

# Preface

## Report into the effectiveness of Australia's military justice system

On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The Committee received 71 public submissions, 63 confidential submissions, and many supplementary submissions. It held eleven public hearings and seven *in-camera* hearings.

The evidence before the Committee ranged across many aspects of the military justice system and covered both disciplinary and administrative processes. This preface contains a summary of the key aspects of the report.

### Australia's military justice system

Despite several attempts to reform the military justice system, Australian Defence Force (ADF) personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.

A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.

### The Disciplinary System

After extensive consideration and significant evidence, the committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function.

Evidence from those subject to investigation and prosecution under the military justice system, personnel with decades of experience in the military police, and the ADF-commissioned Ernst & Young Report highlight fundamental shortcomings. These include inadequately trained investigators, equipment shortages, outdated manuals, low morale, inability to attract and retain high quality personnel, inordinate delays and inadequate resourcing. Service police members describe an organization in crisis, complaining of poor morale, being overworked and under-resourced, loss of confidence, lack of direction and a sense of confusion about their role and purpose.

The committee considers that all criminal activity should be referred to civilian authorities for investigation and prosecution. Outsourcing criminal investigations in peacetime will allow Service police to concentrate on their key military functions in

support of the forces in the field and focus their resources on training and developing their core business. On overseas operations, criminal activity should be investigated by the Australian Federal Police. The military police should only act where civilian authorities decline to do so. Where this happens, the committee has commented on the need for a radical improvement to Service police training and resourcing

The committee has also examined disciplinary tribunals. Evidence to the committee cast considerable doubt over the impartiality of current structures, and argued that Service personnel's rights to access fair and independent tribunals are under threat. The Special Air Service soldier's case perhaps most comprehensively illustrates the inherent flaws in both investigation and tribunal processes. His experiences, however, were echoed by many submitters to this inquiry. It is apparent that Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.

It also considers that a well-resourced, statutorily independent Director of Military Prosecutions is a vital element of an impartial, rigorous and fair military justice system. Until the promised legislation is passed, decisions to initiate prosecutions may not be seen to be impartial, the Director of Military Prosecutions is not independent and, fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.

The committee considers that establishing an independent Permanent Military Court, staffed by independently appointed judges possessing extensive civilian and military experience, would extend and protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes.

The committee considers that reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for prosecuting summary offences, however, suffers from a greater lack of independence than courts martial and Defence Force Magistrate processes. The committee therefore recommends an expansion of the right to elect trial by court martial before the permanent military court, and the introduction of the right to appeal summary decisions before the independent permanent military court.

The inadequacies of the disciplinary process have important consequences for the mental health and well-being of service members, their families and friends. Evidence to the committee illustrates that the stresses placed on individuals under investigation in many cases appear to have had longer term effects, including loss of confidence, loss of employment, suicidal thoughts, attempted and actual suicide. These effects are unacceptable.

## **The Administrative system**

The committee also identified serious problems with the administrative component of the military justice system.

Witnesses appearing before this committee who have been the victims of abuse or are relatives of people who have suffered ill-treatment recount their unwillingness to report wrongdoing. In some instances, worried and sometimes frightened parents felt that they had no other option but to contact the ADF directly about their concerns of mistreatment. They did not take this step lightly and, in some instances, even this significant step was still not enough to put a stop to mistreatment or for the ADF to provide the necessary support for the ADF member struggling to cope in the military environment. Some of these ADF members suffered severe psychological breakdowns and in the most extreme cases took their lives.

The very fact that two young soldiers at Singleton were not prepared to pursue their right to make a complaint about cruel and abusive treatment, and that the wrongdoing came to light only through the determined efforts of their parents, speaks volumes about the inadequacies of the administrative system. They were not alone in their experiences. This failure to expose such abuse means the system stumbles at its most elementary stage—the reporting of wrongdoing.

The committee also found the next stage in the administrative system—investigations—seriously flawed. There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.

Conflict of interest and the lack of independence of the investigator and the decision-maker was one of the most corrosive influences eroding the principles of natural justice and one of the most commonly cited concerns. Many witnesses called for an independent adjudicator so that a neutral and unbiased investigation could take place free from contamination by self-interest or third party influence.

The appeal and review processes underpin accountability and are an essential guarantee against injustice. Yet, evidence clearly showed that the problems evident in administrative inquiries flow into the review processes—lapses in procedural fairness, poorly conducted investigations, conflicts of interest and inordinate delays. In other words, the current review and appeal processes did not remedy the shortcomings in administrative inquiries but rather perpetuated them.

A number of witnesses to this inquiry attributed the onset or aggravation of health problems, particularly psychological, to the difficulties they encountered with the military justice system. Others spoke of a work place where safe and responsible work

practices were not always promoted and which, in some instances, placed the physical or psychological well-being of ADF personnel at risk.

The committee has made a number of recommendations but the key one is designed to establish a statutorily independent grievance and complaint review body.

This initiative is intended to remove from the system the main negative factors that presently undermine its integrity and credibility. It hopes to encourage ADF members to report wrongdoing or to make a complaint. It will enable those who feel unable to pursue a matter through the chain of command to seek redress through an independent and impartial body. Furthermore, this independent review body will take on the important oversight role to ensure that investigators are better trained, that inquiries observe the principles of procedural fairness, and that delays are kept to a minimum. It will be in a better position to take account of the needs and well-being of those caught up in the military justice system.

Overall, the recommendations are designed to put in place a justice system that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable for all ADF personnel.