



# *Learning from our Allies*

## Reforming the U.S. Military to Stop Sexual Violence

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# Sexual Violence in the U.S. Military



In 2010, the Department of Defense (DOD):

- Estimates more than 19,000 incidents of sexual assault occurred (52 per day).
- 3,158 military sexual assaults were reported.
- Only 529 cases went to trial.
- Only 52% resulted in court martial convictions.

# Sexual Assault Complaints



- In 2005, Congress mandated the creation of the Sexual Assault Prevention and Response Office (*SAPRO*) to “provide oversight, guidance and accountability of sexual assaults within the DOD.”
- *SAPRO* has no authority to create policy or influence process. Primary focus data collection and prevention.
- This year General Officer appointed as director, succeeding civilian predecessor.

# U.S. Military Reporting Procedures



Survivor can choose between two different reporting procedures:

- *Restricted reporting:*
  - Receive medical treatment and counseling.
  - Does not initiate investigation.
  - Intended to deal with hostile climate by ensuring anonymity and safety within the unit.
- *Unrestricted reporting:*
  - Receive medical treatment and counseling.
  - Disclosure triggers a report to survivor's chain of command who then has discretion in deciding whether to pursue criminal charges in response to allegations of sexual misconduct.

# Command Discretion and Influence



- Commander is primary investigator, fact finder and first adjudicator.
- The Manual for Courts Martial (MCM) directives and guidance.
- *A commander's authority is absolute.* Therefore any commander may unilaterally decide to not pursue an investigation, deny prosecution or prescribe other punishments.
  - In 2010, over 40% of sexual assault perpetrators were punished through Non-Judicial Punishments or other administrative actions.
  - In 6% of cases, perpetrators were given the option to “RILO” – resign in lieu of court martial.
- Decision can be countermanded by another commander.

# External Reporting: Equal Opportunity Complaints



- The DOD requires that all EO complaints are investigated in a fair, impartial, and prompt manner, and that all reports of investigation of formal complaints are reviewed for legal sufficiency.
- EO complaint flaws include:
  - Inadequate number of EO specialists.
  - EO can only make recommendations - no enforcement authority.
  - Personnel training deficiencies.
  - Lack of records retention.

# External Reporting: Inspector General Complaints



- IG independently investigates fraud, waste, and abuse (i.e. sexual assault or sexual harassment).
- IG is at liberty to chose how resources of department are used. 2011 GAO report critical of IG for not investigating sexual assault complaints.
- IGs can only make findings and recommendations.
- IG is at liberty to chose how resources of department are used. 2011 GAO report critical of IG for not investigating sexual assault complaints.
- Commanders receiving IG reports are free to delegate implementation of IG's findings and recommendations. The officer assigned to implement IG findings could be in the perpetrator's chain of command.

# External Reporting: Article 138 Complaints



- UCMJ ARTICLE 138: “Any member of the armed forces who believes himself wronged by his commanding officer may request redress.”
- Service members can make an official complaint about commander misconduct that is forwarded to the General Court-Martial Convening Authority.
- Response to the complaint is at the discretion of the command structure, which limits its effectiveness.
- Service members believe that they will be retaliated against. Thus, Article 138 complaints are infrequently submitted.

# External Reporting: Military Whistleblower Protection Act



- Prohibits reprisal (adverse personnel action) against “protected communication” regarding violation of a law or regulation with a Member of Congress or the IG.
- Does not reduce enormous professional and personal risks for the service member in speaking out – passed in 1988, yet hostile climate persists.
- Additionally, service members have a First Amendment right to make complaints to members of Congress.

# Independent Reporting: External Auditing Bodies



Inspector General of the Australian  
Defence Force



Canadian Force  
Grievance Board

- Complaint to the IGADF if:

- victimized, discriminated against or disadvantaged by filing a complaint.

- chain of command is perceived to be part of the problem/failed to address the problem.

- Composed only of civilians & independent from the chain of command.

- If complainant not satisfied with the decision, he/she may appeal to Federal Court.

# Independent Reporting: Ombudsmen



**Defence Force  
Ombudsman**

- Independent from the chain of command.
- Offer recommendation for a course of action to the appropriate decision maker or Parliament.



**National Defence and Canadian  
Forces Ombudsman**

- Independent from the chain of command.
- Not intended to be the first place a complainant turns, unless there is complaint mishandling.

# Independent Reporting: Human Rights Bodies



## Australian Human Rights Commission

- In 1990, HRC challenged ADF's discrimination policy after reviewing a complaint filed by a service woman discharged for being lesbian.
- November 1992: Australian Defence Forces lifted its ban on gay and lesbian soldiers.



## European Court of Human Rights

- *Findlay v. United Kingdom* (1997): U.K. military justice system violated plaintiff's right to an impartial trial.
- Led to changes in the U.K. military justice system that brought more independence to the process.

# Military Investigation



## Australian Defence Force Investigative Service

- Military counterpart to and works with the Australian civil police.
- Provides investigatory service for the Army, Navy, and Air Force to increase the professionalism and effectiveness of ADF policing.



## Canadian Forces National Investigation Service

- Own chain of command allows for investigations without fear of influence from any command element.
- Investigators that specialize in Sexual Assault.

# Prosecution



## Director of Military Prosecutions

- Statutorily independent and free from perceptions of command influence.
- Responsible for deciding which serious offenses will be prosecuted, and through which adjudicative process.



## Director of Military Prosecutions

- Military police can refer a charge to the referral authority independent of military commander.
- Decision making has been turned over to officials with legal training who do not hold the mantle of command.

# Military Courts



*Findlay v. UK (1997)*

- ECHR: British courts martial not sufficiently separated from chain of command to be considered impartial.
- The court found that non-legally-qualified military officers had too much influence over legal process.



*R. v. Généreux (1992)*

- Supreme Court of Canada: military tribunal not sufficiently independent to comply with requirements of the Canadian Charter of Rights & Freedoms.
- Canada altered the National Defence Act to create a new, independent judiciary within the military.

## Access to Civilian Courts



- Sexual assaults cannot be tried by a military prosecutor without the consent of the civilian prosecutor.



- When a sexual offense occurs in the military, prosecutor communicates directly with civilian authorities.

# Shortcomings of U.S. Military Adjudication



- UCMJ is not designed to administer justice. Allows commanders to enforce regulations to maintain good order and discipline.
- Manual for Courts Martial directs commanders to first consider the character and military service of the accused when conducting investigations and legal proceedings.
- Military judges are appointed by the Judge Advocate General of the appropriate armed service.
  - Judges serve without a fixed term at the pleasure of the JAG.
  - Promotions/reassignments of Judges depend on annual evaluations by senior officers.
  - Assignments subject to personal knowledge and desires of JAG.
  - Judges have no formal protections; subject to retaliatory removal anytime.

# Limited Access to U.S. Civilian Courts



- *Feres v. U.S. (1950)*: Government is not liable under the Federal Tort Claims Act for injuries to service members where the injuries arise out of or are in the course of activity “incident to service.”
- *Chappell v. Wallace (1983)*: rejected the notion that service members mistreated by superiors should be able to sue a federal official for a constitutional violation.
- *Salazar v. Heckler (1986)*, *Gabryluk v. U.S. Army (2009)*: Courts have uniformly rejected *Title VII* claims by female uniformed service members alleging discrimination and sexual harassment due to contradictory language between *Title 5* and *Title 10*.

# Recommendations



*Create an external review organization that deals with complaints of sexual misconduct. The external organization should have the following features:*

- Independence from the military chain of command.
- Jurisdiction should be broad.
- The organization should have both the authority to review questionable cases, impose penalties on commanders who mishandle cases, and refer such cases to civilian federal courts (DOJ) for prosecution.

# Recommendations

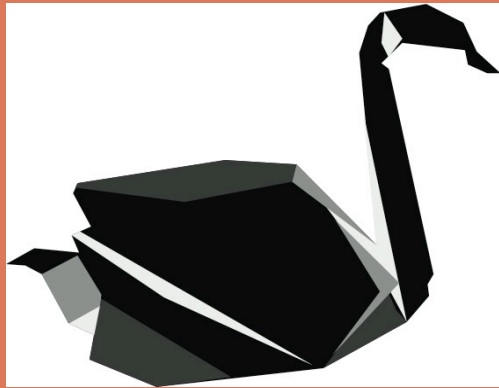


*Improve the independence and impartiality of the internal military justice system by:*

- Creating an investigatory body, staffed by personnel outside of the chain of command, with the duty to investigate alleged sexual offenses.
- Creating a director of military prosecutions who has independent and final authority to oversee prosecutions and refer cases to be tried by courts martial.
- Granting more independence to military judges.
- Revising the Manual for Courts Martial to remove biased language, and remove the investigatory burden from the immediate commander.
- Granting military prosecutors independence from the chain of command.
- Bolstering internal accountability with Congressional legislation that repeals the Feres doctrine.



# Service Women's Action Network



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