WAR-FIGHTING AND ADMINISTRATIVE LAW: DEVELOPING A RISK-BASED APPROACH TO PROCESS IN COMMAND DECISION-MAKING

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In June 2013, the Chief of Army, Lieutenant General David Morrison, AO, addressed the ranks of the Australian Army on YouTube, expressing anger and disappointment at the actions of a group of officers and non-commissioned officers – the so-called 'Jedi Council'. The allegations centred on the production and distribution of highly inappropriate material demeaning women across both Defence computer systems and the internet. Lieutenant General Morrison used strong language in his warning – there was '*no place*' in the Army for members who '*exploit and demean*' their colleagues. He stated that he '*would be ruthless in ridding the army of people who cannot live up to its values*'. At the time, three individuals had been suspended from duty pending an ongoing investigation, and another 14 individuals were directly implicated. A further 90 members of the Australian Defence Force (ADF) were considered to be on the periphery of the group.[1]

In November 2013, Army announced that the service of six members had been terminated as a result of these allegations. Three more terminations followed by the end of the year. Eight others were retained in the Army but received administrative sanctions.

Press coverage questioned the amount of time taken to take action in relation to these individuals.[2] Lieutenant General Morrison highlighted the difficulties he faced dealing with these cases expeditiously. In a speech in October 2013, Lieutenant General Morrison said in respect of the Jedi Council, that he '*bridled against legal restrictions and complicated processes that constrained his ability to protect both the victims of bad behaviour and the reputation of our Army*'.[3] Lieutenant General Morrison reiterated the same concerns a fortnight ago in a speech to the Supreme and Federal Court Judges Conference in Darwin, not to reject the proper application of law to the military, which is fundamental to the rule of law, but to highlight the conflict between trends towards greater regulation of process on the community's expectations of accountability and timeliness of decisions.

Lieutenant General Morrison's intention with respect to the individuals who engaged in serious misconduct in the Jedi cases was always clear. He sought to take action against them to end their military service. He made a conscious choice to pursue action via an administrative route rather than lay charges under the *Defence Force Discipline Act 1982.*[4] However, the process of investigating, initiating action, making decisions to terminate the service of nine members and waiting for these personnel to exhaust their internal merits review options took many months, consuming time and resources, including legal resources within the Department and also externally engaged advisors. The question is: How can there be such a difference between command intent, and what actually occurred?

Defence has recently emerged from a lengthy period of rolling reviews of a range of topics including ADF culture and military justice arrangements. This process has been more or less continuous since the Burchett review in 2001.[5] Each review introduced new measures

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and processes intended to guide command decision-making. However, after over a decade of piecemeal reform, commanders in the ADF face a labyrinth of instructions, policy and guidance on how to act and what to do in response to issues and incidents, much of it overlapping and not all of it consistent. The outcome has been layer upon layer of complexity and process as highlighted by Lieutenant General Morrison's response to the Jedi Council cases.

Defence is now re-writing its policy guidance for decision-making processes. The new approach will encourage commanders to make values-based decisions, and to adapt processes to the circumstances of a particular decision. Commanders will be asked to apply judgment and consider risks to both the organisation and individual ADF members when making decisions, and to apply processes that are adapted to those risks. The intent is to spend time and resources that are proportionate to the risks of any particular decision.

This paper will discuss some of the problems associated with Defence's history of cultural, organisational and legal change to command authority, and will outline how a risk-based approach to decision-making can balance concerns about abuse of power and unfair outcomes with flexible and proportionate processes.

Role and function of the Australian Defence Force

The mission of the ADF is to defend Australia and its national interests. The ADF serves the Government of the day and is accountable to the Commonwealth Parliament to efficiently and effectively carry out the Government's defence policy. The ADF is comprised of the Navy, Army and Air Force and its primary role is to defend Australia against armed attack. To fulfil this role the ADF must generate combat capability, not only for the direct defence of Australia, but also with a capacity to do more where there are shared interests with partners and allies,[6] and to support peacekeeping, humanitarian assistance and disaster relief operations worldwide.

Military service is unique. The breadth of the tasks and the authority to use armed force to achieve them demands that military service be understood for what it is: a non-contractual and unlimited liability on members to serve, to their deaths if necessary. It permits no union support or any real mechanism for industrial negotiation in relation to terms and conditions of employment. At its heart is the system of command, and the corresponding requirement to follow all lawful orders, which is the means by which the ADF instils the self-discipline in members to meet this liability of service at all times. Flowing from this is a statutory military disciplinary system to enforce compliance, which can include civilian incarceration as a punishment in the event of the most serious forms of misconduct or disobedience.

This command authority has its statutory basis within the *Defence Act 1903* (Cth). Decisions regarding appointment, promotion and employment within the ADF are also guided by extensive regulations made under that Act.[7] Understanding the scale of the Defence organisation in which these decisions are made is also important – in the most recent Defence Annual Report for 2012-13, the average full time funded strength of the ADF was around 56,600, plus 20,700 individuals in the Reserve who undertook paid work, plus 21,500 Australian Public Service personnel, including those employed within the Defence Materiel Organisation, and another 400 full-time equivalent contractors.[8] Personnel are deployed on 17 operations around the world,[9] including, until recently, combat operations in Uruzgan, Afghanistan. Importantly, all of these people are engaged in providing a service to the Australian public as a whole, which is quite a different thing from the model of service delivery to individuals in the community common to many other government agencies. This is the context within which military commanders make decisions.

Commanders do not eschew the role of law in the modern military. They are comfortable with the need to follow process and adhere to legal obligations across the spectrum of military decision-making, which stretches from the planning and conduct of operations around the world to the management of personnel in day to day duties on an Australian base. All of these decisions are assisted today by timely, relevant legal advice, often as an obligatory precursor to action as opposed to simply being an 'optional extra'. This is so even in the strictly operational realm of targeting and the use of force, and detention and interrogation of prisoners, in all of which detailed processes are followed before any decision to proceed is made, usually in highly compressed timeframes. The targeting decision-cycle, for example, involves complex assessments of casualty avoidance and collateral damage and incorporates a regime for executive / government approval in certain circumstances, although decisions may be required immediately. The process is demonstrably adjusted to the urgency of each decision.

In dramatic contrast, the Jedi Council cases highlight the protracted timelines prescribed in the process to obtain the involuntary discharge of an ADF member in the face of overwhelming evidence of misconduct. In these circumstances, an organisation that must, by definition, be agile and adaptable in the face of threat, has been encumbered with processes which are protracted and complex for commanders to navigate, and have given rise to hesitation and reluctance on the part of some to take action, because it is easier not to or because they fear disproportionately adverse consequences for making the 'wrong' decision, including the risk of legal challenge.

So what has led Lieutenant General Morrison to make these surprising public statements, and, for our purposes, what does this have to do with administrative law?

Command

As a basis for decision-making, command is *sui generis*. The ADF defines command as:

> The authority that a commander in the military service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of organising, directing, coordinating and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale and discipline of assigned personnel.[10]

Therefore, in military doctrine, commanders have an onerous responsibility and are held accountable for their actions and their inaction.[11]

Historically, the prerogative of command was largely unfettered and included power to dismiss at pleasure.[12] However, the reality for military forces around the world is that command authority has been increasingly limited by the introduction of policy and legislation. In Great Britain, military discipline arrangements were radically reformed during the 19th century. A series of acts was implemented in order to provide military personnel with a wider range of procedural protections and to align military discipline more closely with the societal standards of the day for criminal justice processes. The ADF inherited this as the basis for its military law in the early 20th century.[13]

The trend of limiting the absolute nature of command power continued, with the emergence of fetters on other elements of command decision-making beyond disciplinary processes. These limits have imported concepts and policy approaches that reflect growth in administrative law and the exercise of public power more broadly in Australia, particularly since the 1970s. These have now permeated much of the operational as well as the peacetime sphere of Defence activities. For example, the highly risk averse decision to remove soldiers from Afghanistan when they have engaged in misconduct or they present

an operational risk because they are ineffective, involves notice periods, written submissions (usually with the benefit of legal assistance to the soldier), written decisions and, more often than not, opportunities for review before they are returned to Australia. After their return, they are able to seek review through a range of internal and external channels, even though the decisions may have no implications for their careers, other than to deprive them of some deployment allowances. The only adjustment to circumstances is that the initial process can be (but will not always be) completed more quickly than it would be at home.

The curtailment of command discretion on operations reflects the trend of the last ten years in command decision-making generally. A number of high profile incidents, followed by external reviews, has fostered this trend, along with a community and Parliamentary desire to ensure that command authority is tempered by safe-guarding the reasonable expectations of individual members.

History of Defence review and reform

The starting point for the continuous cycle of review and procedural reform in military justice and decision-making is difficult to identify. In 1998, the Defence Force Ombudsman undertook an own motion investigation into ADF responses to serious sexual offences.[14] In 1999, the Joint Standing Committee inquired into the conduct of military inquiries and ADF discipline processes.[15] Taken together, the effect of these two reviews was to introduce the principles of procedural fairness into ADF decision-making, and to start an organisational move towards standard use of formal inquiry processes.

The Burchett inquiry,[16] as well as a Joint Standing Committee report,[17] followed allegations of brutality and 'rough justice' within the Army's parachute battalion (3 RAR) in 2001, which focused on the use of bastardisation, mistreatment and intimidation as a means of disciplining subordinates during the period 1996 to 1999. Mr Burchett made many recommendations, among them the appointment of a Military Inspector General, with broad powers to oversee military justice. This was implemented with the creation of the statutory office of Inspector General ADF.[18]

The Burchett report also expressed the opinion that the exercise of command power by a superior commander to remove an officer from a position of command could hardly be thought to exist for everyday use. Where there was no true urgency, Mr Burchett considered that the principle of procedural fairness should have priority over the prerogative of command.[19] Mr Burchett's approach is evident in the 2003 introduction of the '*Guide to Administrative Decision-Making'*.[20] This manual applied, for the first time, the general concept of procedural fairness to command decisions in Defence. It also explicitly acknowledged that, in many cases, the standards and procedures it prescribed were *more* onerous than those imposed by law.[21] This makes the *Guide* unusual even in the context of a general trend towards increasing administrative guidance across the public sector aimed at mitigating risk.

Defence had earlier published the '*Administrative Inquiries Manual'*.[22] This *Manual* is the archetypal risk averse approach. The guidance includes a table illustrating the types of incidents where a commander should consider initiating an inquiry, and detailed guidance on setting up inquiries ranging from a simple, non-statutory fact-finding exercise through to a Board of Inquiry, which would exercise Royal Commission type powers. While the guidance was practical, easy to read and included templates and examples, it also led to a culture of 'templated' responses. The tendency has been to conduct an inquiry in response to incidents, without any real analysis of what the information requirements actually are, in order to support the kinds of decisions that might need to be made.

The culture of templating and prescriptive guidance was complemented by the creation of a myriad of Defence-specific complaint-handling mechanisms. This particular feature of Defence reform has been highlighted in a review of the ADF Redress of Grievance System, conducted jointly by the Department of Defence and the Defence Force Ombudsman in 2005.[23] The review commented that this rapid increase in complaint avenues vastly added to the complexity of managing and administering complaints in Defence. The effect has been that very few complainants and managers appear to understand all of the available avenues, and many of the processes have the mandate to examine similar issues.

In summary, the procedures canvassed by the Ombudsman's review included the Defence Equity Organisation (1997), Complaint Resolution Agency (1997), the Army Fair Go Hotline (2001), the Defence Whistleblower Scheme (2002) and the Inspector-General ADF (2003). These were all established in addition to the statutory ADF complaint mechanism, redress of grievance, in Part 15 of the *Defence Force Regulations 1952*, which is based on the historic position that military members can complain to the Crown.[24] Additional avenues for complaint and investigation have since been created. Most recently, the Sexual Misconduct Prevention and Response Office (SeMPRO) was established in 2013, after Ms Broderick's report into the treatment of women in the ADF.[25] While not permanent, the Defence Abuse Response Taskforce has been established to assess and respond to historical allegations of abuse in Defence.[26]

Defence's review and reform, and the proliferation of subject specific complaint processes, has also been accompanied by broader whole of government efforts, such as the introduction of the *Public Interest Disclosure Act 2013* and amendments to the *Freedom of Information Act 1982* (Cth), the *Privacy Act 1998* (Cth), and the *Work Health and Safety Act 2011* (Cth). Meanwhile, judicial review in a range of contexts has continued to develop administrative law principles, the most expansive interpretations of which are, in turn, integrated into Defence policy. All of this has added multiple layers of complexity to Defence internal procedures.

Cumulative effect of review and reform: HMAS *Success* Commission of Inquiry and the ADFA Skype Incident

What this lengthy history shows is the cumulative effect of single issue military justice reviews on the coherence and complexity of decision-making processes across the ADF. The result is a system which has been subject to well-intentioned but piecemeal adjustments in response to high profile incidents, to such an extent that it has lost internal coherence and 'stovepipes' information and complaints by subject matter without consideration of the effects on individuals and the organisation.

This was the problem confronted by Mr Gyles in his 2011 Commission of Inquiry in relation to HMAS *Success'* Asian deployment from March to May 2009.[27] The allegations of misconduct were numerous, but focussed on complaints about sexual targeting, a reported ledger of sexual exploits and impunity onboard the ship. The Commanding Officer landed three sailors at Singapore and sent them home to Australia. In part three of his report, Mr Gyles questioned whether the many reforms connected with military decision making in the last 10 to 15 years had over-reached their mark, asking the question 'has the pendulum swung too far towards individual rights?' He reflected that the failure by individuals in the command structure could reflect a more general breakdown in respect for rank and command, accompanied by reluctance on the part of those in command to exercise that command.[28]

In particular, Mr Gyles suggested that ADF policy required too much natural justice to be afforded in some administrative inquiries, noting that procedures that expand or apply

natural justice rights for individuals come 'at considerable cost. It ties up the time of those in command and affects their ability to act decisively'.[29] Somewhat controversially, he adopted an expansive view of the extent to which he believed that ADF command decisions were immune from administrative law review.[30] In essence, he asserted that command decisions (based as they are on prerogative power) are not subject to judicial review. Finally, he observed that the existence of multiple internal merits review avenues for ADF personnel is 'resource intensive and presents an opportunity for "gaming" the system and for vexation of the target'.[31]

Mr Gyles' report was a significant turning point for Defence. His observations and recommendations turned attention to the need for a comprehensive overhaul of ADF and Defence systems. However, before significant work could be done, the revelation of the so-called 'Skype' scandal brought the issues Mr Gyles had identified into sharp relief.

The 2011 Skype case attracted national media attention and resulted in criminal convictions for two cadets who had broadcast footage of a sexual encounter over Skype to other cadets. The Government's response was the initiation of six cultural reviews into various issues as well as the DLA Piper Review to examine historical allegations of abuse.[32] The Defence response to these reviews was the *Pathway to Change* strategy.[33] One of the more significant goals was the commitment to simpler and more effective processes, with the broader aim of improving accountability for both unacceptable behaviour by individuals and for those who manage and respond to unacceptable behaviour. Moreover, the report emphasised the need for Defence to accept that Defence personnel, in light of the heavy responsibilities they carry, be held to the highest standards of behaviour.[34]

Framing the issues post-Skype and *Pathway to Change*: The Re-thinking Systems Review

Therefore, in framing the challenge for Defence administrative law in 2014, the views of Lieutenant General Morrison, Chief of Army, carry significant weight.

> I have been struck at how legalistic our culture has become. This of course reflects a wider societal trend. But we have reached the point where it may be about to seriously impede the effectiveness, cohesion and discipline of the Armed Forces.
>
> Quite frankly, as Chief of the Army, I have been restrained from removing some people from the Army whose conduct, if replicated in any reputable civilian organisation, would have seen them removed from their office and walked to the door by a security guard. That is no exaggeration.
>
> I have little doubt that the cumulative effect of legal change incrementally introduced by Parliament in circumscribing my ability to respond to these incidents would astonish the public, if they understood that generally the delays and diluted responses are forced by process rather than lack of command will. I suspect many Parliamentary representatives would be equally surprised at the effects, in some respects unintended, of their reform.[35]

We have now reached the point where a Service Chief does not feel he can command effectively and meet public and government expectations about how he should deliver Army's combat capability, because of the regulatory and legal policy framework that the same public and government has imposed or expects him to follow.

Not long after the Skype scandal, Duncan Lewis, the then Secretary of Defence, and General David Hurley, AC, DSC, the then Chief of the Defence Force, commissioned a review of all investigation, inquiry, review and audit systems, processes and structures across Defence. It provided a unique opportunity to address all of these structural issues, rather than having a single issue focus. It differed from the body of earlier reviews carried out since 2001 because it was a holistic examination of fact finding, decision-making and

review for Defence's integrated ADF and APS workforce. The review took account of recommendations from the reviews referred to above, including those that are the basis of the *Pathway to Change* strategy, Mr Gyles' observations in part three of the report of the HMAS *Success* Commission of Inquiry and the recommendations in volume one of the DLA Piper Review of Allegations of Sexual and Other Forms of Abuse in Defence, but it did so with the intent of reconciling the aim of each of those reviews with a single and coherent procedural structure. What was also different about this review was that, for the first time in recent history, it was internally driven.[36] This gave it the capacity and the context to respond to command, based on working level military input.

It is pleasing to be able to say that some of the results of what came to be known as the *Re-Thinking Systems Review* are now in the process of being implemented. In the main, the recommendations are focused on simplification, reduced complexity, and change focused on making military command work by having commanders exercise their command responsibilities, make decisions and stand by them. The greatest opportunity offered by these innovations is the chance to re-adjust Defence systems to the context in which Defence makes decisions.

In advocating the adjustment of administrative decision-making according to context, we are not suggesting that the foundational principles of administrative law should not be applied to Defence. Rather, the principles need to be adjusted proportionately to the requirements of a lay decision-maker making day to day decisions. In the past, the Defence policy has been to adopt a purist approach in this respect. However, there is room for greater flexibility. For example, the *Briginshaw* principle[37] allows for proportionate adjustment in process to accommodate the relative seriousness of the decision to be made.

In the Defence context, the complex and burdensome process surrounding administrative decision-making has become counter-productive. Processes that are intended to increase fairness for individuals have actually prevented timely and fair decision-making.

Innovations in decision-making arising out of the Re-thinking Systems Review

As part of first-principles systemic reform, Defence is distilling the plethora of policy into innovative guidance that focuses the attention of commanders and other decision-makers on the need to exercise judgment in the circumstances that exist at the time and reduces the emphasis on compliance with rules and formal processes. Commanders will be asked to consider risks to the organisation and individual ADF members when making decisions, and adapt processes to those risks. The goal is to re-empower commanders to command and lead, spending effort proportionate to the risks of any particular decision.

Instead of mandatory requirements or absolute rules, the guidance will outline principles that commanders should consider when making decisions. These include:

Commanders should be trusted to exercise judgment

Decision-makers will make mistakes – this is inevitable. However, in most situations, mistakes can be corrected and most decisions are subject to review processes for this reason. Commanders have considerable training and experience relevant to the decisions they need to make, and should be trusted to exercise judgment and common sense in determining what process to follow in making the decision. While some commanders may, on occasion, exercise poor judgment in decision-making, this is a preferable risk to that posed by overly-prescriptive processes.

In providing commanders with greater flexibility to exercise judgment, in re-empowering commanders to command, there is a risk that some commanders will take advantage and abuse their re-vitalised command authority. Commanders must be held accountable for their actions. However, accountability is not created through onerous process but by trusting commanders to exercise judgment and by requiring them to record and report decisions and the justification for making decisions. This enables review and oversight of command decision-making, including by higher level headquarters and senior leadership in Defence and also by the Inspector-General ADF and external agencies such as the Defence Force Ombudsman.

While commanders must be held accountable, care will be required to encourage the exercise of judgment. For example, poor decision-making should generally be addressed through performance management processes, rather than more severe sanctions. Disciplinary and other sanctions should usually be reserved for egregiously poor or repeated incidents of poor decision-making.

Commanders should manage risk, rather than avoid risk

As administrative lawyers, we tend to focus on the legal risks associated with decision-making, such as the risks associated with failing to provide procedural fairness and the decision being overturned on judicial review. However, decision-making involves many risks, which vary depending on the type of decision in question. Non-legal risks may, ultimately, be more important from an organisational perspective. An obvious risk is making a mistake – getting the decision wrong. Other risks may arise if a decision is delayed. Defence is very sensitive to reputational risks, because of the long term damage these can cause to its relationship with government, its public perception and its recruitment efforts.

It is impossible to avoid risk completely when making decisions and commanders should not be expected to achieve this. Instead, they should be encouraged to manage decision-making risks. To do this, commanders need to understand the various risks that are associated with a particular decision and should consciously assess how to balance those risks when making a decision. Mitigating one risk will often increase another, so it is necessary to exercise judgment to determine how best to balance competing risks.

On the issue of legal risk, it should be noted that the courts have traditionally been quite deferential to command authority in judicial review cases involving the ADF.[38] When considering judicial review cases more generally and, in particular, the seminal administrative law cases dealing with issues such as procedural fairness, relevant considerations, duty to inquire, reasonableness and rationality, it should be noted that they typically deal with decisions that have an extremely adverse and long term effect on individuals – such as decisions to refuse protection visas or decisions to refuse or cancel a licence required for a person's livelihood. Judicial review cases therefore tend to represent the extreme of procedural requirements, because of the nature of the decisions under review and their serious consequences. In the ADF, most of the procedural requirements that have been written into Defence internal policy documents are derived directly from these cases with little regard for their context, often out of fear of legal risks that are unlikely to eventuate. While good practice would suggest that, in most cases, a person should not be surprised by a decision, this is not the equivalent of imposing a universal legal requirement to provide absolute procedural fairness, the breach of which would inevitably result in the decision being quashed on judicial review.

Commanders should apply time and resources proportionate to the possible consequences of a decision

This principle is an application of the idea that risks need to be balanced. The risks associated with getting a decision wrong will depend on the seriousness of the potential consequences. In the context of decisions affecting individuals, an assessment of the severity of consequences might require consideration of potential financial detriment, adverse career effects and the availability of mechanisms to ameliorate these effects should the decision prove to be affected by error. Where decisions potentially have a wider impact, it may also be necessary to consider adverse effects on third parties, such as complainants and victims, and on Defence as an organisation. The more severe any adverse consequences are likely to be; the more important it is to get the decision right in the first place. For this reason, time and resources should generally be applied to decision-making activities proportionate to the possible consequences of the decision. This principle applies to all activities associated with decision-making, including fact finding, providing procedural fairness, and developing a statement of reasons. However, we note that high profile incidents tend to be accompanied by high reputational risk, which may warrant a more publicly transparent decision-making process than would ordinarily be adopted, requiring greater resources than might have been required if a matter was not in the media.

The concept of proportionality is the basis of procedural rules that apply only above a certain threshold. An obvious example is the *Commonwealth Procurement Rules*, which impose additional processes for procurements valued above $80,000.[39] While the procurement example is quite simple to apply, difficulties can arise when attempts are made to set hard thresholds in other settings, where there is no readily available quantitative or qualitative value to define the threshold. Under these circumstances, attempting to set hard thresholds may distract decision-makers into focusing on compliance with the threshold at the expense of considering the merits of the decision.

For example, in 2010, following the HMAS *Success* saga, Defence introduced the concept of a 'serious or complex incident' as a means of defining a threshold for when a formal statutory inquiry would be required. Substantial effort was subsequently devoted to either avoiding the initiation of onerous statutory inquiry processes (through creative reinterpretation of the definition of a 'serious or complex incident') or to slavishly applying the formula and initiating costly fact finding processes even when the relevant information was already available. We would prefer commanders and decision-makers to spend their time engaging with the substantive issues, to analyse what their decision-making requirements are and to determine the fact finding requirements based on what they need to know, rather than on an arbitrary threshold prescribed by policy. This might involve, for example, considering what information is required, how difficult it will be to obtain, how important it is, how much time is available, and what the consequences are likely to be if the ultimate decision turns out to be incorrect. Decision-makers should manage risk rather than follow rules.

Commanders may need to trade off certainty that a decision is correct against making a decision quickly

One of the most significant risks associated with decision-making is delay. In many cases, delay in making a decision can be detrimental to affected parties and to Defence as an organisation. It can also cause significant hardship to the decision-maker. In the operational context in particular, delays can have significant consequences. Delay can also be a source of anxiety and can produce concerns for the welfare of staff. Delay often occurs because a decision-maker is attempting to obtain complete information before making a decision, in order to avoid the possibility of making a mistake. Accuracy in decision-making is important

but it must always be balanced against the need to make decisions within an appropriate time frame. Where the balance falls is a matter of judgment, and will depend on the particular circumstances of the decision in question, balancing the possible adverse consequences of a mistake against the possible adverse consequences of delay. In all cases, commanders should remember the law of diminishing returns – there will come a point in all fact finding activities where the value of additional information that may be obtained through further fact finding will be outweighed by costs imposed by the resultant delay. Similar considerations apply when providing procedural fairness or writing a statement of reasons. In decision-making, the perfect is the enemy of the good.

Conclusion

Any reform program necessarily involves a recalibration of risk. Defence is a vast organisation. There needs to be a degree of prescription in order to promote consistency. In the past, the degree of prescription has become disproportionate. However, if the new arrangements don't include some elements of prescription they will be too vague to be useful and may lead to unreasonable or irrational outcomes. What will follow, inevitably, is pressure to revert to a more prescriptive system.

While we talk about these developments in the experience of the ADF, there has clearly been similar regularisation of process across other fields of decision-making and a broader trend towards regulation by governments world-wide. The idea that decision-makers should be bound by procedural expectations is based on very good reasons directed at ensuring better quality, fairer and more consistent decisions, and at improving transparency and accountability of public administration. However, as the Defence experience illustrates, unless the development of process is carefully considered, it can impede organisational goals and result in unintended consequences.

Balanced against the trend towards regulation is the very real issue of trust and accountability. Rather than prioritising broad-brush policy when something goes wrong, we need to emphasise that people are responsible and accountable for their decisions. Errors in decisions should be identified on review, particularly where the error arises from unfairness or bad faith, and the decision-makers held accountable. Mistakes will be made, but they need to be dealt with in a reasoned fashion as mistakes rather than assuming all isolated incidents to be evidence of systemic or policy failings to be addressed through central control. Mere adherence to extensive policy and processes cannot displace the obligation on a decision-maker to make a decision. It is inevitable that decisions will be challenged, particularly in a framework that confers rights on individuals to seek redress. We expect to be tested and probed but equally where no error is found on review, the decision-maker needs the courage, with the backing of Defence, to hold the line.

Ironically, the ADF has traditionally relied on a command philosophy which requires 'decentralised command, freedom and speed of action and initiative, but [which] is responsive to superior command.'[40] It 'requires a high level of mutual trust at all levels of command,'[41] which has been overtaken by ten years of piecemeal regulatory and policy reform. This is what Defence is currently reintroducing, adjusted to the unique context of military service.

Endnotes

1 Lieutenant General David Morrison, AO, 'Chief of Army message regarding unacceptable behaviour', <http://www.youtube.com/watch?v=QaqpoeVgr8U> at 16 July 2014.

2 See for example the ABC's coverage, at <http://www.abc.net.au/news/2013-11-14/army-personnel-sacked-over-explicit-emails/5092966> at 16 July 2014.

3 Lieutenant General David Morrison, AO, Chief of Army address to the Australian Army Legal Corps Conference, 3 October 2013, <http://www.army.gov.au/Our-work/Speeches-and-transcripts/~/media/Files/Speeches/CA_AALCConference_3OCT2013.pdf> at 16 July 2014.
4 The *Defence Force Discipline Act 1982* (Cth) is the primary means by which the ADF enforces a quasi-criminal disciplinary regime. It prescribes offences and provides for both summary trial and trial by service tribunals, including Defence Force Magistrates and Courts Martial. Penalties include detention and imprisonment. It is complemented by a system of administrative sanctions for misconduct, which draw on command authority or are, in some cases, described legislatively, including in the *Defence (Personnel) Regulations 2002* (Cth). Administrative sanctions may include formal counselling, censure, reduction in rank or termination of service. Lieutenant General Morrison has publicly referred to the '*growing complexity of our quasi-criminal investigation and proceedings, in which most of the actors are lay men and women*' and the '*significant impact on time taken and resource requirements*' in relation to using disciplinary processes.
5 James Burchett QC, *Report of an inquiry into military justice in the Australian Defence Force*, 2001 ('Burchett Inquiry'), <http://www.defence.gov.au/media/DeptTpl.cfm?CurrentID=893> at 17 July 2014.
6 Department of Defence, Defence Annual Report 2012-13, <http://www.defence.gov.au/AnnualReports/12-13/part_one/chapter_two.asp> at 14 July 2014.
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8 Department of Defence, Defence Annual Report 2012-13, <http://www.defence.gov.au/annualreports/12-13/part_three/chapter_six.asp> at 14 July 2014.
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10 Department of Defence, Australian Defence Doctrine Publication (ADDP) 00.1 Executive Series, *Command and Control*, 2nd edition, 2009, pp1-2.
11 Ibid.
12 See, for example, *Coutts v Commonwealth* (1985) 157 CLR 91 at 98.
13 See, for example, the history summarised in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice in the Australian Defence Force*, 1999, Chapter 1.
14 Defence Force Ombudsman, 'Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures', 1998, <www.ombudsman.gov.au/files/investigation_1998_04.pdf> at 14 July 2014.
15 Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Military Justice Procedures in the ADF', 1999, <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/military/reptindx.htm> 14 July 2014.
16 Above n 5.
17 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An investigation into allegations of brutality in the Army's Parachute Battalion*, 2001.
18 Burchett Inquiry, above n 5, paragraphs 265-76 and recommendation 55. See also Part VIIIB of the *Defence Act 1903*.
19 Ibid, pp157-9, recommendation 54.
20 Department of Defence, Australian Defence Force Publication (ADFP) 06.1.3 Executive Series, *Guide to Administrative Decision-Making,* 2nd edition, 2010.
21 For example, Department of Defence, ADFP 06.1.4, *Administrative Inquiries Manual*, states that '*in some cases [this manual] prescribes standards and procedures more onerous than those imposed by the ordinary law*' at paragraph 1.6.
22 Above n22.
23 Joint Report by the Department of Defence and the Defence Force Ombudsman, *Review of the ADF Redress of Grievance System*, 2005.
24 In *Millar v Bornholt* [2009] FCA 637, Logan J discussed the history and evolution of formal 'redress of grievance' or complaint mechanisms as a means by which subordinates could properly raise wrongs by, and through, their chain of command: paragraphs 12-32.
25 Elizabeth Broderick, *Review into the Treatment of Women in the Australian Defence Force (Phase 2 Report)*, 2012, https://defencereview.humanrights.gov.au/report-review-treatment-women-australian-defence-force> at 17 July 2014, recommendation 18.
26 <http://www.defenceabusetaskforce.gov.au/Pages/default.aspx> at 17 July 2014.
27 *HMAS Success Commission of Inquiry, Allegations of Unacceptable Behaviour and the Management Thereof*, Part Three: Further Recommendations, President the Honourable Roger Gyles AO QC, 2011, < http://www.defence.gov.au/coi/success/> at 17 July 2014.
28 Ibid, paragraph 2.1 and Chapter Two generally.
29 Ibid, paragraph 2.51.
30 Ibid, paragraphs 2.45-60.
31 Ibid, Executive Summary, p.ix.
32 Major General C.W. Orme AM CSC, *Beyond Compliance: Professionalism, trust and capability in the Australian profession of arms (Report of the ADF personal conduct review)*; Prof Margaret Hamilton AO, *The Use of Alcohol in the Australian Defence Force: Report of the Independent Advisory Panel on Alcohol,* 2011; Rob Hudson, *Review of Social Media and Defence*, 2011; Geoff Earley, *Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction: a report by the Inspector General Australian Defence Force,* 2011; Carmel McGregor, *The Review of Employment Pathways for APS*

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33 Department of Defence, *Pathway to Change: Evolving Defence Culture, A Strategy for Cultural Change and Reinforcement,* 2012, < http://www.defence.gov.au/pathwaytochange/Docs/120410%20Pathway%20to%20Change%20-%20Evolving%20Defence%20Culture%20-%20web%20version.pdf > at 17 July 2014.

34 Ibid, p6.

35 Lieutenant General David Morrison, AO, Address to the Australian Army Legal Corps Conference, above n 3.

36 <www.defence.gov.au/header/documents/StageAreport.pdf> at 17 July 2014.

37 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

38 See in particular Mitchell Jones, 'Judicial Review of Administrative Action Against Members of the Australian Defence Force: Can a Warrior Win in Court?' (2005) 13 *Australian Journal of Administrative Law* 8. The Full Federal Court decision in *Martincevic v Commonwealth of Australia* [2007] FCAFC 164 provides a rare example where the Court was willing to overturn a military decision, relying on a breach of the detailed procedural requirements prescribed in regulation 87 of the *Defence (Personnel) Regulations 2002* governing termination of a member's service from the ADF.

39 *Commonwealth Procurement Rules*, paragraph 9.7 (the threshold for corporate Commonwealth entities is $400,000, and the threshold for construction services is $7.5 million).

40 Department of Defence, ADDP 00.1, *Command and Control,* above n 11, paragraph 2.19.

41 Ibid, paragraph 2.21.