Gender, Governance and the Defence of the Realm

Globalising Reforms in the Australian Defence Force

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1. Introduction

Senior leaders of the Australian Defence Force (ADF) concede that it has historically been, and remains in some aspects, a ‘hyper-masculinist’ institution, as the Chief of Army recently informed the United Nations.² A number of public reviews have documented evidence of serious gender-based discrimination, as well as incidents of gender-based violence against women and men within the ADF.³ Since 2011, the ADF has been under intense pressure to reform this aspect of its governance as both a capability issue and as a personal conduct issue. A capability issue to the ADF means anything which can affect adversely its effectiveness in operations, including limiting the number of talented female recruits through reputational damage. A conduct issue means behaviour that is deemed not to be in compliance with service codes or the profession of arms, the ideal ‘warrior’.⁴ A number of egregious incidents have come under the attention of the media, and the internal responses have been heavily

¹ Australian Research Council Future Fellow, Asia Pacific College of Diplomacy, The Australian National University. The author was an external consultant to the Defence Review of Allegations of Sexual and other forms of Abuse and was not privy to the final report or any case materials. The author is grateful to Dr Gabrielle Simm, Dr Ian Hall, Dr Gary Rumble and Erica Coray for their comments on a draft, as well as the anonymous reviewers.

² Department of Defence, Chief of Army David Morrison at a UN Women/Government of Australia hosted side event panel discussion ‘Implicit stereotypes, explicit solutions: Overcoming gender-based discrimination in the workplace’ at the Commission for the Status of Women Session 57, New York, 8 March 2013.

³ Gary A. Rumble, Melanie McKean and Dennis Pearce, *Report of the Review of Allegations of Sexual and Other Abuse in Defence: Facing the Problems of the Past, Vol 1: General Findings and Recommendations* (2011) <<http://www.minister.defence.gov.au/files/2012/03/Report-of-the-Review-of-allegations-of-sexual-and-other-abuse-in-Defence.pdf>> at 16 June 2015. See also Supplement to Volume 1 and Volume 2 (April 2012), available at <http://www.defence.gov.au/pathwaytochange/docs/DLAPiper/Background.htm>. The Review is often mistakenly called the DLA Piper Review, even though the Report does not carry any reference to DLA Piper in its cover page or title. This is because - as is stated in the Disclaimer at the front of both Volumes of the Report - ‘The opinions expressed in the Report ... are solely those of Dr Gary A Rumble, Ms Melanie McKean and Professor Dennis Pearce AO ... The opinions expressed in the Report do not necessarily represent the views of other contractors to the Review, nor of DLA Piper Australia.’ The arrangements for conducting the Review are explained in Volume 1 and Supplement and in related Appendixes. This chapter refers to the ‘Defence Abuse Allegations Review’.

⁴ Craig Orme, *Beyond Compliance: Professionalism, Trust and Capability in the Australian Profession of Arms: Report of the Australian Defence Force Personal Conduct Review* (Defence Publishing Service 2011).

criticized.⁵ In this respect, Australia is not alone: other western military organisations have also faced this kind of pressure.⁶

In both its international operations and its internal organisation, the ADF could be a rich site for integrating the gender-equal developments in international law and comparative public law. In the domestic arena, there exists an interplay between military justice and criminal, constitutional and administrative law. Other ‘cosmopolitan’ militaries⁷ have shown a willingness to accept the norms and standards of international law and due process and incorporate them into their own governance framework in relation to ending discrimination and sexual and other forms of gender-based violence.⁸ Sometimes this process has been imposed on the military by parliaments or courts, such as the UK Service Complaint Commissioner discussed further below.

The Australian military carries a special constitutional role and receives many exemptions from the legal responsibilities of ordinary citizens. These exemptions are necessary for the ADF being able to perform its constitutional function to protect the state—the state allows the military to bear arms on the state’s behalf and rewards the soldier for being willing, if necessary, to die in defence of the national interest.⁹ The Australian military thus exists in a state of exceptionalism in relation to ‘ordinary’ law, but is still bound through the Constitution by the rule of law and civilian control.¹⁰ However, these exemptions do not encompass individuals being outside the reach of the law when it comes to the unequal

⁵ Rumble, et al, above n 3.

⁶ Francine D’Amico and Laurie Weinstein (eds). *Gender Camouflage: Women and the U.S. Military* (New York University Press, 1999).

⁷ Cosmopolitan theorists in international relations debate whether militaries in a globalising world are employed less in the defence of the state and more on broader regional and international security and humanitarian tasks such as disaster response and peace-keeping. See further Lorraine Elliot and Graeme Cheeseman (eds), *Forces for Good: Cosmopolitan Militaries in the Twenty-First Century* (Manchester University Press, 2004).

⁸ For the purposes of this chapter, I am using the definition of ‘sexual and other abuse’ against women and men defined broadly and in the ‘practical rather than legalistic’ sense by the Defence Abuse Allegations Review (2012: xxi, 5), in line with the Defence Instructions (General) PERS 35-4 Management and reporting of sexual offences, but narrower than the definition of ‘unacceptable behaviour’ set out by Defence Instruction (General) Personnel 35-3 – Management and Reporting of Unacceptable Behaviour, Annex A and B, 28 June 2009.

⁹ *Australian Constitution* s 51(vi), s 61, s 68. See also Department of Defence, *The Strategic Framework 2010* (Defence Publishing Service, 2010) 8–9

¹⁰ See further Department of Defence, *Capstone Series ADDP-D: Foundations of Australian Military Doctrine*, edition 3 (2012) Department of Defence 5-1 <<http://www.defence.gov.au/adfwc/Documents/DoctrineLibrary/ADDP/ADDP-D-FoundationsofAustralianMilitaryDoctrine.pdf>> at 5 June 2015. See also Sir Ninian Stephen, opinion in Appendix 39, Volume 1, Defence Abuse Allegations Review (2012), see n 3 above.

treatment of men and women serving in the ADF, and does not provide impunity for criminal behaviour perpetrated by members of the ADF against other members.

I argue that international and comparative law can intersect with and influence military law and policy to improve gender equality within the ADF and improve the community impacts of ADF operations overseas. I argue further that the Commonwealth Parliament should insist on such an approach and appoint independent gender advocates to monitor progress through legislation. New legislation should mandate that gender equality is fundamental to achieving the mission of the ADF as a foundational Australian public institution. A case study of the ADF response to the Defence Abuse Allegations Review¹¹ which covers gender-based abuse of both women and men, and the Broderick reviews which focuses on the treatment of women in the ADF,¹² is examined in this light. If this legal intersection does not occur, the ADF and successive governments will continue to respond to gender abuse in an ad hoc manner laboring under what I term the ‘rotten apple delusion’ and ‘wait out’ reformist impulses.¹³ The ADF should embrace parliamentary scrutiny and accept external monitoring from independent gender equality advocates.

1.1. Structure

Part One outlines very briefly the relevant international, comparative and domestic law which I argue should be framing these reforms. International law includes Australia’s obligations under the Convention for the Elimination of all forms of Discrimination against Women (CEDAW)¹⁴ incorporated into the *Sex Discrimination Act 1984 (Cth)* and the *Criminal Code Act 1995 (Cth)*; as well as other international human rights obligations such as the right to privacy, personal integrity and family life. Implementation of these obligations are also set out in the policy framework the *National Plan to Reduce Violence against Women and their Children 2010 – 2022* (Commonwealth of Australia, 2012).

¹¹ Rumble et al, above n 3.

¹² Elizabeth Broderick et al., *Report on the Review into the Treatment of Women at the Australian Defence Force Academy: Phase Two*, Australian Human Rights Commission, Sydney (2012).

¹³ See, eg, Geoffrey Barker, ‘Let the Courts Decide on Defence Abuses’, *Australian Financial Review*, 27 July 2012.

¹⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981 (hereinafter CEDAW)).

A section on comparative law looks at measures being undertaken by Germany and United Kingdom to the same gender equality and sexual assault issues Australia is facing. Relevant domestic law includes administrative law, criminal law,¹⁵ military justice,¹⁶ and Defence Instructions and regulations.¹⁷

I also outline Security Council resolutions¹⁸ implemented into policy (but not legislation) by the introduction of the Australian National Action Plan on Women, Peace and Security (Commonwealth of Australia, 2012). These apply to any overseas operations the ADF undertakes, especially peacekeeping and emergency or disaster response. When the members of the ADF are deployed on a mission to restore international peace and security under Security Council authorisation, they are required to understand the security threats to the female population and incorporate the perspectives of women into peace processes to ensure sustainable security responses. The focus of the Women, Peace and Security agenda of the UN is the full participation of women as important security actors.¹⁹

The gender challenges for Australia's military institutions were made clear in the 2011-2012 'culture reviews' of the ADF, outlined below. The Defence Minister Stephen Smith ordered these reviews to examine systemic issues arising out of the so-called 'Skype scandal' described below. Part Two examines the outcomes of these 'culture' reviews, notes the proposal to remove restrictions for women on frontline combat, and charts the implementation of the reforms up until March 2013.

Part Three argues the case for the Australian military to undertake law and policy reform to progress a gender equality agenda, and examines what the obstacles to lasting reform might be. The ADF may enact a raft of administrative and policy reforms in response to past scenarios. However, there has not yet been a commitment to women's rights as fundamental to the mandate of the ADF. I call this the 'rotten apple delusion', explored further below,

¹⁵ *Criminal Code Act 1995* (Cth).

¹⁶ *Defence Force Discipline Act 1982* (Cth).

¹⁷ See especially *Defence Instruction (General) PERS 35-4, Management and Reporting of Sexual Offences* (2004); *Defence Instruction (General) PERS 35-3, Management and Reporting of Unacceptable Behaviour*, (2009).

¹⁸ See also *Charter of the United Nations* ch VII.

¹⁹ See also Security Council Report, *Third Cross-Cutting Report on Women Peace and Security*, April 2013, <<http://www.securitycouncilreport.org/cross-cutting-report/women-peace-and-security-sexual-violence-in-conflict-and-sanctions.php>>, at 22 April 2013 at 16 June 2015.

although I do note some progress in attitudes expressed by ADF leadership in 2013. The impulse for reform was forced on the ADF by media, political leadership and long-term advocacy. I analyse what internal motivations might strengthen reform efforts for the future, but conclude that it is up to the Federal Parliament to force a long-term accountability for gender diversity and accountability for gender abuse on the ADF.

Part I: Relevant law and policy

The Defence Reviews have proceeded for the most part as if international law does not exist, or has nothing to say about women or gender-based abuse in the ADF. Similarly, the national policy framework on violence against women was also completely overlooked.

International and Comparative Law

The most wide-ranging of the international human rights treaties devoted to women is the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the UN General Assembly in 1979 and now with 186 state parties (but with many states making serious reservations to certain provisions).

Australia signed CEDAW at a special signing ceremony in Copenhagen at the UN World Conference for the Decade of Women on 17 July 1980, sending a strong delegation of experts led by Robert Ellicott (Minister for Home Affairs in the Fraser Government). The treaty then entered into force in September 1981. After a long consultation period with the States and Territories, Australia ratified the treaty on 28 July 1983, but made some reservations,²⁰ one relating to defence personnel. The revised treaty in 2000 read:

²⁰ Including the ‘federalism’ declaration Australia makes to most international treaties. Australian practice is to make a short ‘federal declaration’ on ratification of treaties where it is intended that the States will play a role in implementing the treaty. The CEDAW reservation follows the sample declaration attached to the Principles and Procedures for Commonwealth–State Consultation on Treaties: ‘Australia has a Federal Constitutional System in which Legislative, Executive and Judicial Powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise.’

*The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties.*²¹

Even with these reservations, Australia's ratification of CEDAW became part of the intense domestic and partisan debates that affected the passage of the *Sex Discrimination Act 1985 (Cth)*.

In 2000, Australia removed a previous exemption in the legislation in respect of women in Australian Defence Force combat-related employment areas through an amendment to the *Sex Discrimination Amendment Act 1995 (Cth)*. Almost 90 per cent of all employment areas in the Australian Defence Force were made open to women, the exemptions being areas of 'combat duties' where the duties required a person to commit, or to participate directly in the commission of, an act of violence against an adversary in time of war. As the new combat positions phase in, presumably Australia can withdraw the reservation altogether as no longer applicable.

The Convention contains a broad definition of discrimination in Article 1, covering both equality of opportunity (formal equality) and equality of outcome (de facto or substantive equality):

[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

²¹ This is the current text. On 30 August 2000, with effect from that date, Australia withdrew that part of the reservation which read: 'The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define "combat" and "combat-related" duties.'

The Convention requires states to take legal and other measures to ensure the practical realisation of the principle of sex equality.²² The Convention covers a broad range of areas where state parties must work to eliminate discrimination, including political and public life,²³ international organisations,²⁴ education,²⁵ employment,²⁶ health care,²⁷ financial credit,²⁸ cultural life,²⁹ the rural sector,³⁰ the law³¹ and marriage.³² By contrast, the *SDA* focuses primarily on participation in the formal paid workforce, rather than other aspects of life.

CEDAW allows for progressive realisation, but also requires results in securing substantive gender equality through a prohibition on direct discrimination under Article 2a. Article 4 allows for affirmative action, in the form of temporary special measures designed to accelerate de facto equality such as quotas in employment, education, financial services and politics to overcome historical barriers. The core organising principles of CEDAW are therefore equality, non-discrimination and state obligation. CEDAW obliges governments to take proactive measures to prevent sexual stereotyping and address violations of its terms.

In 1999, CEDAW was supplemented by an Optional Protocol. The Optional Protocol creates a mechanism allowing individual claims of violations under CEDAW to be made to the CEDAW Committee, and a procedure enabling the committee to initiate inquiries into situations of grave or systematic violations of women's rights. As of 2013, 104 states were party to the Optional Protocol. Australia finally acceded to the Optional Protocol on 24 November 2008 under the then Rudd Government, and Australian women could make complaints from March 2009.

CEDAW is not the only international law relevant to the rights of women in the ADF, as there are also norms which impact on operations. There are special protections for women and

²² CEDAW, above n 14, art 2.

²³ Ibid, art 7.

²⁴ Ibid, art 8.

²⁵ Ibid, art 10.

²⁶ Ibid, art 11.

²⁷ CEDAW, above n 14, art 12.

²⁸ Ibid, art 13b.

²⁹ Ibid, art 13c.

³⁰ Ibid, art 14.

³¹ Ibid, art 15.

³² CEDAW, above n 16.

girls under international humanitarian law (including the Geneva Conventions and the Rome Statute).³³

There is also increasing ‘soft law’ in the area of women’s rights at the United Nations. The Declaration on the Elimination of All Forms of Violence Against Women was adopted by the UN General Assembly in December 1993. The Beijing Conference for Women in 1995 adopted a Platform for Action. The Security Council has also issued a series of resolutions on women, peace and security, including Resolutions 1325 (2000) (peace building), 1820 (2008), 1888 and 1889 (2009) and 2106 (2013) (sexual violence in armed conflict).

This is not to say that the United Nations offers a perfect or even an adequate framework for the protection of women’s rights. The UN system is a product of elite diplomacy in which women are under-represented and, until very recently with the new agency UN Women, it lacked effective gender architecture.³⁴ Indeed, as Caroline Lambert states, the UN human rights treaty system ‘is a partial site of justice for women and a site of partial justice’.³⁵ It does, however, offer an international space in which to debate issues of gender equality and a set of standards to which state parties can be held to account. For these reasons, gender equality in the ADF should be measured by these standards.

Is the ADF as an institution ready to effectively address the gendered nature of conflict, to apply gender analysis to itself, and does it accept that challenge?³⁶ The *Australian National Action Plan on Women, Peace and Security* includes compulsory reporting requirements to

³³ See further: Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001)..

³⁴ The UN General Assembly agreed to the establishment of a new gender architecture at its last session of 2009.

³⁵ Caroline Lambert, ‘Partial Sites and Partial Sightings: Women and the United Nations Human Rights Treaty System’, in Sharon Pickering and Caroline Lambert (eds), *Global Issues, Women and Justice* (Federation Press, 2004) 165.

³⁶ There is almost no reference to women except for the need for more diversity in recruitment in the key strategic document Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030* (White Paper) (Defence Publishing Service, 2009).. In the new White Paper released in mid-2013, women are referred to in the context of personnel retention, but there is also reference to the National Action Plan on Women, Peace and Security. Department of Defence, *Defence White Paper 2013*, (Defence Publishing Service, 2013). See also Commonwealth of Australia, Australian National Action Plan on Women, Peace and Security 2012-2018, March 2012 <http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/aus_nap_on_women_2012_2018.pdf> at 15 January 2013.

government to improve the gendered response to peace and security challenges within our region and internationally. Combined with the *Pathway to Change* document, we therefore have internal and external criteria for measuring improved gender outcomes for the ADF.

Can Australia's military institutions respond to the interplay between public and international law on questions of gender equality? Or will the role of the ADF as an institution dwindle in social importance as women and men who do not conform to a limited notion of a 'warrior' withdraw their talent?

Part II: The Reform Impulse

Since 1995, there have been 13 substantial inquiries into sexual abuse, of which the Defence Abuse Allegations Review is the most comprehensive. Defence Minister Stephen Smith ordered 33 major reviews of the department since he took office in September 2010 at a substantial cost.³⁷ This chapter focuses on the Defence Abuse Allegations Review and subsequent taskforce, and the Broderick review (phase 2) as it relates to discrimination and sexual abuse. I note the range of reviews undertaken in 2011.

2011-12 Defence Reviews

On 11 April 2011 the Minister for Defence announced a series of wide-ranging reviews into aspects of ADF 'culture'. The Minister also announced a Review of Allegations of Sexual and Other Forms of Abuse in Defence to take complaints and assess whether there were credible complaints of abuse which had not been dealt with.³⁸ All reports are final. The only outstanding action is the post-Review Taskforce led by Len Roberts-Smith QC.³⁹ The reports include:

³⁷ Ian McPhedran, 'Defence Reviews Tally \$20m and Rising', *The Adelaide Advertiser*, 16 January 2012.

³⁸ Smith, Stephen, 'Sex Discrimination Commissioner to Lead Review of the Australian Defence Force Academy and the Australian Defence Force' (Press Release, 11 April 2011) <<http://www.minister.defence.gov.au/2011/04/11/sex-discrimination-commissioner-to-lead-review-of-the-australian-defence-force-academy-and-the-australian-defence-force/>> at 30 January 2013.

³⁹ The Taskforce website is available at <http://www.defenceabusetaskforce.gov.au/Pages/default.aspx>, accessed 30 January 2013.

- Report of the Review of Allegations of Sexual and other forms of abuse in Defence⁴⁰
 - Review of Personal Conduct of ADF Personnel⁴¹
 - Review of the Use of Alcohol in the ADF⁴²
 - Review of Social Media and Defence⁴³
 - Review of the Management of Incidents and Complaints⁴⁴
 - Review of Employment Pathways for APS Women in the Department of Defence⁴⁵
- Review into the Treatment of Women in the Australian Defence Force Academy (Phase 1 and Phase 2)⁴⁶

The Minister called these reviews in response to two incidents in 2011, one related to the Australian Defence Force Academy (ADFA), and one relating to a Royal Australian Navy vessel, the HMAS Success, outlined in brief below. There have been subsequent incidents in

⁴⁰ Rumble et al, above n 3. As noted, on 11 April 2011 the Minister for Defence Stephen Smith announced an external review of allegations of sexual and other forms of abuse that were raised following the Australian Defence Force Academy ‘Skype’ incident. Three lawyers were engaged by the Minister; Dr Gary A Rumble, Ms Melanie McKean and Professor Dennis Pearce AO, then with law firm DLA Piper. The remit was to review each allegation methodically and at arm’s length from Defence to make recommendations to the minister and secretary for further action. Key events were as follows:

- 11 October 2012—Volume 1 of the Report submitted- General Findings and Recommendations and the first tranche of Volume 2 in relation to Individual Allegations.
- 7 March 2012—the Minister announced the release of redacted extracts of Volume 1: Facing problems of the past - General findings and recommendations.
- 17 April 2012, the Minister announced he had received the final tranche of Volume 2 of the Report - Individual Allegations.
- 14 June 2012—the un-redacted Executive Summary to the Review Team's Volume 1 Report became public under Freedom of Information provisions
- 10 July 2012—the Final Report of Phase 1 of the Review of Allegations of sexual and other abuse in Defence was released.
- 26 November 2012—the Minister for Defence announced the Government’s response to the Review. Volume 1 and the Supplement to Volume 1 included some ‘findings’, broad recommendations and identified systemic issues for Phase 2 consideration. Volume 2 made initial assessments on all of the specific 1100 or so allegations from around 775 before the Review and made thousands of recommendations on specific allegations (as laid out in the Explanatory Material for Volume 2 which is appended to Supplement to Volume 1).

From the Minister’s March 2013 letter to the Senate Committee and after evidence of Roberts Smith, it seems that the Government did not accept or reject any of the Review’s Volume 1 or Volume 2 findings and did not accept or reject any of the recommendations. Everything the Review ‘found’ and all systemic issues identified and all recommendations made have been transferred to DART.

⁴¹ Orme, above n 4.

⁴² Margaret Hamilton, *The Use of Alcohol in the Australian Defence Force – Report of the Independent Advisory Panel on Alcohol* (Defence Publishing Service, 2011).

⁴³ George Patterson Y&R, *Review of Social Media and Defence* (Defence Publishing Service, 2011),

⁴⁴ Geoff Earley, (IGADF), *Review of the Management of Incidents and Complaints in Defence, Including Civil and Military Jurisdiction: A Report by the Inspector General Australian Defence Force* (Defence Publishing Service, 2011).

⁴⁵ Carmel McGregor *The Review of Employment Pathways for APS Women in the Department of Defence* (Department of Defence 2011).

⁴⁶ Broderick, et al, above n 12, and Elizabeth Broderick et al, *Report on the Review into the Treatment of Women at the Australian Defence Force Academy: Phase One*, Australian Human Rights Commission, Sydney (2011).

both sites. There has subsequently been a Gay Hate Facebook page incident as well, where serving gay members of the ADF have been the subject of disturbing posts, and have also received death threats.⁴⁷

The Skype incident

In April 2011, a female cadet (known only to the public as 'Kate') was allegedly filmed without her knowledge having sex with a fellow cadet, Daniel McDonald.⁴⁸ The act was broadcast on Skype, an internet-based equivalent to telephone/video conferencing, to a group of cadets in a nearby room.

The following facts were contained in her statement in the ACT Magistrate's Court, leaked to the media and reported. After returning to her room, the female cadet discovered a message on her Facebook site. "The content of the message stated, 'I'm about to root a girl n(sic) and have a webcam set up to the boys in a nother (sic) roomwin?'. " Shortly after, the statement details, McDonald told the woman "someone else must have posted it as a joke".

On 1 April, the Australian Defence Force Investigative Service (ADFIS) allegedly told the cadet she had been filmed and broadcast. The cadet took her story to the media, namely, Channel 10, allegedly after being told the men would face minor disciplinary conduct. It is unclear from the public record, but appears that the incident was referred to the Australian Federal Police (AFP) who initially did not find an offence on the facts. How ADFA's disciplinary response proceeded was not public, but it was publicized that the female cadet also faced disciplinary offences, unrelated to the incident.

The then Vice Chief of Defence Force tasked Mr Andrew Kirkham QC to undertake an Independent Inquiry into the ADFA management of the so called Skype Incident of March

⁴⁷ ABC TV, Four Corners Report, March 2013

⁴⁸ See for example, media reportage by Fairfax press: <http://www.theage.com.au/national/women-in-uniform-have-advantage-20110801-1i8iz.html#ixzz1U4Uc3aSV>, (accessed 4 August 2011), and <http://www.smh.com.au/national/adf-cadets-friend-with-benefits-claim-20110429-1e07z.html#ixzz1U4VZjQtd> (accessed 4 August 2011).

2011 and its aftermath ('the Kirkham Inquiry'). The Minister responded on 7 March 2012, clarifying several allegations, but the report was not released.⁴⁹

McDonald was subsequently arrested by the AFP and faced the ACT Magistrates court on charges of using a carriage service to cause offence and an act of indecency. Fellow cadet Dylan De Blaquiére faced one count of using a carriage service to cause offence. Both were granted bail. As of August 2013, McDonald had returned to ADFA, 'Kate' had not but stayed with Defence at a Queensland base, and De Blaquiére had returned home to South Australia. Dylan De Blaquiére and Daniel McDonald faced a jury trial in the ACT Supreme Court in August 2013, both charged with using a carriage service in an offensive manner. McDonald was also accused of committing an act of indecency on the young woman, who was then aged 18.⁵⁰ Both were found guilty in late August 2013 and were each sentenced to 12-month good behaviour bonds (McDonald two, Blaquiére one). Defence terminated McDonald's employment in October citing that his conduct was 'inconsistent with the values of the Australian Army and the standards expected of a member of the Australian Defence Force'.⁵¹

Other aspects of the case were dealt with by other parts of the Culture Reviews, including the incident itself, and the effects of 'binge drinking' and the impact of social media on unacceptable conduct within the Defence environment.

This incident raised sexual assault issues particular to more 'closed' facilities within Defence, especially those with higher proportions of younger people, such as training institutions like ADFA and ships. Another is the interaction between civilian authorities and Defence processes, with the possibility of amplification of difficulties or confusion over the pathway to redress for victims of sexual assault or other violations. Questions raised included:

- What is the outcome for ADF members who seek to complain outside the internal Defence system?
- What are the incentives and disincentives of the current system viewed from the victim/survivor's perspective?

⁴⁹ Stephen Smith, 'Minister for Defence – Outcomes of the Kirkham Inquiry' (Press Release, 7 March 2012).

⁵⁰ Louis Andrews, 'ADFA Skype Scandal Trial Set', *Canberra Times*, 28 February 2012.

⁵¹ Department of Defence, 'Statement on the termination of service of former ADFA cadet' (Press Release, 9 November 2013).

- What are the physical and mental issues for victims and how effectively are their needs addressed?
- What are the duties or responsibilities of ‘bystanders’ or whistleblowers in these situations?

Another theme was how members of the ADF understand and implement Defence standards and values, both expressed clearly or exemplified by their leaders, for example ‘unacceptable conduct’, keeping the team strong or ‘keeping mates safe’, and what the civilian community might understand these values and standards to mean in practice.

None of these discussions were held with external stakeholders to the ADF, and none seem to have been resolved as of 2015.

Report of the Review of Allegations of Sexual and other forms of abuse in Defence

As noted, on 11 April 2011 the Minister for Defence Stephen Smith announced an external review of allegations of sexual and other forms of abuse that were raised following the Australian Defence Force Academy ‘Skype’ incident.

The Review received allegations from over 1,000 people. Thousands more have since been received by the Roberts-Smith Taskforce, which in April 2013 imposed a final deadline. The Review identified a range of allegations from 775 sources which fell within the Review’s Terms of Reference, and found the overwhelming majority of the allegations to be plausible. These plausible allegations dated from 1951 to 2012, and involved minors, and both women and men. The Review also found that ADF environments typically have factors which indicate a high risk of abuse occurring’ (Finding 1). The Review also found present risks to the operational capability of the ADF:

The apparent failure of Defence to call to account perpetrators of abuse and/or mismanagement of allegations of abuse in the past carries risks for Defence now because some of those persons may be in positions of senior and middle management within the ADF (Finding 5).

The Minister did not pass the report on to the Secretary of the Department of Defence, contrary to the terms of reference of the Review,⁵² but otherwise broadly accepted most the Review's findings. The Government response included the establishment of the further Taskforce as noted, as well as a parliamentary apology to be offered by the Defence Minister, access to a capped compensation scheme for individual claims (\$50,000 maximum), and a free telephone hotline.⁵³

The independent Taskforce led by Mr Roberts-Smith QC was given responsibility for liaising with those who have made allegations of abuse to determine an appropriate response in individual allegations, which can include:

- restorative justice/conciliation processes where a victim and alleged perpetrator are brought together in a facilitated process;
- referral to counselling (with the Taskforce being funded to provide counselling services beyond those generally available to Defence personnel or veterans) and health and other existing services;
- compensation, to a maximum of \$50,000;
- referral of appropriate matters to police for formal criminal investigation and assessment for prosecution; and
- referral of appropriate matters for disposition by the military justice system or other Defence process (for example, considered under the Public Service Act).

The Taskforce will also consider if further investigation through a new Royal Commission is required into particular matters identified in the Report of the Review Team, in particular in relation to ADFA as outlined above and in relation to alleged events at HMAS Leeuwin in the 1960s and 1970s.

⁵³Stephen Smith, 'Minister for Defence – Government Response to the Review into Allegations of Sexual or Other Forms of Abuse in Defence', (Press Release, 26 November 2012) <<http://www.minister.defence.gov.au/2012/11/26/minister-for-defence-government-response-to-the-review-into-allegations-of-sexual-or-other-forms-of-abuse-in-defence/>> at 12 January 2013.

The Taskforce will operate for a year, unless a longer period is required, and at its conclusion report to Parliament through the Minister for Defence. It is already clear that the Taskforce will require an extension of time.

Broderick Review into the Treatment of Women in the ADF

The outcomes of the Broderick Reviews were much more positive in governance and accountability terms, and the Sexual Misconduct Prevention and Response Office may be the brightest legacy of the entire exercise for the future. The Minister announced on 26 November 2012 that Defence had accepted all 21 recommendations from the phase 2 report of the Broderick Review into the Treatment of Women in the ADF, six in principle and 15 in full.

Key measures to be implemented include:

- establishing a dedicated Sexual Misconduct Prevention and Response Office to coordinate timely responses, victim support, education, policy, practice and reporting for any misconduct of a sexual nature, including sexual harassment and abuse;
- Implementing restricted reporting, so that personnel can make confidential reports of sexual harassment, sex discrimination and sexual abuse (which was also recommended by the Defence Abuse Allegations Review);
- introducing Waivers for Initial Minimum Provision of Service and Return of Service Obligations for victims of sexual assault/ harassment, so they can discharge from the ADF expeditiously and without financial penalty;
- Increasing diversity on promotion boards and selection for most senior positions;
- Introducing growth targets for recruiting women; and
- Producing an annual 'Women in the ADF' report to report on implementation of the Reviews' recommendations and related initiatives.⁵⁴

It is clear that if both the intent and the recommendations of both the Defence Abuse Allegations Review and Broderick reviews were fully implemented, gender equality outcomes would have a much stronger governance footing in the ADF.

⁵⁴ Smith (Press Release, 26 November 2012), above n 53.

Part III: Implementation

Combat roles: revolution or red herring?

The headline outcome in the media was the removal of sex barriers to direct combat roles announced on 27 September 2011, although this was not the actual issue under the political microscope.⁵⁵ On 7 March 2012, the Minister for Defence, Secretary of Defence and the Chief of the Defence Force jointly announced the response to reviews into aspects of Defence and Australia Defence Force Culture and released *Pathway to Change - Evolving Defence Culture*.

Allowing women to undertake combat roles from which they were previously barred may be considered an important step for equal opportunity in a constitutional and citizenship sense, even if feminist and other opinion was divided over the issue.⁵⁶ That proposal is not the focus of this chapter however, as here the focus is on attitudes to governance, particularly accountability for violations of women's rights, as well as the incorporation of sources of law that encourage gender equality.

The debate over frontline combat roles has been going on for at least a decade. Indeed, it could be argued that agreeing in 2011 to the phased reforms for women in direct combat over five years were employed as a red herring. Dealing with substantial gender equality outcomes within the ADF as an organisation, and particularly the prevention of sexual assault within the rights framework offered by international law will be very challenging for the ADF. Allowing women access to frontline combat is not a substitute for these more structural reforms. It still remains to be seen how the comprehensive recommendations from these suite of reviews will be implemented by the Government and ADF's response, set out in the document *Pathway to Change*.⁵⁷

⁵⁵ See, eg, Mark Dodd, 'Combat roles offered to women', *The Australian*, 12 April 2011. Michelle Smith, above n 38; Barker, Geoffrey. 'Defending Defence Equity', *Inside Story*, 28 September 2011. Jeremy Thompson, 'Combat 'Too Dangerous' for Female Soldiers', ABC News, 12 April 2011. .

⁵⁶ See also Anne Summers, 'The Lady Killers: Women in the Military' *The Monthly*, December 2011-January 2012; and Natalie Sambhi, 'Why I Want to Serve on the Front Line, Despite Challenges for Women at War', *The Conversation*, 2 October 2011.

⁵⁷ Department of Defence, *Pathway to Change: Evolving Defence Culture: A Strategy for Cultural Change and Reinforcement*, (Defence Publishing Service: Canberra, 2012). See also Susan Harris Rimmer 'Gender Issues in

For most Australians, a more convincing moment was the video footage of the Chief of Army David Morrison in July 2013, which has since had over 1.3 million views. He was telling members of the so-called 'Jedi Council', senior officers who had shared footage of sexual encounters online without the women's knowledge. Eight soldiers have been suspended, and one convicted.

Those who think that is ok to behave in a way that demeans or exploits their colleagues have no place in this army...If that doesn't suit you, get out.⁵⁸

180 ADF personnel were sacked in 2014 for abuse related offences, most from the army. This did seem to the public to be a higher level of accountability for such offences but also linked to the personal leadership of Morrison, who has now retired.

Part Four: Modest aspirations

Other jurisdictions have made an effort to incorporate human rights standards and the rule of law into their military standards, aligned to national policy frameworks. For example, the German Federal Ministry of Defense Chief of Staff, General Harald Kujat issued a command and control order for superiors 'Dealing with Sexuality' on 20 December 2000 on Bundeswehr, Berlin.⁵⁹

It begins: '[t]he armed forces are subject to the following principles of law' and elaborates that a 'person's private and sexual life is part of his private sphere and is thus protected by the constitution'.⁶⁰ It then states that '[e]very person has the right to sexual self-determination and the right to be free of discrimination on the grounds of sex or sexual orientation'.

the ADF: The Other Shoe Drops', *ASPI Strategist* blog, 15 November 2013, available at <http://www.aspistrategist.org.au/gender-issues-in-the-adf-the-other-shoe-drops/>.

⁵⁸ 'Chief of Army David Morrison Tells Troops to Respect Women or "Get Out"', ABC News, 14 June 2013 < <http://www.abc.net.au/news/2013-06-14/chief-of-army-fires-broadside-at-army-over-email-allegations/4753208>> at 16 June 2015.

⁵⁹ Command and Control Order (FÜ S I 4 - Ref. 35-04-09)

⁶⁰ The document cites Article 1 (1) of the Basic Law for the Federal Republic of Germany: Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority, as well as Article 2 (1), Basic Law: Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. Article 3 (1), Basic Law: All persons shall be equal before the law.

Also cited as binding is Article 8 ECHR: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this

Paragraph 4 states:

4. Special standards apply to the sexual conduct of male and female military personnel. These arise above all from the duty to act in accordance with the principles of comradeship (Section 12 Legal Status of Military Personnel Act - SG)⁵, the general obligations of conduct as soldiers (Section 17, SG)⁶ and from the obligation of superiors to act as examples (Section 10 SG)⁷.

5 Section 12 SG: The cohesion within the Bundeswehr mainly relies on comradeship. It places the obligation on all soldiers to respect the dignity, honor and rights of their comrades. ...This includes mutual recognition, consideration and respect of other views.

6 Section 17 SG: (1) The soldier shall maintain discipline and respect the superior's status both on and off duty.

(2) His conduct must reflect the good reputation of the Bundeswehr as well as the respect and trust placed in him as a soldier. ...

(3) ...

(4) To the best of his ability the soldier shall do anything he can to preserve or restore his health. He shall not willfully or grossly negligently tamper with his health.

7 Section 10 SG: (1) Superiors shall set an example in the way they conduct themselves and perform their duty.

(2) They have a duty to supervise their subordinates and are responsible for their discipline.

(3) They must look after their subordinates.

(4) Orders may be issued only for official purposes and only with due regard for **national and international law** and service regulations. (emphasis added)

right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, ...for the prevention of disorder or crime, for the protection of ... morals, or for the protection of the rights and freedoms of others; and Article 14 ECHR: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Another example is the establishment in the United Kingdom of a permanent Service Complaints Commissioner in 2006, discussed in the Defence Abuse Allegations Report at section 8.22.⁶¹ The Commissioner has a remit which covers any complaint made after 1 January 2008, to provide rigorous and independent oversight of how the complaints system is working and to report back to Ministers and to Parliament. The Commissioner also provides an alternative point of contact for Service personnel, or someone acting on their behalf, such as a member of their family, a friend or MP, to raise concerns.

The Commissioner has a special remit to deal with unacceptable behaviour, including bullying, harassment, discrimination, victimisation and dishonest or improper behaviour. In these cases the Commissioner has to be kept informed by law about the handling of a complaint and the outcome. The Commissioner presents a public annual report to Parliament on how efficient, effective and fair the complaints process has been during the year. This role is being undertaken by the Independent Taskforce at present, but not in a permanent sense and the Taskforce is designed to wind up in 2013. Given how many complaints have been received by both the Defence Abuse Allegations Review Team and the Taskforce so far (729 complaints lodged by April 2015), it is clear that there is a demand for such a Commissioner.

The one aspect of comparative practice that Defence has taken on board was the recommendation of the Broderick review that a new entity be set up that takes reporting sexual misconduct out of the chain of command. The Sexual Misconduct and Prevention Office (SeMPRO) was launched in July 2013, and is explicitly informed by international practice on creating victim-centred complaint processes in military settings.⁶²

Conclusion: The rotten apple delusion

The ADF has consistently been resistant to the idea of external accountability and independent inquiry, and also resistant to the concept that there may be something structurally wrong in the institution as opposed to a few ‘rotten apples’.

⁶¹ See also Service Complaints Commissioner for the Armed Forces website, <http://armedforcescomplaints.independent.gov.uk>.

⁶² Ballard, Angela, *Sexual Assault Prevention and Intervention in a Military Environment*, Winston Churchill Memorial Trust of Australia, Canberra (2009).

Dr Gary Rumble, one of the authors of the Review, stated in March 2013 that he held deep concerns that victims might give up on the process, and perpetrators might wait out the public attention.⁶³ The Report itself is frank about the resistance it received in conducting the review:

During the course of this Review, the Review members have heard a lot about the ADF's need to maintain operational capability and about 'moving forward'. Central aspects of the ADF's operational capability are the loyalty of serving men and women to the ADF and broad community confidence in the ADF.

It was, therefore, not a surprise to the Review members when we encountered resistance in our discussions with current and former leaders of the ADF when we tried to take them back to discuss past problems of abuse and what might be done now to respond to the ongoing effects of that past abuse.

At one level there has been hostility simply because we outsiders—civilian lawyers—have been questioning 'their' ADF on the particularly sensitive issue of abuse by members of the ADF inflicted on other members of the ADF.

At another level there is a concern that a report by the Review drawing attention to past abuse in the ADF could damage the ADF's current reputation and, thus, damage the ADF's operational capability. (Rumble et al 2012: 4)

Minister Smith has also made statements about the need for more robust cycles of parliamentary reporting and oversight by Parliamentary committee. This is a promising initiative, although Committees have often been far too deferential to ADF evidence in the past. A specific reporting focus on complaints now there is baseline data may prove very useful over time, as would a focus on CEDAW compliance in particular and human rights in general.

Many Defence leaders since the 1970s have talked about 'bad' or 'rotten' apples, peripheral to the overall success of Defence as an organisation, and unfairly focused upon by external

⁶³ 'Defence Abuse Report Author Savages Government', ABC News, 15 March 2013 <<http://www.abc.net.au/news/2013-03-14/defence-report-author-savages-government-commitment/4573892>> at 16 June 2015.

critics. The Grey report in 1996 took on this ‘rotten apples’ talk and responded that ‘the barrel was rotten’, in other words, that normal young Australians arrived at ADFA and the culture at the place affected them immediately with pressure to perform certain ritualised conduct.⁶⁴ The few bad apples response also ignores the consistent finding of many reports, listed in Chapter 6, Volume 1 of the Defence Abuse Allegations Review- that there is under-reporting. As there is under-reporting ADF leaders cannot be confident that they know the full picture.

There has been distinct resistance to acknowledging or admitting structural or systematic gender exclusion and violations of rights, and to acknowledging that ‘ADF environments typically have factors which indicate a high risk of abuse occurring’⁶⁵ as a modern example of a total institution, where the participation of women is low. Admittedly, many of these violations and exclusion are found in society outside Defence, as is clear through the current Royal Commission to investigate Institutional Responses to Child Sexual Abuse, established in January 2013.⁶⁶ But Defence cannot aspire to excellence in all other forms of endeavor and reputation, and not this area of crucial reputational risk, especially where it has itself accepted that diversity leads to better team decision-making and therefore more effective operational capability.

The pressure for the current suite of ADF reviews was political, media and socially driven by external factors. Defence would not have undertaken the culture reviews itself. Many of the key actors like Minister Stephen Smith (stepping down in the September 2013 election) and Commissioner Broderick could move on to new posts, or be without any post in the near future. None of the mainstream defence or foreign policy think tanks have engaged with the ‘culture reviews’ as crucial to operational outcomes. The good money would have to be on the current ADF leadership team waiting it out, or making small but highly visible concessions to particular senior women who accept the parameters of ad hoc reform.

⁶⁴ Bronwen Grey, *The Grey Report: Report of the Review into Policies and Practices to Deal with Sexual Harassment and Sexual Offences at the Australian Defence Force Academy* (1998).

⁶⁵ Rumble, Gary A., Melanie McKean and Dennis Pearce, *Report of the Review of Allegations of Sexual and Other Abuse in Defence: Facing the Problems of the Past, Supplement to Volume 1 and Volume 2* (2012), xxiii.

⁶⁶ See also the official website for the Royal Commission into Institutional Responses to Child Sexual Abuse, <http://www.childabuseroyalcommission.gov.au/Pages/default.aspx>

But maybe all of Australia's total institutions are receiving the message that it is much easier in a digital age to 'jump the walls'. Why not harness reform efforts to globally agreed standards of gender equality and suffer less the vagaries of the politics of the day? Why not accept the truth—Defence has not been 'uniformly' good at putting the rights of women at the centre of operational effectiveness, or gender equality at the heart of the values of a modern warrior. See rectifying this as a true test of leadership, because as Clare Burton states, 'discrimination issues are leadership issues first and foremost'.⁶⁷

Gender equality measures that focus on human resources may at least increase the relative number of women in the ADF and thus may start to remove one of the most significant abuse risk factors—being in a minority group. This could turn into a self-reinforcing positive spiral—gender equality increases the proportion of women in the ADF, which reduces the risk of women experiencing abuse in the ADF. The reduced incidence of abuse should encourage more women to enter and/or stay in the ADF and thus to further to raise the proportion of women to men, and so on in a virtuous spiral.

But addressing the structural gender issues that relate to both women and men in the ADF—this is the start of a long road. The ADF needs to accept that they need external accountability and independent advocacy to achieve gender equality.

⁶⁷ Burton, Clare. *Women in the Australian Defence Force: Two Studies*, Defence Publishing Service, Canberra, 1996.