 4.

[28] DFDA s 63.

[29] SENATE REPORT, *supra* note 1, ¶ 2.14.

[30] 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.

[31] JAMES BURCHETT QC, REPORT OF AN INQUIRY INTO MILITARY JUSTICE IN THE AUSTRALIAN DEFENCE FORCE ¶ 223 (2001), http://www.defence.gov.au/media/2001/1608012.doc. The establishment of a DMP had also been considered and recommended by Brigadier the Honourable Mr. Justice Abadee in his 1997 Study into the Judicial System under the Defence Force Discipline Act.

more acceptable within the Australian Defence Force now than it was previously, provided a practicable model can be devised."[32]

Until 2006, when amending legislation came into effect,[33] 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 introduced the relevant legislation by the time the report was completed. As a result of the amendments, the 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:

> (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.
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> (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 members 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

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[32] *Id.* ¶ 224.

[33] *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.

> investigations and makes recommendations on the evidence disclosed and possible courses of action commanders may utilise.[34]

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."[35]

C. Interaction with the Civilian Justice System

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.[36] 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.[37]

In practice, the ADF makes an initial determination on whether offenses of a suspected criminal nature should be referred to civilian police for investigation and prosecution. This is based on an assessment of "whether dealing with the matter under the DFDA can be reasonably regarded as substantially serving the purpose of maintaining and enforcing Service discipline."[38]

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."[39]

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[34] *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. 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.

[35] DFDA s 188GG.

[36] INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE, REVIEW OF THE MANAGEMENT OF INCIDENTS AND COMPLAINTS IN DEFENCE INCLUDING CIVIL AND MILITARY JURISDICTION (2011), http://www.defence.gov.au/pathwaytochange/docs/incidentscomplaints/.

[37] *Id.* ¶ 147.

[38] 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) 9 (Oct. 2005), http://www.defence.gov.au/mjs/docs/mji_government_response_4oct052.pdf.

[39] SENATE REPORT, *supra* note 1, ¶ 2.8.

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.[40] 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."[41]

III. Proposed Military Court System

A. Background

1. Establishment of the Australian Military Court

In response to the 2005 Senate Report, the government agreed to establish "a permanent military court to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates."[42] The court was to be entirely independent from ADF chains of command, and would "satisfy the principles of impartiality and judicial independence through the statutory appointment [by the Minister of Defence] of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth)."[43] Judge advocates would be able to sit alone or with a military jury in cases involving more serious offenses.[44]

In terms of ADF perspectives on this proposal, the Government Response notes only that "[t]he ADF is committed to improving the system to address the concerns of Defence personnel, the Parliament and the community. The Chief of the Defence Force has assured us that he will drive this reform personally."[45] The then Chief of the Defence Force had previously made detailed submissions to the Senate committee during the inquiry process in which he strongly emphasized the importance of an effective military justice system and the unique needs of military forces in terms of maintaining high standards of discipline.[46] The submissions referred to improvements

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[40] GOVERNMENT RESPONSE, *supra* note 38, at 13–15.

[41] *Id.* at 14.

[42] *Id.* at 5.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 2.

[46] General P.J. Cosgrove AC MC, Defence Submission to the Inquiry into the Effectiveness of the Australian Military Justice System (Submission No. P16, Feb. 23, 2004), http://www.aph.gov.au/Parliamentary_Business

that had been made, including the establishment of the DMP, and concluded that the existing system "is robust, effective and highly accountable to the public."[47]

The government introduced the Defence Legislation Amendment Bill 2006 in order to give effect to the Government Response to the Senate Report.[48] The Explanatory Memorandum for the bill noted that the concerns about the existing courts-martial and Defence Force magistrate trials "stemmed from the location of judge advocates and DFMs within the military chain of command and the implications for their (actual and perceived) independence."[49]

The bill established the Australian Military Court (AMC) as a "service tribunal" through inserting a new section 114 into the DFDA, thereby replacing the courts-martial and Defence Force magistrate processes with the AMC. Contrary to the recommendations in the Senate Report, the AMC was therefore not established under Chapter III of the Australian Constitution,[50] which "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."[51] Instead, the establishment of the AMC relied on the "defence power" of the federal parliament contained in section 51(vi) of the Constitution.[52] The government essentially intended that the provisions in the bill relating to the appointment, tenure, and remuneration of judges would satisfy the principles of impartiality and judicial independence, as well as independence from the chain of command.[53]

/Committees/Senate_Committees?url=fadt_ctte/miljustice/submissions/sub16.pdf. A further submission was made by General Gosgrove that addressed public submissions and evidence provided to the committee: General P.J. Cosgrove AC MC, Final Defence Submission to the Inquiry into the Effectiveness of the Australian Military Justice System (Submission No. P16F, July 28, 2004), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/submissions/sub16f.pdf.

[47] Defence Submission to the Inquiry into the Effectiveness of the Australian Military Justice System, *supra* note 46, at 91.

[48] *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 May 31, 2013).

[49] 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.

[50] AUSTRALIAN CONSTITUTION ch. 3, http://www.comlaw.gov.au/Details/C2004C00469.

[51] Sue Harris Rimmer & John Moremon, Defence Legislation Amendment Bill 2006, at 6 (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.

[52] AUSTRALIAN CONSTITUTION s 51(vi).

[53] *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.

The Senate committee that examined the bill raised concerns about the potential for challenges to the constitutional validity of the AMC.[54] The Australian Labour Party, in opposition, opposed the bill in its entirety for various reasons, including the qualifications of potential judges and the fact that there was no provision for the court to be one of record.[55]

The bill was enacted in late 2006 and the AMC commenced on October 1, 2007.[56] In addition to the AMC provisions, the bill provided for improvements to the summary authority system and restructured the military offenses in the DFDA into three classes and stated how these were to be dealt with.[57]

2. High Court Decision and Government Response

As feared by the Senate committee, a challenge to the validity of the AMC was brought to the High Court of Australia in the case of *Lane v Morrison*.[58] In August 2009, the High Court upheld the challenge, finding that

> the jurisdiction conferred upon the AMC by section 115 of the 2006 Amendment Act, to try charges of service offences, involved the exercise of the judicial power of the Commonwealth otherwise than in accordance with Chapter III of the Commonwealth of Australia Constitution Act (the Constitution). That being the case, the 2006 Amendment Act took the AMC beyond what is authorised by section 51(vi) of the Constitution. In addition, their Honours determined that the AMC did not comply with the provisions of section 72 of the Constitution as it was not comprised of Justices who were appointed in the manner, or for the period, specified by that section.[59]

As a result of this decision, the Parliament enacted the Military Justice (Interim Measures) Act (No. 1) 2009,[60] which essentially reinstated the pre-2007 DFDA by bringing back the courts-martial and Defence Magistrate processes and associated roles.[61] The improvements to the summary authority system were retained, but the new class of offense system was not.

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[54] Senate Standing Committee on Foreign Affairs, Defence and Trade, Report on the Inquiry into the Provisions of the Defence Legislation Amendment Bill 2006 at 5, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/completed_inquiries/2004-07/def_leg_bill_06/index.htm.

[55] *See* Cth, Parliamentary Debates, Senate, 5 December 2006, 90–93 (Sen. Mark Bishop), http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2006-12-05/0118/hansard_frag.pdf;fileType=application%2Fpdf.

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

[57] Sue Harris Rimmer & John Moremon, *supra* note 51, at 13–15.

[58] *Lane v Morrison* [2009] HCA 29, http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html.

[59] Paula Pyburne, *supra* note 53, at 4. 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.

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

[61] *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://

This legislation was intended to be a temporary measure, with terms of appointments for various service tribunal roles to expire after two years. A bill introduced by the new administration in May 2010 that sought to establish a Military Court of Australia under Chapter III of the Constitution would have replaced the interim measures,[62] but this bill lapsed in July 2010 at the end of the parliamentary term.[63] The Parliament subsequently passed an extension bill in 2011 which provided for the continuation of the existing system for a further two years.[64] A second extension bill is now pending before the Senate, having been passed by the House of Representatives on May 16, 2013.[65] The introduction of this bill was necessitated by the fact that a 2012 bill that again attempts to establish a military court system has not yet been passed.[66]

B. Current Proposals

The Minister for Defence introduced the Military Court of Australia Bill 2012 in June 2012.[67] This is accompanied by the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012,[68] which will "provide arrangements for transition to the new Military Court and includes additional enhancements to the Australian Defence Force military discipline system, not directly associated with the establishment of the Military Court."[69] For example, this latter bill includes provisions that will retain "the present system of courts-martial and Defence Force magistrates for use in exceptional situations where it is not possible for the Military Court of Australia to sit overseas."[70]

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parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-09-14/0071/hansard_frag.pdf;fileType=application%2Fpdf.

[62] Press Release, Hon. Robert McClelland MP, Establishment of the Military Court of Australia (May 24, 2010), http://robertmcclelland.com.au/2010/05/24/establishment-of-the-military-court-of-australia/.

[63] *Military Court of Australia Bill 2010*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4412 (last visited May 31, 2013).

[64] *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 May 31, 2013).

[65] *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 May 31, 2013).

[66] *See generally* Paula Pyburne, *supra* note 53.

[67] *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 May 31, 2013).

[68] *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 May 31, 2013).

[69] 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/.

[70] 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.

As with the 2010 bill, the 2012 bill would establish the Military Court of Australia in accordance with Chapter III of the Constitution and would remove the determination of proceedings for more serious offenses from the chain of command. Commentary on the bill provided by the Australian Parliamentary Library in February 2013 describes the effect of the bill as follows:

> The Bill provides that judicial officers cannot be appointed if they currently serve in the ADF. However, the Bill requires that all appointees will, by reason of experience and training, have a detailed understanding of the ADF service environment. Matters are to be tried other than on indictment. The effect of this provision is that there is no right to a trial by jury, even for the most serious of offences. This appears to be the most controversial aspect of the Bill and is discussed in detail below.
>
> It is envisaged that the vast majority of less serious service offences will continue to be heard by summary authorities at the unit level. The Military Court's General Division (comprising judicial officers at the Federal Magistrate level) will try certain less serious service offences at the request of an accused and/or upon referral by the Director of Military Prosecutions. The Military Court's Appellate and Superior Division (to be comprised of persons at the Federal Court judge level) will try the serious service offences set out in Schedule 1 to the Bill. This Division will also hear appeals from first instance decisions, in which case it will sit as a Full Court, generally meaning there will be three judges.[71]

The two 2012 bills have now been considered by two Senate committees.[72] While it appears that there is broad cross-party support for the bills, the core issue of the right to trial by jury 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.

[71] 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.

[72] 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.

Canada

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SUMMARY Since the late 1990s Canada has been greatly reducing the role of commanders in its military disciplinary and justice system. In reaction to public scrutiny and legal challenges to Canada's military justice system, Bill C-25 was enacted in 1998, which amended the National Defence Act and other Acts to institutionally separate the functions and responsibilities of the main actors in the military justice system. Investigative, prosecutorial, defense, and judicial roles are now distinct, creating a greater degree of independence of these functions from the military's chain-of-command structure.

I. Canada's Current Military Criminal Justice System

Canada's military justice system is regulated by the National Defence Act (NDA) [1] and its subordinate regulations, namely the Queen's Regulations and Orders.[2] The Code of Service Discipline "is a central part of the NDA and comprises approximately one-half of the Act."[3] The Code sets out "the foundation of the Canadian military justice system including disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, appeals, and post-trial review."[4]

A. Canada's Service Tribunals

The NDA established "a two-tier system of military justice."[5] The first tier, "where most disciplinary matters are dealt with, is the summary trial system."[6] The second tier of Canada's military justice system is a formal court-martial system. Both tiers are referred to as Service Tribunals.[7]

According to the Office of the Judge Advocate General (JAG), "[t]he summary trial is the overwhelmingly predominant and most important form for the trial of disciplinary proceedings." Where a member is charged with a service offense, "a summary trial permits the case to be tried

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

[2] *Queen's Regulations and Orders (QR&Os)*, NATIONAL DEFENSE AND THE CANADIAN FORCES, http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/index-eng.asp (last updated Dec. 22, 2011).

[3] 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).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

and disposed of, as a general rule, at the unit level. Summary trials are presided over by superior commanders, Commanding Officers (COs) of bases, units or elements, or delegated officers."[8] According to a 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.[9]

A court-martial, on the other hand "is a formal military court presided over by a legally qualified military judge."[10] 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." There are two types of courts-martial: the General Courts Martial and the Standing Courts Martial.

The General Courts Martial consists of a military judge and a panel of members. Unlike General Courts Martial, Standing Courts Martial are presided over by only a military judge. Moreover, "[t]he military judge makes both a finding on the charges and imposes sentence if there is a finding of guilt."[11]

B. Jurisdiction over Offenses

A service offense "is 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*."[12]

The Code of Service Discipline includes a number of offenses "that are uniquely military in nature."[13] Where a crime or offense is committed by a person "subject to the *Code of Service Discipline* under the *Criminal Code* or other Federal Law, the *NDA* provides jurisdiction to deal with the matter in the military justice system."[14]

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,

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[8] *Id.*

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

[10] JAG, *supra* note 3.

[11] *Id.*

[12] *Id.*

[13] *Id.* According to the DDCS Guide, "[e]xamples 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." DDCS Guide, *supra* note 9.

[14] *Id.*

> [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.[15]

It is important to note that "[t]he jurisdiction to try offences is limited at the summary trial level."[16] 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.[17]

These limited number of offenses do not include sexual offenses like sexual assault.

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

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.[18]

However, since the 1990s Canada has been "greatly reducing the role of commanders in its military disciplinary system."[19] This was done as a result of "legal changes, court challenges, and public opinion."[20] 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.[21]

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[15] *Id.*

[16] *Id.*

[17] *Id.*

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

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

[20] *Id.*

[21] *Id.*

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."[22] In 1992, the Supreme Court of Canada, in the *Généreux* decision,[23] held that the General Courts Martial system violated paragraph 11(d) of the Charter, which guarantees a fair and public hearing by an independence and impartial tribunal. According to Brigadier-General Jerry Pitzul and Commander John 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."[24] The Court felt that "the appointment of the members of the court by the military authority ordering the trial"[25] diminishes its impartiality and independence.

As a result of the *Généreux* trial (but before the actual Supreme Court decision was issued), amendments to the National Defence Act and the Queen's Regulations and Orders (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, An Act to Amend the National Defence Act and to Make Consequential Amendments to Other Acts.[26]

One of the major changes made under the reform was that the Minister of National Defense 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."[27] According to Pitzul & 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.[28]

In order to strengthen the independence of courts-martial and to "reduce the exercise of discretionary powers by the military hierarchy,"[29] provisions regulating the courts-martial system were also amended. Changes included

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[22] Jerry S.T. Pitzul & John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 AIR FORCE L. REV. 1, 11 (2002), http://www.afjag.af.mil/shared/media/document/AFD-081204-027.pdf.

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

[24] Pitzul & Maguire, *supra* note 22, at 9.

[25] REPORT OF THE SOMALIA COMMISSION OF INQUIRY, *supra* note 17.

[26] 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), http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c15-e.pdf.

[27] Pitzul & Maguire, *supra* note 22, at 12.

[28] *Id.*

[29] 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.

- "[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."[30]

One amendment removed the power of the Commanding Officer, as convening authority, "to appoint the President and members of the court."[31] The CO "also lost the power to vary the number of officers on the panel"[32] 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, 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 members. Moreover, the military judges were no longer responsible to the chain of command.

Bill C-25 also clarified "the roles and responsibilities of the principal actors in the military justice system, including the Minister and the [JAG], and the establishment of clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions."[33] 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."[34]

According to the Lamer Report, the first annual report reviewing the provisions and operation of Bill C-25,

> [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.[35]

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[30] Alleman, *supra* note 19, at 177 (quoting Pitzul & Maguire, *supra* note 22, at 8).

[31] Rossignol, *supra* note 29.

[32] *Id.*

[33] 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 [known as the 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.

[34] Alleman, *supra* note 19, at 177.

[35] Lamer Report, *supra* note 33, at 12.

According to the same report, "[t]he 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."[36]

The Bill also introduced a new grievance process and established the Canadian Forces Grievance Board, which is independent of the chain of command.[37]

A year earlier, in response to reports and studies by a Summary Trial Working group and a Special Advisory Group, regulatory changes were also made to the summary trial system. Those changes included amendments that

- "precluded commanding officers from trying any case which they have personally investigated";[38]
- "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";[39]
- "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 scheme of punishments in keeping with the summary trial's disciplinary character;[40] 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."[41]

III. Subsequent Review

In July 2008, Bill C-60 came into force, which simplified the structure of the court-martial system, namely from four types of courts 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." 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."[42]

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[36] *Id.* at 14.

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

[38] Pitzul & Maguire, *supra* note 22, at 10.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 11.

[42] Library of Parliament, *supra* note 26, at 4.

Currently, a Bill C-15 to further amend the National Defence Act is being considered in response to the 2003 Lamer Report and the May 2009 Report by the Standing Committee on Legal and Constitutional Affairs.[43] Highlights of the proposed amendments include providing security of tenure for military judges until a fixed age of retirement.[44]

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

[44] *Id.*

Israel

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SUMMARY Israeli military courts are authorized to adjudicate Israel Defense Forces (IDF) service members in the regular and reserve services who are accused of violating the laws of the state. Military Courts of first instance are generally comprised of three-judge panels where the head of the panel is a professional judge, with a legal education and judicial experience. Hearings held in the Appeal Court Martial are generally presided over by a three-judge panel, with at least two of the judges having a legal background.

Military personnel accused of perpetrating military offenses punishable by up to three years of imprisonment and whose rank is below Lieutenant General may be subjected to disciplinary proceedings within the chain of command depending on the circumstances.

In April 2012, the IDF removed disciplinary adjudication authorities from the military chain of command in cases involving certain "lighter" offenses including sexual offenses. This was done following the establishment of a special reservists' adjudication unit. The unit is composed of reservists of high military rank who are qualified attorneys.

I. Adjudication of Offenses

Israel's Military Justice Law, 4715-1955,[1] as amended, establishes a system for the adjudication of Israel Defense Forces (IDF) active service soldiers,[2] reservists, and military contractors accused of having committed military or other criminal offenses while in service. The Law provides for adjudication by military courts or alternatively through disciplinary proceedings depending on the gravity of the offense and the rank of the accused.

A. Military Courts

Based on the Military Justice Law,

> [m]ilitary courts are authorized to hear all cases that involve IDF service members, in the regular and reserve services. Indictments relating [sic] 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

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

[2] Most Israeli citizens are subject to the military draft and to reserve service duties following completion of the initial draft.

> 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.[3]

The Law established the following military courts:

(1) Courts of first instance:

- (a) a district court martial,
- (b) a naval court martial,
- (c) a special court martial,
- (d) a field court martial,
- (e) a traffic court martial.

(2) Appeal Court Martial[4]

Decisions of the Appeal Court Martial may be subjected to review by the Israeli Supreme Court upon receipt of special permission by this court. Permission is very restrictive and may be granted "when there arises an important, difficult or novel legal issue."[5]

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 the Military Court of Appeals have a great deal of judicial experience acquired while previously sitting in a military court of first instance.[6]

Examples of offenses that must be adjudicated by military courts include treason,[7] assistance to the enemy,[8] mutiny,[9] looting,[10] and rape.[11]

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[3] Summary provided at *Criminal Proceedings in the Military Courts*, IDF MAG CORPS, http://www.law.idf.il/647-2350-en/Patzar.aspx (last visited May 30, 2013).

[4] *Id*.

[5] IDF MAG CORPS, *supra* note 3.

[6] *Id.*

[7] Military Justice Law, 4715-1955, 9 LSI 184 (1956), *as amended*, § 43.

[8] *Id.* § 44.

According to the Law, "[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."[12]

B. Disciplinary Proceedings

According to the Military Justice Law, "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."[13]

A disciplinary proceeding is usually conducted by an adjudication officer of the same unit in which the defendant serves.[14] Unlike most judges presiding over military courts, adjudication officers are usually not required to have either legal training or experience.

The Law recognizes the right of a soldier to request disciplinary adjudication by a higher ranking adjudication officer 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.[15]

Among offenses that are considered "a military offense" for the purpose of disciplinary adjudication are offenses under the Law for Prevention of Sexual Harassment, 5758-1998.[16] Unlike offenses under the latter law that are usually handled in disciplinary proceedings, rape is adjudicated by military courts outside of the chain of command.[17]

II. Removal of Disciplinary Authority from the Military Chain of Command in "Lighter" Offenses Including Sexual Harassment

According to an article published in the Israeli press on April 2, 2012, a special unit has been established by the IDF for the adjudication of "light" sexual offenses and other "minor" offenses, "such as unbecoming behavior, when the suspect and the victim are of similar status, events in which there is doubt as to consent, etc."[18] The establishment of the new unit, the article

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[9] *Id.* § 46.

[10] *Id.* § 74.

[11] *Id.* § 75.

[12] *Id.* § 184.

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

[14] *Id.* § 139.

[15] *Id.* §§ 148–151.

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

[17] Rape is punishable by twenty years of imprisonment under the Military Justice Law if committed by an individual, and by a life sentence if committed by three soldiers together. Military Justice Law, 4715-1955, 9 LSI 184 (1956), *as amended*, § 75.

[18] Hanan Grinberg, *For the First Time: IDF Established "Patrol" of Adjudication Officers*, MAARIV (Apr. 2, 2012), http://www.nrg.co.il/online/1/ART2/352/548.html (in Hebrew).

proposes, was intended to reform a situation in which many proceedings were canceled "due to the lack of knowledge of adjudication officers who were not dealing with the subject [of sexual offenses] and [due] to the worry [on the part of the adjudication officers] that they would be subjected to vendetta in the future."[19] The compilation of a database of judges, completion of which was expected last year, was reportedly expected to provide a solution to the problem.[20] An IDF source quoted in the article also suggested that members of the new unit "would be the IDF patrol that would fight sex offenses."[21]

According to the new system, disciplinary proceedings involving "lighter" sexual offenses will no longer be made by commanders within the chain of command. Instead, persons accused of such offenses will appear before adjudication officers of the newly established unit. The unit is to be comprised of reservists at the rank of Lt. Colonel or higher who are qualified attorneys and have received special training in this area.

According to the Israeli attorney Shlomi Rachbi, who was quoted in the article, the removal of disciplinary determination authority from the military chain of command in lighter offenses was necessitated by what he called "the spread of the phenomenon of vendetta and threat against adjudication officers" who have found themselves on the defendant's stand after adjudicating their subordinates.[22] As an example, Rachbi told the story of a female soldier who had threatened, through her father, to file a sexual harassment complaint against an adjudication officer if the penalty he had imposed against her was not voided. After the adjudication officer refused to do so, Rachbi noted, the soldier filed a complaint against the officer.

In response to an inquiry by the article's author, an IDF spokesman stated as follows:

> IDF treats sex offenses [in its ranks] with utmost seriousness and considers a thorough examination and handling of complaints involving such offenses of great importance; the legal treatment [of such complaints] underwent adjustment within this framework.[23]

A search for information regarding the impact of the 2012 reform on law enforcement and adjudication of lighter offenses by reservists with legal training outside of the chain of command has not identified any additional data.

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[19] *Id.*

[20] *Id.*

[21] *Id.* (translated by author, R.L.).

[22] *Id.*

[23] *Id.*, last paragraph (translated by author, R.L.).

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 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.

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 by members of the armed forces was 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 for 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*, 2011 (version 3), ¶ 1.2, 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 civilian criminal law offenses committed by members of the armed forces as well as 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. Each 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, but instead he 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

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

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]

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

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[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.

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

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. 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.[29] 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."[30]

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.[31] 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.[32] 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.[33]

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 is an extensive set of guidance that provides 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."[34]

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[28] Rozenberg, *supra* note 7.

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

[30] *Id.*, Explanatory Notes, ¶ 246.

[31] *Id.* § 116.

[32] *Id.* § 121.

[33] *Service Prosecuting Authority*, MINISTRY OF DEFENCE, http://spa.independent.gov.uk/test/about_us/index.htm (last visited May 29, 2013).

[34] *The Inspectorate's Report on the Service Prosecuting Authority* at 12 (July 2010), http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/200110309-spainspectionreportcd30191110-u1.pdf.

VIII. Examples of Courts-Martial

Despite the independence that has been put in place through the provision of an independent Judge Advocate, there have been reported cases of failure, with blame being allocated by one Judge Advocate on a "closing of ranks" within the military that resulted in insufficient evidence for the successful prosecution of a case.[35] 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 soldiers and that his injuries were consistent with systematic beating over a period of time.[36] 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.[37] 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 due to a lack of evidence.[38]

An independent review of the recently established Service Prosecuting Authority found that, other than some minor issues, the system was operating successfully.[39]

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

[36] 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).

[37] Raymont, *supra* note 35.

[38] *Id.*

[39] *The Inspectorate's Report on the Service Prosecuting Authority*, *supra* note 34.