The Military and ADR

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A Senate Inquiry into Australia's Military Justice System determined that its purpose is to 'support the peacetime and operational activities of the Australian Defence Force (ADF), serving to **maintain discipline** and **reinforce the chain of command**'.

A broad or narrow view may be taken of what is comprehended by 'military justice'. If interpreted broadly, military justice extends beyond matters arising, and dealt with, under the *Defence Force Discipline Act 1982*, so as to include matters such as the taking of administrative action, processing of Redress of Grievances (ROG), and resolving 'workplace' issues such as allegations of bullying, harassment etc.[1]

The use of Alternative Dispute Resolution (ADR) can provide targeted means of resolving internal disputes without requiring recourse to more formal processes, including traditionally punitive measures such as courts-martial.

An enduring, hotly disputed issue concerning ADR in a military context

The suitability/applicability of ADR in a military context has received a great deal of attention in the last 10-15 years, both in Australia and overseas.

Inquiries have been conducted into the issue, in Australia and overseas, by military officials, Defence departments, external regulatory agencies (Inspectors-General, Ombudsman offices), and parliamentary committees.

An ongoing, and as yet unresolved, issue is this: do the overarching objectives of military justice, being the maintenance of discipline and the reinforcement of the chain of command, support an expansive or limited role for ADR in a military context?

Views about that issue differ greatly, and intensely. Indeed, the military systems of different countries have taken quite different approaches to the issue. For instance within the United States military, official stated policy is to use ADR to resolve intra-military disputes to the maximum extent practicable.[2] In Australia, despite repeated calls over recent years for a more expansive role for ADR, it is still regarded by many as sitting very uncomfortably with the objectives of military justice – 'as a potential challenge to discipline and morale within the Service'.[3]

The 'cautious' approach to ADR in the Australian military context is unmistakeably captured in the following recommendation concerning the suitability of ADR as a means of resolving disputes about unacceptable behaviour (including unacceptable sexual behaviour) within the ADF:

> Subject to adequate guidance being made available to commanders and managers on the limitations of ADR as a solution to work-related issues involving command relationships or disciplinary incidents, greater use of ADR across [the ADF] should be encouraged.[4]

This recommendation reflects the current reality within the ADF: namely, resort to ADR is always an exercise of command discretion, albeit one informed by the wishes of the disputants.[5]

Thus far, the ADF's use/promotion of ADR has focussed significantly upon employment-type disputes - ROGs (including with respect to unacceptable behaviours), and resolution of complaints in relation to matters such as transfers, allowances, and entitlements.

ADR within the ADF

Within these particular areas of dispute the ADF utilises several types of ADR, including but not limited to mediation, conflict coaching, group facilitation, and group facilitated conversations.

Amongst the identified benefits of these forms of ADR are the absence of any formal complaint-lodging requirement; the voluntary, flexible and cost-effective nature of the process; timeliness; and possible repair or restoration of workplace relationships.

The reparation of workplace relations, in the context of a disciplined and hierarchical ‘workforce’, has super-added significance within the ADF, making ADR particularly well suited to certain types of dispute.

Key benefit of ADR in the context of military justice and beyond: unit cohesion

Many, if not most, of the benefits attending ADR apply to its use in a military context. Arguably, one of the fundamentally desirable outcomes of military justice is the promotion of ‘unit cohesion’, a concept applicable outside the military context, but having exceptional significance within it.[6]

Unit cohesion is said to bring numerous benefits in a military environment, such as:

- enhancing group discipline
- motivating better decision-making in stressful circumstances, and
- promoting ‘communaliz[ing] of combat trauma’ which permits unit members to cathartically share grief.

Promotion of unit cohesion and good morale is an organising principle which underpins approaches to intra-ADF disputes generally.

Because of the importance of maintaining unit cohesion and good morale, ADR may be particularly beneficial as a means of resolving some intra-ADF disputes, especially those which may impact significantly upon unit cohesion – such as disputes involving poor or unacceptable conduct within a unit or between members of different units.

Maurer, a Judge Advocate with the U.S. Army, argues that the conciliatory nature of ADR, and the fact that it provides ‘far greater ability to hold the offender accountable to the victim’, makes it particularly beneficial within a military justice context.[7]

Further, because use of ADR is an exercise of command discretion, the ADF puts a lot of emphasis on, and effort into, so-called ‘pre-intake’ processes – preparatory consideration of such matters as the implications of ADR, the most appropriate form of ADR, selection of the DR practitioner, expectation management etc. This preparatory work is usually undertaken in ways which include significant input by the disputants.

However, a command-centric approach to the use of ADR within the military may bring its own problems, as well as solving others. For instance, the historical and ongoing phenomena of bastardisation, sexual harassment, and discrimination arguably reflect enduring cultural norms, and the somewhat ‘closed’ nature of the military as a system. This presents challenges in relation to a command-centric approach to ADR, particularly where (i) the availability of ADR is a matter of command dispensation, not right; (ii) the particular form of ADR is selected by a commanding officer; (iii) the ADR practitioner who is selected is usually a member of the military; (iv) the process and outcome of the ADR is confidential, but often (if not always) subject to command endorsement. In such a context, there appears to be some risk that disputes will be resolved in ways which (i) involve overt or hidden support for one of the disputants; and/or (ii) align with the (wrongly) perceived short-term organisational interests of ADF management.

The level, indeed existence, of that risk is contestable; and how any such risk should be dealt with is complex given the desirability, in most cases at least, of disputes being resolved in ways which ‘fit’ the culture and context of the ADF.

When is ADR appropriate and what limitations might apply?

The use of ADR in a military context is generally regarded as having some significant limitations; and is often considered as being of little use in certain matters – rightly or wrongly.

It is often thought that the applicability of ADR processes in a military context depends heavily upon the nature of the dispute eg the particular form of impugned conduct.

Maurer suggests limiting ADR processes in the context of military justice to cases of ‘relational misconduct’ - those circumstances where the misconduct is intrinsically related to the relationship between the offender and victim, where the effect of the conduct is physical or emotional harm to the victim (as opposed, for instance, to alleged crimes against the State, insubordination or breaches of discipline standards owed to superiors).[8]

ADRAC wonders about the correctness of this perspective. There may be many kinds of ‘unit corrosive’ behaviour which might not have a direct personal victim, but which may be ripe for ADR processes (drunkenness, vandalism of public property, passive non-targeted insubordination, expression of misogynist views out of earshot of any victim etc). The immediate supervisor of the ‘offender’ may properly be regarded as a participant in the ADR process, albeit that he/she may not be a personal victim of the behaviour in question. Indeed, an alternative perspective is that the types of dispute most amenable to ADR in a military context are those involving disagreement between complainants and ‘system’ command in relation to some disputed action taken by system command.

‘Unit corrosive’ behaviours may often involve an underlying ‘dispute’ which is simply (but not necessarily effectively) ‘resolved’ by the exertion of superior authority (the chain of command).

This takes one back to the issue discussed above concerning the use of ADR in a military context. Does the use of ADR involve the ‘civilianisation’ of the ADF and, ultimately, a weakening of military discipline? As noted above, perspectives on that issue differ. ADRAC welcomes input about it.

It has also been contended that ADR should not be imposed on a ‘mandatory or compulsory’ basis in a military context. The same is often said of other contexts.

ADRAC considers that arguments advanced against mandatory forms of ADR may sometimes be overstated. One only has to have regard to the benefits of mandatory family dispute resolution in the fraught context of disputes following family breakdown to understand that mandatory ADR may have a very legitimate and useful role to play, even in highly charged, high-stakes or 'toxic' disputes. In a military justice context (as in many other contexts), mandatory ADR should not preclude the taking of more formal action if an outcome is not achieved.

It is sometimes said that in a military context special concerns arise because the consequences of some behaviour, such as sexual assaults or harassment, will be compounded by the forced proximity of each party.[9] These concerns are very real and may intensify if the victim and offender share an isolated living environment such as a small barracks or a ship.

However, ADRAC considers that, instead of rigid rules or presumptions, the appropriateness of any ADR process requires a fact-intensive assessment, informed by a proper understanding of the particular vulnerabilities, sensitivities and implications at play. For instance, it may be that the victim of poor conduct – including of an alleged assault or harassment perpetrated within a closed environment such as a small barracks or ship – may prefer to participate in an ADR process concerning the conduct than await the outcome of other processes (which may take longer and permit less victim input into outcomes).

But the risks of system-closure, and the conscious or unconscious exertion of cultural norms by managerial input into ADR processes, must be carefully identified, assessed and addressed at all times.

Ongoing issues

In relation to this last-mentioned point, an issue which arises in relation to ADR processes which take place in a military context relates to selection of the DR practitioner.

ADRAC understands that DR practitioners in the ADF context are usually well trained ADF personnel (and this is seen as preferable). Such personnel have the

advantage of knowing the culture and context of the ADF. However, if the DR practitioner is a member of the ADF, or even a staff-member of the Department of Defence, it may be more difficult for him/her to bring complete neutrality and independence to bear on performance of their role. Of course, views differ as to the need for a DR practitioner to have 'complete neutrality and independence'. Whatever view is taken on that issue most people would agree that unconscious bias is not a good thing in a DR practitioner – because it may favour, in a hidden way, one of the disputants or the perceived interests of the ADF itself.

ADRAC is not suggesting that a DR practitioner, in a military context, should not seek to pursue outcomes that align with the best interests of the ADF. In many situations such alignment will be a positive thing. However, ADRAC considers that there should be transparency and scrutiny as to the factors which influence the role and selection of a DR practitioner and the particular form of ADR process.

For instance, at a very basic level, terms such as 'conciliation' may be much more apt than 'mediation' when the DR practitioner has an organisational interest in the process or outcome.

ADRAC understands that (i) the ADF has put in place various checks and balances to ensure appropriate selection of DR practitioners; and (ii) the ADF regularly uses external DR practitioners – who are sometimes former members of the ADF (including former reservists). ADRAC understands that these external DR practitioners are often retired judges or lawyers, particularly in 'high risk' intractable disputes. ADRAC appreciates that such DR practitioners will have a good understanding of the operational exigencies applying to the ADF, but wonders whether there might be much more scope for use of DR practitioners with other qualifications and skills (who may be able to quickly get across relevant operational/environmental factors).

In this regard it is worth remembering that ADR outcomes in a military context (as in other contexts) need not be self-executing. In an ADF context, they may be subject

to approval by a nominated commanding officer who is in a position, and is expected, to have advertent regard to the interests of the ADF.

ADRAC also understands that the ADF is often beset, at any one time, by a small number of longstanding disputes which consume a disproportionate amount of time and other resources, including of very senior officers and officials. ADRAC wonders whether there might be more scope for the ADF to engage expert external DR practitioners, especially at an earlier point in time, to advise the ADF on the *management* of such matters – in effect, to formulate a dispute-specific management plan. The widespread use and application of prescriptive Defence Instructions may, on occasions, allow insufficient flexibility in tailoring ADR processes to the distinctive circumstances of a particular dispute.

ADRAC welcomes input into the issues raised above, comments and observations on the topic generally.

1. Even though military personnel are not strictly employees, use of the expression ‘workplace’ is now common in a military context, as are references to ‘HR disputes’ and ‘employment-type disputes’.

2. Dr Dominic Katter Alternative Dispute Resolution in the Military Context, UNSW Law Journal, Vol 28(2), 2005, p 469.

3. Ibid at p 465.

4. Recommendation 18, *Review of the Management and Incidents and Complaints in Defence*, Inspector-General ADF, Mr Geoff Early, 2011, page 26.

5. See Defence Instruction (General) PERS 34- 4 dealing with *Use and Management of Alternative Dispute Resolution in the ADF* which has been recently replaced by Chapter 2, Part 2 of the Complaints and Resolution Manual.

6. Courts have for many years recognised the distinctiveness of disciplined (command driven) forms of ‘employment’ such as the police and the military.

7. Maurer, page 434.

8. Maurer, page 428.

9. Katter, page 466.