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Civilian courts should handle military misconduct cases: report

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TORONTO, OTTAWA - A retired Supreme Court judge is urging sweeping changes to the prosecution of sexual misconduct in the Canadian Armed Forces, including upgraded protections for victims and the removal of such cases from the military justice system until improvements are made.

spotlight over sexual misconduct. Several top commanders have stepped aside while investigations into misconduct allegations unfold. The federal government last month asked a former Supreme Court justice, Louise Arbour, to look into sexual misconduct in the military. Six years ago, retired Supreme Court judge Marie Deschamps authored a report on the subject.

The military justice system shares responsibility for prosecuting sexual offences with the civilian criminal justice system, but lacks some of the rights protections.

On Tuesday, Mr. Sajjan released Mr. Fish's report, a broader look at the military justice system. The report is the third since 2003 to review military justice under a legal requirement that followed the Somalia inquiry. It is the first of the three to look in detail at the system's investigation and prosecution of sexual misconduct.

"Sexual assault should not be prosecuted in the military system until certain conditions are met," Morris Fish told The Globe and Mail on Tuesday after his report on the military justice system for Defence Minister Harjit Sajjan was tabled in Parliament.

"Sexual misconduct in the CAF remains persistent, preoccupying and widespread - despite the CAF's repeated attempts to address the problem," Mr. Fish wrote in his report.

Those conditions, he said, include giving victims the rights that have been enshrined in the civilian justice system since 2015 - rights to information, protection, participation and restitution. They also include procedural protections that give victims a voice in pretrial hearings related to the use of personal records and past sexual history; some of those protections are informally included in the military system, but should be written into law, he said in an interview.

Under his proposed changes, victims of sexual assault or harassment and their confidants and counsellors would no longer be required to report all incidents to the military chain of command. That duty has exposed them to reprisals, ostracization and pressure to withdraw complaints, he said. (There could be exceptions; he called for a working group to explore the issue further.)

The military has been under an intense

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He also urged the establishment of a restorative justice approach that would bring offenders and victims together to work toward accountability and restitution. In some cases, victims have been reluctant to report because they feared disproportionate punishment would cost a perpetrator their job, he said.

He called for free, independent legal advice to be provided by the Sexual Misconduct Response Centre within the Defence Department.

He noted that the Canadian government has already endorsed incorporating victims' rights in the military system.

Two years ago, Parliament passed the Declaration of Victims Rights for that system. But the declaration has not taken effect yet.

Elaine Craig, a professor at Dalhousie University's Schulich School of Law in Halifax, said it was good that Mr. Fish's review, unlike the two earlier ones, looked at sexual misconduct.

She also supported the recommendation to remove the duty to report from victims. She stressed, though, that the military justice system should not investigate and prosecute sexual offences until all procedural protections available to victims in the Criminal Code (not just those in the victims' rights bill) are expressly incorporated into the military system.

The purpose of creating a separate justice system for the Canadian military was to enhance efficiency, morale and discipline.

Mr. Fish's examination went beyond how the military justice system treats victims of sexual misconduct.

He noted that the system is plagued with delays and that officers involved in disciplinary proceedings or grievances need better training. Mr. Fish also found that military judges, prosecutors, defence counsel and military police need to be more independent from the chain of command. For instance, the judges should cease to belong to the military, and thereby become more fully independent, civilian judges.

Mr. Fish said when CAF members are treated unfairly, their avenue for remedy is the Forces' grievance system, which he called "broken."

He pointed out that members of the Forces have no right to jury trials, and, he wrote, unless they choose trial by courts martial, which includes that option, they will be tried summarily without legal representation. Mr. Fish said Forces members "should not be deprived of legal rights and recourses available to civilians."

Mr. Sajjan, the Defence Minister, said he has accepted the 107 recommendations in Mr. Fish's report "in principle" and that the government will implement them as efficiently as it can.

However, in the short term, the Canadian Armed Forces and the Department of National Defence will implement 36 of them.

Notably missing from that list is the recommendation that the Declaration of Victims Rights be brought into force as soon as possible.

Until it is, the recommendation said, "unless the victim consents," sexual assault cases should not be investigated or prosecuted under the National Defence Act and instead be referred to civilian

authorities.

The recommendation concludes by saying the National Defence Act should be amended to "expressly incorporate in substance" the rights and protections afforded by the Criminal Code to victims and those accused of sexual offences.

When asked specifically about this recommendation, Mr. Sajjan said the government has to be "mindful of the independence of the investigative process in its current form."

He said politicians can't interfere with the process that's in place now, but added that the government is "absolutely committed" to Mr. Fish's recommendations and ensuring there is justice for survivors who come forward.

Mr. Sajjan said some recommendations will require greater consultation and analysis, which he said will be done with Ms. Arbour.

He said he is also committed to establishing an implementation plan for recommendations that need further review, and significant legislative and regulatory changes.

"This report comes at a critical time," he said. "Over the past few months, we've heard far too many heartbreaking experiences of Canadian Armed Forces' members and Department of National Defence [staff] who have been impacted by hateful, hurtful and harmful behaviours in our ranks, too many accounts of appalling abuses of power. And we know that more work needs to be done so that we can have meaningful and lasting cultural change."

Conservative defence critic James Bezan, public services and procurement

critic Pierre PaulHus and Conservative MP Leona Alleslev said in a joint statement that Mr. Fish's review confirms that the governing Liberals "failed to act on the issue of sexual misconduct in the Canadian Armed Forces for six years."

"It's clear that the Liberals sat on the recommendations from the last report into sexual misconduct in the Canadian Armed Forces and instead of taking action to fix this issue - Justin Trudeau has asked for another report. This is a failure of leadership from Justin Trudeau and this Liberal government."

NDP defence critic Randall Garrison said in a statement that it's urgent that attention is paid to the "scathing assessment" of the government's failure to address sexual misconduct in the military.

"Sexual misconduct within the Canadian military, and the response from leadership, has been a national embarrassment.

Survivors don't need more reports; they need to have confidence that those in power will take action when they come forward.

"Sadly, the inaction of the Liberal government over the past six years ... has made it difficult for service women and men to trust their safety and dignity is being protected."

Michel Drapeau, a University of Ottawa law professor, said an independent body is necessary to oversee the implementation of the recommendations. "Unless this gets done, then I'm afraid to say we're spinning wheels and we will not be making progress," he said.