

Chapter 13

Disciplinary and adverse administrative action

The disciplinary and administrative components of the military justice system

13.1 Adverse administrative action can follow from a DFDA matter, a civilian criminal charge or an administrative inquiry. It is intended as a management tool to correct or deal with unacceptable or unprofessional behaviour. It may take the form of a warning, a formal censure, reduction in rank, removal from posting or appointment, disallowance of pay and other financial entitlements or even termination of enlistment or appointment.

13.2 The ADF makes a clear distinction between action taken for breaches of the disciplinary system and those of the administrative system.¹ In the military justice system, disciplinary offences are specified in the DFDA and cover a range of activities or offences. There are, however, many contraventions of rules and regulations that are not punishable under the DFDA but are nonetheless subject to formal censure and punishment under administrative procedures. Defence Manual ADFP 06.1.3 notes that:

Adverse administrative action is usually initiated and/or imposed when the conduct or performance of a member is below the standard expected of a particular member and is not in the interests of the ADF. It is official action that reflects formal disapproval on a temporary or permanent basis.

13.3 Although the advice is clear in directing that offences under the DFDA are to be dealt with under the disciplinary system, there appears to be scope in determining whether disciplinary or administrative action will be taken. One witness told the committee that 'they flip-flop between administration and discipline'.²

Deciding on disciplinary or administrative action

13.4 Generally, the decision to impose adverse administrative action is discretionary. In exercising this discretion, a decision-maker must comply with the requirements of administrative law. The Manual advises that:

In determining what, if any, adverse administrative action should be taken, the merits, circumstances and the sufficiency of evidence in each case must be reviewed. A decision whether or not to impose adverse administrative action depends on the seriousness of each case and the interests of the ADF.³

1 See for example ADFP 06.1.3 para. 1.1.

2 In camera *Committee Hansard*, 10 June 2004, p. 94.

3 ADFP 06.1.3, para. 1.11.

13.5 Elaborating on this point, Lieutenant General Leahy told the committee that the commanding officer is required to make the judgement based on offences in the DFDA as to whether administrative or disciplinary action is appropriate.⁴ He used the following example:

...when a soldier has not done something or has done something overtly that he should not have done—he has contravened standing orders or he has carried out actions that he should not have done—it goes through an administrative process. Normally—and it is hard to say, locked tight, that this is what happens each time—there would be an investigation of some type and the investigating officer would determine that an individual has done something wrong or that an individual has not done something that he should have. What is open to us then is that we can take either disciplinary action or administrative action.⁵

13.6 The Manual provides some guidance on the matters that should be taken into account when considering adverse administrative action. It explains that 'adverse administrative action can be taken instead of, or in addition to, disciplinary proceedings under the DFDA or civilian court proceedings.'⁶ It concludes:

In determining what, if any, adverse administrative action should be taken, the merits, circumstances and the sufficiency of evidence in each case must be reviewed. A decision whether or not to impose adverse administrative action depends on the seriousness of each case and the interests of the ADF. Guidance on what conduct or performance warrants initiation of adverse administrative action is contained in Defence Instructions and policies, such as those dealing with theft, the use of drugs, censures, and warnings.⁷

13.7 This authority to choose between the alternative courses provides the commander or other decision-maker with flexibility and allows account to be taken of the particular circumstances surrounding the breach. However, it may also produce uncertainty and a lack of consistency in the general operation of both systems. Some may see too much scope for subjectivity or arbitrariness in exercising this discretion to pursue one course of action over another. Colonel Hevey gave an example of where an officer is likely to recommend administrative procedures:

...that a first-year soldier might inadvertently put in a wrong claim. That would not go to a Defence Force magistrate's hearing; that would normally

4 *Committee Hansard*, 5 August 2004, p. 17.

5 *Committee Hansard*, 5 August 2004, p. 6.

6 ADFP 06.1.3, para. 1.9. The Manual further explains that guidance on when DFDA action should be taken or matters referred to the civilian authorities is contained in DI(G) PERS 45–5—Australian Defence Force Prosecution Policy and DI(G) PERS 45–1—Jurisdiction under the Defence Force Discipline Act—Guidance for Military Commanders.

7 ADFP 06.1.3, para. 1.11.

be counselling, unless there was some criminal intent. Those are normally the sorts of matters that go to the Defence Force magistrate.⁸

13.8 The distinction seems to relate to the gravity of the wrongdoing and its potential to cause harm. In other words, a contravention deemed to be an administrative offence would fall short of a criminal offence. Consequently, the severity of a punishment assigned to an administrative contravention should not be oppressive or carry with it the stigma attached to a criminal conviction. Colonel Harvey reminded the committee that, while not a punishment under the DFDA, adverse administrative action is widely regarded by ADF members as a form of 'punishment'.⁹

Views on the current relationship between the disciplinary and administrative components of the military justice system

13.9 Some witnesses expressed dissatisfaction with the way in which the disciplinary and administrative systems intersect. The Australian Defence Association thought there was a serious problem with the incorrect use of the administrative law processes and with what it perceived as 'a growing reluctance to use the disciplinary code in certain circumstances'. It submitted:

There is an unfortunate and strengthening tendency instead to wrongly use administrative processes to investigate and/or punish alleged criminal acts or disciplinary transgressions by Service personnel.¹⁰

13.10 In looking at both the disciplinary and administrative components of the military justice system, the report has shown that they are indeed two separate systems with their own distinct procedures, offences and penalties. The committee would be concerned if administrative action were used solely because of a perceived difficulty in successfully prosecuting a particular breach or offence.

13.11 Mr David Richards, a barrister and solicitor responsible for the management and conduct of the national military practice in a large private law firm, argued that 'a line needs to be drawn between administrative discipline and criminal discipline'. He supported the proposal:

...that the CDF should have absolute control over the administrative system, which would include insubordination offences. The insubordination offences and the control type offences may very well have criminal imprisonment or fines of that nature; I do not have an issue with that. What I do have an issue with is this: if somebody leaves the Defence Force with a criminal conviction, whether they are asked to leave or otherwise, to the outside world that person has a criminal conviction. If they leave the Defence Force with an administrative conviction for discipline,

8 *Committee Hansard*, 1 March 2004, pp. 65–6.

9 *Submission P64*, p. 5.

10 *Submission P 39*, p. 4.

notwithstanding what the penalty might be, that is a completely different issue. If the military wishes to provide serious sanctions to maintain their discipline within the military, that is fine; I do not have an issue with that at all.¹¹

13.12 The Burchett Report referred to minor infringements under the DFDA such as speeding on base. It noted the findings in the 1988 Report of the Judge Advocate General which stated:

I consider that there is a need for a system of minor non-judicial punishments such as extra duties for minor singularly disciplinary offences rather than having to comply with all the panoply of a trial under the adversary system ...¹²

13.13 It also cited the 1989 Report of the Defence Force Discipline Legislation Board Review which stated:

The Board is firmly of the view that in the case of infringements which are purely disciplinary and which are neither serious nor of a criminal nature it is essential that a system be established which will enable such infringements to be dealt with speedily and without formality but which, at the same time, will adequately protect defence members from unfair treatment.¹³

13.14 To deal with misdemeanours such as minor traffic offences, the Burchett Report suggested the introduction of legislation enabling a ticket, like that used by the police in various civil jurisdictions, to be issued. It would seem to the committee that, in cases where a breach of the law or rules is of a minor nature and where little discretion is required in determining the guilt of an alleged offender, a quick and straightforward administrative device to deal with the transgression would be fairer and more cost effective.¹⁴

13.15 The Burchett Report also referred to 'extras' and suggested that 'guidelines should make it clear that, as a matter of policy, extras are to be regarded as an

11 *Committee Hansard*, 9 June 2004, pp. 44–5 and 48.

12 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 76.

13 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, pp. 76–7.

14 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 17.

administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the Defence Force Discipline Act'.¹⁵

13.16 The Burchett Report recommended, *inter alia*, that consideration be given to reviewing the nature of the punishments that may be imposed under the AFDA in the light of contemporary standards.¹⁶ The United Kingdom Government is currently reviewing its Service offences. It recognises the importance of keeping in step with changes in the civilian criminal justice system and of benefiting from recent judicial interpretation.¹⁷ The Australian military justice system appears due for a similar review.

Committee view

13.17 Clearly, a number of witnesses were concerned about the grey areas that have developed between the disciplinary and administrative systems. In light of these concerns and the recommendation by the Burchett Report, it appears that a review of the penalties imposed under the military justice system is long overdue. The time for review is also fortuitous in that a significant body of work has recently been done by the Australian Law Reform Commission on criminal, civil and administrative procedures and penalties.

13.18 In March 2003, following a period of public debate, the Australian Law Reform Commission produced a report, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*. This comprehensive report identified clear principles intended to ensure that there is a fair, effective and workable system of decision making and enforcement. It provides an extensive discussion on matters such as the distinctions between criminal and administrative procedures and would serve as a useful starting point and guide for the review.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

15 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 85.

16 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 32.

17 Ministry of Defence, *Memorandum from the Ministry of Defence, 'Tri-Service Armed Forces Bill*.

13.20 The intention is to help the ADF better delineate between the two systems, improve its administrative procedures and review and change where appropriate the penalties for administrative contraventions.

13.21 The Minister for Defence may wish to seek the assistance of the Attorney-General in having the matter of the disciplinary and administrative military justice systems referred to the Australian Law Reform Commission to conduct the suggested inquiry. The Australian Law Reform Commission could draw on the expertise and experience it gained while inquiring into Federal civil and administrative penalties.

Double jeopardy

13.22 Where an overlap occurs between the disciplinary and administrative system, the question also arises about the potential use of evidence gathered for one proceeding to be used in the other and about the protection against double jeopardy. The principle behind double jeopardy is that a person should not be punished twice for what is substantially the same act and should not be unfairly subject to the two procedures because of vexatious motives.

13.23 The danger with double jeopardy in the ADF is that the relevant Defence Service may make repeated attempts to punish an individual for substantially the same offence putting the accused through unnecessary ordeal and delaying the process.

13.24 Two cases in particular raised concerns. In each case disciplinary action had been taken unsuccessfully against a member but was followed almost immediately by administrative action for what appeared to be substantially the same alleged action. One witness gave the example of a staff cadet who was charged, tried and punished over an incident. Two months later, on legal advice, the charge was quashed and expunged from the Cadet's personal record. An apology was offered and the Cadet told that no further disciplinary action would be taken. According to the witness, 'without pause, the Cadet was then told that, notwithstanding the quashing and expunging of the charge', administrative action would be pursued.¹⁸

13.25 Mr Neil James, Australia Defence Association, was concerned about cases where, in his view, the double jeopardy principle has been undermined. He told the committee:

They are saying that proceeding against people administratively means they are not actually on trial, so therefore it is not double jeopardy. The position of the Australia Defence Association is that, yes, in black letter law that is correct. However, we think that in too many cases it is quite specious because it does not look at the effect of what happens. The effect of what happened to the SAS soldier in question was quite simply that he was charged under the Defence Force Discipline Act and acquitted. Because the ADF felt that there were some aspects of the case that required further investigation, they proceeded against the individual administratively to

18 Confidential *Submission C26*, p. 2.

show notice to show cause through the normal procedure. Our argument is that that was probably wrong morally. He had actually been acquitted and that should have been the end of it. I think the real problem here is that the effect is double jeopardy. In this case they proceeded against the SAS member because there appeared to the lawyers to be no other way they could air the evidence. If they had adjusted some of their inquiry procedures, there may have been a better way of airing some of that evidence than proceeding against the individual, who was put through a very harrowing experience, we believe, unnecessarily. Quite frankly, it was probably an abuse of his human rights in the long run.¹⁹

He asserted that people are 'either guilty of a disciplinary offence or they are not'.²⁰

Committee view

13.26 The committee has recommended that the ADF commission a review of its disciplinary and administrative system. Given that concerns have been expressed about double jeopardy, the committee believes that these concerns could be considered by the proposed review.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

13.28 In addition to addressing and rectifying the piece-meal approach to reform of the military justice system, the committee believes that close, careful and regular monitoring is required to ensure that those steps taken by the ADF to improve the military justice system are having the desired results. As a result, the committee has resolved to take an active parliamentary role in examining the effectiveness and fairness of the military justice system on an ongoing basis. To assist the committee in this task, the committee has suggested that the ADF submit an annual report to the Parliament on its military justice system.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

- (a) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.**
- (b) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;**

19 *Committee Hansard*, 9 June 2004, pp. 32–4.

20 *ibid.*

- **Director of Military Prosecutions**
- **Inspector General of the ADF**
- **The Service Military Police Branches**
- **RMJ/CJA**
- **Head of Trial Counsel**
- **Head of ADR.**

Part IV

Other important matters that relate to the military justice system

The report has clearly identified problems in Australia's military justice system.

The final Part of the report deals with matters that did not fit neatly within with scope of the examination of the military justice system. Although they deal with a specific aspect of the ADF, they are nevertheless connected closely with the system:

- the inquiry into the suspension of Cadet Sergeant Eleanore Tibble—in particular, the lack of action taken where sexual impropriety may have been at issue, and the particular procedural fairness issues that relate to the rights of children; and
- mental health issues and the military justice system.

