Executive summary

1. The USA,[1] Canada,[2] the United Kingdom[3] and other European nations[4] as well as Australia,[5] have throughout the past twenty years seen numerous court challenges to the legal validity of their respective military justice systems.

2. Several of these challenges have been successful and resulted in substantial legislative reform, particularly in Canada and the UK.

3. The trilogy of High Court challenges to the military justice system in Australia[6] achieved little success in terms of fundamentally changing the system.

4. However, the issues raised in the court challenges and other concerns voiced in the community in recent times, have resulted in several significant parliamentary, coronial and quasi-judicial inquiries into matters related to the military justice system in Australia, including:

- the 2002-2003 West Australian Coroner's investigation of the HMAS *Westralia* fire;
- the 2001 Burchett QC Inquiry into Military Justice in the Australian Defence Force (ADF);
- the 2001 Joint Standing Committee on Foreign Affairs and Trade (JSCFADT) Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion inquiry;
- the 1999 JSCFADT Military Justice Procedures in the ADF inquiry;
- the 1998 Commonwealth Ombudsman's Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences; and
- the 1997 Abadee Study into the Judicial System under the Defence Force Discipline Act (DFDA), which Justice Abadee began in 1995.

5. Each of these inquiries has identified, to a greater or lesser degree, shortcomings in the military justice system and its processes. Most of these inquiries made substantial recommendations for change in areas of legislation, policy and

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1 Weiss v US (1994) 510 US 1.

2 R v Genereux (1992) 88 DLR 110.

3 Grieves v United Kingdom (57067/00) [2003] ECHR 683 (16 December 2003).

4 See the Dutch, Turkish and Romanian cases cited by the European Court of Human Rights in Cooper v United Kingdom (48843/99) [2003] ECHR 681 (16 December 2003).

5 R v Tyler; ex parte Foley (1993-1994) 181 CLR 18.

6 Re Tracey; ex parte Ryan (1989) 166 CLR 518; Re Nolan; ex parte Young (1991); R v Tyler op. cit.

procedure. Many of the recommended changes, such as the establishment of an Inspector General of the ADF (IGADF), have been implemented. Some of the recommendations, such as the convening of a General Court of Inquiry into any ADF death, have not. A few of the recommendations, such as the establishment of a statutorily independent Director of Military Prosecutions (DMP), remain in limbo.[7]

6. In parallel with this current Senate Committee inquiry, the Commonwealth Ombudsman is undertaking an *Own Motion Review of Matters of Administration Relating to Defence's Dealings with People Under the Age of 18 years*, which is yet to be completed.

7. Against this background of almost ten years of rolling inquiries into the military justice system, the Chief of the Defence Force (CDF) recently expressed his view that 'The military justice system is sound, even if it has sometimes not been applied as well as we would like…I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people'.[8]

8. In view of the extensive evidence received, the committee cannot, with confidence, agree with this assessment. It received a significant volume of submissions describing a litany of systemic flaws in both law and policy and believes that the shortcomings in the current system are placing the servicemen and women of Australia at a great disadvantage. They deserve a system that is fairer, with rules and protections that are consistently applied. The committee has recommended a series of reforms that would constitute a major overhaul of the military justice system in Australia.

9. The submissions made to this inquiry, which number well over 150 and although canvassing a wide range of personal circumstances, contain a number of recurring themes which echo many of the complaints made in previous inquiries. Despite the six inquiries in the last ten years and the subsequent reforms described by CDF and the Service Chiefs,[9] certain types of complaint continue to be made.

10. Complaints were made to this inquiry about recent events including suicides, deaths through accident, major illicit drug use, serious abuses of power in training schools and cadet units, flawed prosecutions and failed, poor investigations. Some of these complaints raise serious concerns about sub-standards of justice meted out within the ADF.

11. The committee believes that all Australians, including ADF personnel, are entitled to the protection of laws and fair process. While the ADF and service conditions make it a unique workplace, it is nonetheless at a fundamental level a modern workplace with a very large workforce that should not be left vulnerable in

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7 General P. Cosgrove, *Submission P16*, para. 2.83.

8 Proof *Committee Hansard*, 1 March 2004, p. 13.

9 *Submission P16*.

the twenty first century to arbitrary, inadequate complaint resolution and investigative processes.

12. What is striking about the submissions to this inquiry is the variety of background and experience in their demographic. The complainants range from a 15 year old female cadet to a 50 year old male two-star general equivalent and include every single rank level in between those two extremes. They include serving and ex-serving personnel, general service and specialist officers and other ranks, legal officers and health professionals, police and convicted persons, civilian Defence employees and Equity officers, mental health and social workers, community and returned service groups and, most poignant of all, the next of kin of deceased members.

13. The committee's reference was to inquire into 'the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures' and the handling by the ADF of a variety of specific matters.

14. Under the terms of reference and in the context of the Committee's role, the committee cannot determine the veracity or otherwise of each and every claim, nor pursue individual remedies for the complainants. However, it is apparent to the committee that in the military justice system there is at least some degree of substance in the submissions the committee has received which suggests the system is not operating properly and justly. This perception in itself is an indictment on any justice system. Modern legal systems are underpinned by the maxim that justice must not only be done but be seen to be done. Assessed against this principle, in too many instances current ADF rules and practice founder.

15. It is clear, however, that substantive injustices to individual servicemen and women have occurred. The ADF has admitted to some of these instances. However, many instances given as evidence to this inquiry met with no comment by the military, despite the committee giving Defence the opportunity to do so throughout the course of this inquiry (by way of written submission). In the view of the committee, the lack of response from the ADF on some of the matters sent to them has made the committee's task more difficult.

16. There are two streams in the military justice system, disciplinary action and administrative action.[10] This report discusses the principal issues raised by the submissions in respect of each of these streams, with particular reference to the recurring themes.

Disciplinary action

17. The discipline related issues and recurring themes raised in this inquiry include:

10 *Submission P16,* para. 2.13.

- inordinate delay in investigation of alleged offences—in some cases investigations have gone on for several years;
- poor quality investigation of alleged offences—such as inappropriate questioning of civilian family members, failure to check easily obtainable exculpatory evidence, failure to liaise closely with civilian agencies;
- lack of independence in the investigation of alleged offences;
- failure to obtain and/or act on Australian Federal Police (AFP) and DPP advice;
- lack of independence in the decision to prosecute;
- poor quality prosecution of alleged offences;
- inordinate delay in the decision to prosecute;
- inordinate delay in the trial process;
- lack of independence in the trial process;
- lack of impartiality in the trial process; and
- inordinate delay in the review of trial process.

18. Complaints about disciplinary action and procedures were relatively few in number but they raised matters of very serious concern. CDF said, 'We have got it wrong from time to time in the ADF but this does not make the entire system wrong or ineffective or our people chronically negligent'.[11] Two of the matters in the past year that the committee is aware of that the ADF 'got wrong', it got spectacularly wrong. The degree of error and the ensuing injustice, which were not identified or corrected by 'the system' but by the tenacity and strength of certain individuals involved, calls into question the fundamentals of the system.

19. In one case, an inept investigation and a flawed prosecution of a decorated officer for what amounted to allegations of war crimes, followed by an improper media statement on the trial and then the inappropriate initiation of adverse administrative action, eventually led to a public apology to the officer by the CDF and Chief of Army (CA). The officer told this committee that other, more junior members may not have had the resources to fight these injustices as he had been able to do, and could have been crushed by this system.

20. In another case, a field rank officer was prosecuted some seven years after the date of the alleged offence on charges which the Federal Court later held should not have been preferred because the relevant service offences were time barred. At trial, the Defence Force Magistrate (DFM) referred to this obvious delay, following the plea of guilty and recorded a conviction but without punishment. The submission from this officer's wife vividly describes the damage to his family and him from this protracted process. The costs to the public purse of the lengthy investigation and protracted

11 *Committee Hansard,* op. cit, p. 10.

prosecution and the multiple appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) and Federal Court are extremely large.

21. These submissions and others, described extraordinary delays in the investigation of alleged offences, the failure of investigators to pursue exculpatory evidence, the failure of investigators to disclose relevant material to the accused, the failure of investigators and commanders to advise the accused of allegations at the appropriate time, the failure of investigators and prosecutors (legal officers) to obtain and/or act on specialist advice, the failure of prosecutors (legal officers) to adequately weigh and assess witnesses evidence. The committee is satisfied that these problems did in fact plague some investigations—this point admitted to by Defence in key instances—and the problems are so severe as to constitute systemic failures.

Criminal investigations

22. The nature of claims made to the committee is not new or without substance. Three years ago Burchett QC wrote 'Many of the problems the subject of submissions to the Inquiry had a strong link to a flawed investigation…With regard to Service Police investigations, complaints were commonly about the time taken'.[12] Four years ago, General Cosgrove told the *Rough Justice?* Inquiry that 'It has taken some 2½ years to investigate and bring this matter to disciplinary hearings. This is too long'.[13] In 2003 CA 'commissioned external consultants Ernst and Young to conduct an independent study of the military police capability to evaluate their work and recommend improvements…'[14]

23. The discipline process reaches its culmination in the trial of charges before a Service Tribunal. The Service Police investigative function is critical to the effectiveness of the military justice system. As in the civilian environment, an efficient and effective police force is the cornerstone of a sound justice system. In many ways the present state and status of the Service Police is a metaphor for the entire military justice system. The Burchett report and the CA's reference to Ernst and Young show that the organization is profoundly under trained and under resourced. This committee has received submissions from Service Police members which describe it as an organization in crisis. Members complain of poor morale, of being over-worked and under-resourced, of loss of confidence, lack of direction and a sense of confusion about their role and purpose. The committee believes it is time to consider another approach to military justice and has made recommendations to address this problem.

24. Not long ago, the ADF, and Army in particular, was a totally self supporting entity, capable of being deployed internationally where it could and did support and administer itself. It had its own Survey Corps, its own Education Corps, its own Pay Corps and its own Catering Corps and performed numerous other logistic functions

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12 Burchett, op.cit, paras 191–192.

13 JSCFADT, Rough Justice Report para. 3.47.

14 *Committee Hansard*, op.cit., p. 32.

from its own personnel resources. There were many reasons for this not least of which were the tyranny of distance and the complete absence of alternative sources of support.

25. However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of ‘core business’ and ‘outsourcing’ have been widely applied across the military. Civilian contractors are everywhere, including Iraq, and have played a significant role in most of the recent ADF operational deployments. The committee believes the role of a criminal law system in the 'core business' is past, and it is appropriate to 'outsource' what is essentially a duplication of an existing civilian system.

26. Broad criminal investigative experience and deep knowledge of the law should be the hallmarks of any investigative service—civilian or military. Civilian police investigators, however, are generally better trained and more experienced in the conduct of criminal investigations than military personnel. Whilst knowledge of the military context is important, the attainment of rigorous and fair outcomes should be the primary aim of a competent system of military justice.

27. Outsourcing criminal investigations in peacetime would allow the Service Police to concentrate on their key military functions in support of the forces in the field. The committee believes that in peace-time the ADF should refer all criminal activity to their civilian counterparts allowing the Service Police to focus their resources on training and developing their core business—the investigation of service offences that have no counter-part in the general population (eg absence without leave, insubordinate conduct). Close liaison could be maintained with their State counterparts and the AFP in particular. Recruitment of Reservists from these organisations should be encouraged.

28. The AFP has been a conspicuous presence in many recent operational theatres. The high level forensic policing skills that the AFP possesses were evident to the world in the aftermath of the Bali bombing and were also used to great effect in the investigation of atrocities in East Timor and in the Solomon Islands. When overseas and on active service, these and other criminal law functions currently performed by servicemen and women could readily be 'outsourced' to the AFP, whose entire business it is to conduct criminal investigations and prosecutions. Contrast this with military personnel who are called on from time to time to investigate criminal offences, but whose main functions, training and reason for joining the military lie elsewhere.

29. Few would argue that the ADF should not maintain its own disciplinary system, and the committee certainly does not. The military discipline system and the prosecuting of service offences that undermine team morale and cohesion, such as desertion, is very important. Military personnel are best equipped to administer such a system. However, this view does not logically extend to the ADF operating an entire criminal system in duplication of the civilian environment. Practical considerations (including financial) and harsh reality (in particular, the relatively poor criminal investigative skills and training of service police compared with mainstream police),

call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service. The question has to be asked: Why not keep the money and spend it on other ADF 'core business' requirements, relieve the commanders of having to decide which crimes they deal with and which they cannot and simply refer all suspected criminal activity to the civilian specialists located nearby.

Prosecutions and trials

30. With respect to the quality of legal advice given to the Service Police in their investigations and the assessment of evidence and decisions on prosecution, Burchett QC suggested, 'That the conduct of prosecutions would be undertaken by the office of the DMP using suitably trained and experienced Service Prosecutors…That an arrangement would be made with Federal and/or State DPPs to enable outplacement (I would suggest for significant periods) of Service lawyers for training and to gain experience on an on-going basis'.[15]

31. A DMP has been appointed but remains subject to command as the legislation creating the independent office has not yet been introduced to Parliament. The DMP is a barrister in Melbourne. The DMP office and staff are all in Sydney. The DMP works 'on the basis of being in the office about one week a month as an overseer'.[16] The Chief Judge Advocate (CJA) by way of comparison is a full time permanent officer collocated with the executive in Canberra.

32. The DMP described the office's workload as having 'increased enormously simply because the ADF knows we are in existence'.[17] The proposed DMP role, of making the decision to prosecute charges, will take over that function from some thirty[18] or so one and two star General equivalent officers. However, under the current rules the DMP cannot be above a Colonel rank or equivalent. This means that a person expected to exercise independent judgment operates in the shadow of, and in the service of, the command chiefs who have ultimate power over his or her future (and in particular, future promotion). It is no reflection on the current DMP for the committee to note that there is a significant, inevitable tension between exercise of legal independence by the DMP and the reality of his/her dependence on those of higher rank in the chain of command for future promotion. This tension creates the potential for the DMP's judgement to be clouded or compromised by extraneous factors related to his or her relationship with the chain of command, and unrelated to the case at hand.

33. In the five year period 1998–2002, the ADF held 257 courts martial and DFM trials,[19] a rough average of about one per week. Well over half of these trials (174)

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15 Burchett, op. cit, p.138.

16 *Committee Hansard,* op. cit, p. 67.

17 ibid., p. 56.

18 Burchett, op. cit., para. 230.

19 *Submission P16*, p. 101.

were Army matters. An analysis of the offences dealt with indicates a mix of military disobedience type offences and misdemeanour crime such as minor assault and simple dishonesty offences.[20] That is, the equivalent of the staple diet of the local civilian magistrate's court in Darwin, Townsville, Brisbane and Sydney, where the major Army units are based.

34. Civilian prosecutors and magistrates are in court almost every day and the courts are always open. Dealing with crime is their core business. The DMP is part time and his office has a number of junior prosecutors who require outside training with the civilian DPPs and mentoring from Reserve practitioners.[21] The Service Tribunals are *ad hoc* and Summary Authorities and JA/DFMs may not deal with criminal matters for months at a time. The committee believes that the public interest and the interests of the ADF would be well served by the efficiencies gained through the ADF relying on the civilian system, which has greater skills and resources and is readily accessible, to prosecute criminal offences.

35. Several submissions from lawyers both military and civilian, invited the committee to reconsider the role of the ADF in prosecuting and trying criminal offences. Aside from the core business question there are real concerns about the legal validity of the whole system. Despite the trilogy of High Court cases which have upheld the constitutional validity of this function, the JAG told this committee of his view that:

> …the current structural arrangements under the DFDA do not fully reflect the considerable body of law that has developed in recent years in connection with the Canadian and United Kingdom military justice systems with regard to the perceived ability of service tribunals to provide a fair and impartial trial. Whether the High Court of Australia would ultimately find the existing structure wanting, to the point of striking all or part of it down, is an issue upon which it is inappropriate for the Committee to express a conclusion. However, I think such a challenge would at least be arguable in light of these developments and it would be better, in my view, to take a proactive approach at this stage.[22]

36. It is likely the JAG's concern would be heightened by the comments of several members of the High Court in the recent matter of Alpert.[23] That matter involved a challenge to the DFDA jurisdiction for a sexual assault offence allegedly committed by a soldier in Thailand while on leave from his unit based in Malaysia. Counsel for the soldier limited his appeal argument to the particular circumstances of service connection but several of the learned Judges made it plain that they were prepared to re-open the entirety of the constitutional validity question. In the light of the recent Canadian and UK developments on fairness and impartiality which were

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20 ADF Senate Taskforce responses to questions on notice 29 April 2004; also Colonel Hevey 'They will inevitably involve either physical violence or fraud', FADT, p. 65.

21 *Committee Hansard*, 1 March 2004, p. 67.

22 *Committee Hansard*, 21 June 2004, p. 37.

23 Re Aird et al; ex part Alpert B60 of 2003, High Court Transcripts.

not fully addressed in the High Court trilogy of DFDA cases, the JAG's concerns about the potential for the system to be struck down appear well founded.

37. The current DFDA trial system and the ADF proposals for the future involve at least one permanent military officer judge advocate (JA) and possibly more (who could deal with all trials between them) and the panel of Reserve JA/DFMs in support. The trials are convened on an *ad hoc* basis. Despite the largest ADF concentrations being in Townsville and Darwin, there has not been a JA/DFM in Townsville for many years. There is only one Reserve JA/DFM in Darwin. However other JA/DFMs regularly travel from Canberra, Hobart and Melbourne to conduct trials in Darwin and Townsville.

38. The officer charged with war crimes type offences in East Timor gave a powerful description of the deleterious effects of this *ad hoc* trial system. The trial was conducted in Sydney. The prosecutor was located in Brisbane. The JA/DFM was located in Hobart. There were eight pre-trial hearings in the matter, several by telephone, over a period of months. The final proceedings took place on a Saturday. The absence of a central point of focus made things very difficult for the accused and his counsel. Eventually, they had to threaten to seek a Federal Court writ on the grounds of delay and lack of evidence before the prosecution was terminated and thrown out.

39. An independent Registrar of Military Justice is to be established as a means of streamlining this process. However, it appears this office will be predominantly administrative and will not have power to deal with interlocutory matters and make interim orders, so that the problem of pre-trial telephone hearings with officials in various places will remain.

40. It appears that more permanent military officer JA/DFMs may be appointed. The Judge Advocate General, Justice Roberts-Smith, envisages a standing court and/or tenured appointments. Some submissions questioned the validity of limiting these appointments solely to military officers. The British system has traditionally had an independent civilian JAG (currently a High Court judge) and a panel of independent Judge Advocates appointed by the Lord Chancellor, who must be civilian legal practitioners with at least seven years' experience as a solicitor advocate or five years as a barrister.

41. The European Court of Human Rights has consistently described the civilian Judge Advocate as an 'important safeguard' of the UK military justice system.[24] It is apparent from the tenor of those decisions that the Judge Advocate's independent civilian status and civilian trial experience was of major importance to the Court's recent approval of that system in Cooper v United Kingdom.

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24 Grieve, op. cit; Morris v United Kingdom (38784/97) ECHR 2002-I at para. 71; Cooper v United Kingdom (48843/99) [2003] ECHR 681 at para. 98.

42. In Australia, the JAG is a Reserve officer and a civilian judge and the JA/DFMs have predominantly been Reserve officers with considerable experience of the civilian courts. The exceptions to this have been a number of permanent officers who were made JA/DFM when the DFDA was first introduced but never sat in that capacity and the office of the Judge Advocate Administrator (JAA) now known as the CJA. A series of permanent military officers have filled the JAA/CJA office.

43. In his 1997 report Justice Abadee (a NSW Supreme Court judge and Reserve Brigadier) wrote:

> …that JAs like DFMs must be independent in the exercise of their powers. They must be independent to serve the Defence Force (and indeed the public). Confidence (indeed public confidence) in the system of military justice also requires an appearance of manifest impartiality on their part. The present system of appointment to the judge advocates' panel, as DFMs and as s 154(1)(a) reporting officers (all of which have an involvement of the JAG in the process of appointment), ensures that only those who have achieved sufficient experience and professional standing are so appointed. The requirement that only military officers may be so appointed, satisfies the need that trained military officers with military knowledge and experience are appointed to these roles. In practice, those appointed…have had considerable experience as civil practitioners in the ordinary trial courts. The present system furnishes men and women who have the qualifications and experience, both civilian and military for appointment to these positions.[25]

44. It is apparent that Justice Abadee, like the European Court, placed considerable importance on civilian trial experience and civilian practice for military judges. Indeed, he went on to state:

> I make these observations at this stage because there are those who argue that a greater degree of independence and impartiality might also be achieved by appointing full time judges, in effect, to a military division of the Federal Court of Australia[26] under Ch III of the Constitution with corresponding reduction in the role of the military in its military justice system. There is no compelling or persuasive view in support of such suggestion. Another alternative advanced is the establishment of what might be professional military judges selected from the military to become, in effect, a full time military judiciary.[27] As to this latter view, I do not consider that, as the present situation stands, there are those in the regular services who would be qualified or trained for such position.[28]

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25 Abadee, op. cit., paras 2.9–2.10.

26 See the JAG's suggestion of a military bench of the Federal Magistrates Court, *Committee Hansard*, 21 June 2004, p. 37.

27 The likely effect of having two or more permanent JA/DFM given the proportion of trials done by the JAA/CJA in recent years.

28 Abadee, op. cit., para. 2.11.

45. In the current system, permanent military legal officers of the rank of senior Major and above are unlikely to have appeared as counsel in a civilian court for at least ten years and more likely fifteen years. Consequently, the civilian trial experience so highly valued by Justice Abadee and the European Court, is not and will not be present for some time, in the pool of permanent military legal officers available for judicial appointments.

46. On the other hand, there remains a large pool of Reserve officers with the necessary experience of the civilian courts to fill these positions. It is noteworthy that prior to the introduction of the DFDA in the mid-eighties, there were no Defence Force Magistrates, only courts martial with Reserve Judge Advocates. The JA then, as now, made rulings and advised on the law. The court martial President and the members of the court were the arbiters of fact and also decided on sentence. One of the principal arguments for retaining criminal offences in the military system is that all behaviour of the members of a disciplined force is germane to the control and effectiveness of that force. The argument asserts the need for trained military officers to assess such offences through the prism of their professional understanding of the military and its ethos and cultural needs. That is the classical British common law model which still operates in the UK.

47. The Australian Defence Association (ADA) submission[29] included an extract from a recent House of Lords decision in which their Lordships quote with approval a statement by the Vice Chief of the Defence Staff about this requirement. There have been similar eloquent Australian statements in support of this principle.[30] It is not difficult to see the value and importance of having a court of military officers determining the charges against one of their peers on a military offence such as desertion or mutiny or insubordination or disobedience.

48. However, in Australia post-DFDA, the dominance of the court martial in determining such matters has been substantially reduced and the function has shifted largely to the DFM who sits alone. Justice Abadee noted the 'movement towards the use of DFM proceedings'[31] and recorded that for the 4-year period 1990–1993, there were 93 courts martial and 161 DFM trials. Five years later, for the 4 years 1998-2001, the trend had become even more marked, with 34 courts martial and 174 DFMs. Indeed by 2002 the DFM trial was by far the preferred forum with 46 DFMs and only 3 courts martial. Since its introduction, the DFDA has significantly altered the approach to the administration of military justice with the once dominant court martial and its centuries of military tradition giving way overwhelmingly to the single DFM, sitting alone**.**

49. As previously recognized, one may readily accede to the arguments in favour of a court of military officers trying a military discipline offence where there is no civilian counterpart offence. The committee certainly supports this argument. It

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29 *Submission P39.*

30 Re Tracey, op. cit. at 545; General Cosgrove, op. cit., para. 2.1–2.9.

31 Abadee, op. cit., para. 2.37.

would, however, have difficulty accepting the importance of having that court of officers decide a strictly criminal offence such as stealing Commonwealth property. For example, it could see no need for, say a RAAF Reserve Magistrate to travel from Melbourne to Townsville to try a charge against an Army soldier for stealing property. This is particularly the case if the trial has been delayed pending the availability of that RAAF officer.

50. In less than 20 years the Australian military justice system has moved from the application of discipline through the traditional method of trial by court martial to a system which has transferred the centre of gravity to legal officers, sometimes of a different service entirely and with little obvious connection to the service of the accused or the forum. The ADF is certainly more tri-Service in much of its approach today and officers in particular have greater exposure to the other services.

51. Returning to the question of removing criminal offences from the military justice system, the committee considered the argument that the ADF needs the capacity to deal with such offences on operations. One reasonable way to assess the strength of this argument is to examine how often such offences are actually dealt with on operations. Since the DFDA was introduced the ADF has seen outstanding service on peacekeeping and warlike operations in many parts of the world. Some of these deployments have involved very large forces for extended periods of time, for example, Somalia, Cambodia and East Timor.

52. It appears that almost no criminal offences have been tried in any theatre of operations during this time. The single exception was an assault in Namibia in 1989. The permanent Defence base in Butterworth Malaysia which has had some trials of minor criminal offences is not an operational theatre (spouses and children accompany members). A few courts and DFM trials have been conducted on operations but all except one held sixteen years ago, have been for service offences such as desertion, dangerous behaviour or disobedience. Conversely some serious criminal matters have been committed in theatre but were only tried on return to Australia. The trials conducted in theatre have involved both permanent and Reserve JA/DFMs.

53. It is argued by some that it is too difficult to draw a line dividing the strictly criminal offences from the purely military offences. However, the DFDA already restricts the disposition of certain offences in Australia, for example, possession of certain types and volumes of illicit drugs cannot be dealt with under the DFDA and serious crimes such as manslaughter and murder must be referred to the civil authorities. Moreover, the service connection test was recognized by its authors, Brennan and Toohey JJ in *Re Tracey*, to present some difficulty in application. Nevertheless service authorities have been applying this distinction successfully for some 15 years.

54. The final matter raised in submissions is the position of those military officers who act as counsel representing the accused in a military trial. Following the Federal Court decision of *Stuart v Sanderson*, members are entitled to the counsel of their choice (at Commonwealth expense if the counsel is a military officer) if that officer is reasonably available. It has been submitted that those officers should form part of an

organization similar to the US military Trial Defense Service headed by a senior officer with independent status similar to the DMP, so that they may be free of and be seen to be free of command influence.

Reform

55. The discipline system is clearly not effective in some areas and needs reform. Defence has taken steps to improve processes but arguably these initiatives treat the symptoms and not the cause. The committee believes that the military justice system in its current form clearly needs a comprehensive, ground up reform. In its historical development, it has been amended, adjusted and added to repeatedly from what began as a self contained system within Defence.

56. This is no longer the situation, and civilian courts and civilian police are now readily available. Furthermore, the evidence is that this costly duplicate criminal law system is set to become even more costly, with an independent DMP with a permanent staff of eight, an independent RMJ and his staff and an independent permanent CJA (with more to come). Yet the evidence is that this system has not dealt with a significant criminal offence on operations in 20 years. There is a clear question as to whether this is a continuing requirement for the public purse to bear the cost of maintaining a separate but parallel criminal law process, particularly one which involves extensive delays and the risk of inadequate investigations and prosecutions. Moreover the JAG has identified a serious potential for the whole system to be struck down for lack of fairness and impartiality.

57. It is twenty years since the last major overhaul of the military justice system which saw the introduction of the DFDA. It is now time to look again at comprehensive reform. The committee received submissions from many serving members and officers of the ADF, concerned parents and mental health professionals questioning the reliance on discipline as a substitute for leadership on some problems in the ADF.

58. The DFDA creates three categories of offence:

(a) Military discipline offences for which there are no civilian counterparts (e.g. absence without leave, insubordinate conduct, disobedience of command, etc.)

(b) Offences with a close civilian criminal law counterpart (such as assault on a superior or subordinate); and

(c) Civilian criminal offences imported from the law applicable in the Jervis Bay territory.

59. The committee recommends that criminal offences (that is, categories (b) and (c) described above) be removed from the military justice system altogether. That is, all criminal offences allegedly committed by members of the ADF that are crimes in the general community too, including those specified separately in the DFDA that have a close civilian counterpart, should be investigated and prosecuted by civilian police and not by the military. Thus, the committee believes that all suspected

criminal conduct in Australia by servicemen and women should be referred to the local civilian police. If the local civilian police decide that the military should deal with the matter, they can refer it back to the service police, who will then investigate and prosecute where appropriate using the existing bodies.

60. In considering the likely effects of such changes on the continued maintenance of good order and military discipline, it is useful to look at the reaction of the commanders in the field to the introduction of the DMP. The DFDA places the commanding officer (CO) of a military unit at the centre of the administration of service discipline. The CO is the pivotal point of the system. The DMP has largely taken over this role for dealing with criminal conduct. This has not apparently been resisted by COs, in fact the DMP has been swamped by the flow of matters referred to his office by the COs.[32] Moreover the DMP considers that 'we were flooded with matters which really ought to have been dealt with at a lower level'.[33] This tends to indicate that those most concerned with the maintenance of service discipline are more than happy to refer even minor matters to another authority to deal with and allow them to get on with their 'core business' of training to fight.

Administrative action

61. The other component of the military justice system is the administrative action system, which is concerned with non-DFDA matters, such as boards of inquiry (BOI), administrative investigations, redress of grievance (ROG) and complaint handling, adverse administrative action and review of command decisions.

62. Whereas the discipline system is largely informed and controlled by the rules and principles of the criminal law, the administrative system is 'subject to administrative law principles, especially the fundamental principles comprising natural justice (also called procedural fairness).[34]

63. The majority of complaints made to this committee were about the administrative component of the military justice system. Again there were common themes which echoed from the previous inquiries over the past ten years. The issues raised in the submissions largely mirror the disciplinary complaints and include:

- untrained investigators;
- inordinate delay in investigation of complaints—in some cases investigations have gone on for several years and through various levels of review;
- poor quality investigation of complaints—failure to identify and speak to relevant witnesses, failure to consult with civilian family members on terms of reference, failure to check easily obtainable evidence, failure to

32 *Committee Hansard*, 2 August 2004 , p. 53.

33 ibid.

34 *Submission P16*, para. 2.58.

liaise closely with civilian agencies, failure to disclose relevant evidence;

- failure to observe the principles underpinning procedural fairness such as the right to know about allegations;
- lack of independence in the investigation of complaints—investigators appointed from within the same unit/organisation, investigators of inappropriate rank or command relationship;
- inordinate delay in the review of investigations—in some cases, several years between the investigation and the decision, by which time any favourable remedy is too late;
- lack of independence in the review process;
- lack of impartiality in the review process—'Caesar reviewing Caesar';
- failure by investigators/commanders to follow and apply policy;
- failure to act on, or follow-up on the implementation of, recommendations;
- failure by commanders to keep members informed of developments in complaints/investigations;
- failure by commanders to protect complainants;
- breaches of privacy and confidence, and
- abuse of power in schools/training units.

Investigations

64. Again, as is the case with the disciplinary issues raised, these complaints are not new or without substance. In respect of administrative inquiries, Burchett QC said, 'The quality of the actual investigation, and also the problem of perceived command influence, were major problems…Procedural fairness was an issue, as well as competence'. Mr Burchett referred to similar remarks in the 1999 JSCFADT report and said '…the independence of an officer appointed to conduct an investigation is sometimes a matter of concern'.

65. In response to these and other inquiries and the Ombudsman's 1998 own motion investigation, Defence introduced a variety of initiatives including:

- the Complaint Resolution Agency
- the Defence Equity Organisation
- the Defence Community Organisation
- 1800 telephone complaint systems
- Defence Whistleblower scheme
- Directorate of Alternative Dispute Resolution and Conflict Management
- Inspector General of the ADF

- Directorate of Personnel Operations
- Fair Go Hotline
- Sudden Death Protocols

66. However, despite this proliferation of agencies and mechanisms, the Commonwealth Ombudsman in his 16 February 2004 submission to this committee stated:

> We have received several complaints where it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved, as well as by other people in relatively senior positions in the ADF. It is axiomatic that if a complaint is not accepted as a complaint it cannot be resolved.
>
> We have also received some complaints which have revealed deficiencies in the investigative process. Some of the issues which have arisen include:
>
> (a) Investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated,
>
> (b) An investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker,
>
> (c) An investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint,
>
> (d) Investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority,
>
> (e) An investigation where members of the public are questioned with little apparent thought for the potential consequences, and
>
> (f) Investigations which have taken so long it renders any outcome favourable to the complainant virtually meaningless.
>
> A consistent theme is the need for better training for investigation staff...Regrettably we see a number of complaints from members of the ADF where the time taken for a decision on a redress of grievance seems inordinate.[35]

67. This submission by the Ombudsman is almost completely in accord with the tenor of the various submissions received by the committee about the shortcomings of the ADF administrative system. Moreover it was made well after the implementation of 14 recommendations made in a review by the Australian National Audit Office in 1999 and four years after 24 recommendations made following another review carried out with the assistance of the Ombudsman's staff[36] in 2000. While the recommended

35 Professor John McMillan, *Submission P28*.

36 Ms Harris, *Committee Hansard*, 2 August 2004, p. 21.

changes have apparently had some effect in reducing delays, it appears that major problems remain and even the reductions in delays are relative, as it still takes on average, some 280 days to resolve an 'administration-type grievance'.[37]

68. Furthermore, despite this Inquiry taking place over a year and the establishment of the Directorate of Personnel Operations and the Sudden Death Protocols etc, the committee was saddened to receive, in the week prior to its last hearing, a submission from the parents of another suicide victim who expressed grave concerns about the handling of their son's relatively recent disappearance and subsequent death.

Boards of Inquiry

69. In respect of Boards of Inquiry (BOI), the committee received a number of complaints about the lack of transparency and independence in the appointment and processes of several BOI. Defence refers to a recent audit by a civilian firm Acumen Alliance which reported in December 2003 that 'the board of inquiry process is generally sound and serves the purpose for which it was created'.[38] In written submissions and in oral evidence, Defence continually emphasized that the 'purpose of an administrative inquiry is not to attribute any criminal or discipline liability as is the case under the DFDA'.[39]

70. Nevertheless, BOI have historically been required to make findings as to whether or not any person(s) failed to follow or apply processes or procedures correctly and such findings may be directly related to a cause of death or serious injury, the consequences of which may be of the highest degree of seriousness for the individual concerned. It is a necessary concomitant of such deliberative processes that ADF members' (including deceased members) interests may be put at risk of adverse comment. Whether DFDA or administrative, the potential consequences of such inquiries for individuals can be very serious indeed.

71. The committee notes that a recent audit by Acumen Alliance made a number of recommendations to improve the system. Thirteen stakeholders were interviewed. Only one of those persons was a Reserve Legal Officer (RLO) and none of those persons had been a participant in a BOI as counsel assisting or representing, or as a potentially affected person (PAP), except the Chief Judge Advocate (CJA) who was counsel assisting in two of the eight BOI. Acumen Alliance did not interview any Reserve Legal Officers who had received the sessional fee for appearing in BOI or their clients. Nonetheless, Acumen Alliance concluded that 'The sessional fee determination is inequitable, does not provide value for money, is not commensurate with market rates and the purpose of its application—i.e. for urgent legal work—does not apply in the case of BOI'.[40]

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37 Defence, Supplementary submission, para. 3.2.

38 CDF, *Committee Hansard*, 1 March 2004, p. 9.

39 Supplementary Defence submission, para. 2.24.

40 The Defence Legal Service BOI Management Audit, October 2003, 1.3.

72. Acumen Alliance states:

> It was suggested that the risk of an inquiry running over time is reduced when permanent officers, rather than reserve members, comprise the Board. The rationale behind this argument was that the imperative to complete the inquiry and return to work is greater for permanent officers…Counsel Representing may become adversarial as they understand their brief to be the protection of the interests of the PAP. There is a strong view and some evidence that Counsel Representing can focus a Board on blame apportionment…lawyers appear to treat BOI as a judicial rather than as an administrative process. This 'judicial approach' does not appear to have arisen, however, where judges or magistrates have been appointed as Presidents.

73. Overall, of the eight BOI examined, Acumen Alliance found only two to have been efficient and effective. Coincidentally these two BOI involved the CJA in the Counsel Assisting role and in one of these, only permanent legal officers appeared as counsel. The latter BOI was described by Acumen Alliance as 'completed on time and well regarded'. It may be that the absence of Reserve legal officers concerning themselves with protecting the interests of the PAP had something to do with this assessment. In any event, the committee is of the view that the absence of any input to the audit report from PAP and the next of kin of deceased members and the counsel representing and assisting in these BOI calls into question the balance of this report. It is also noteworthy that the audit report's approval of judges and magistrates appearing as BOI President is directly opposed by the JAG.[41]

74. The committee noted the desire to improve the inquiry process, but strongly believes that the recommendations put forward by Acumen Alliance do not address the central issue—the perceived lack of independence which can undermine the whole proceedings.

75. This committee received several submissions complaining, inter alia, about the manner in which members and counsel were appointed to BOI, about the conduct of counsel during BOI, about the delays in deciding to conduct a BOI, about the lack of adequate support given to BOI, about the inaccessibility of premises where BOI are held, about the lack of support to next of kin during BOI and about decisions not to hold BOI for certain matters. The committee notes when considering these submissions that the Acumen Alliance audit, which as noted above was not a comprehensive audit, was also critical of six of the eight BOI it examined.[42]

76. The 1999 JSCFADT report recommended that a General Court of Inquiry should be mandatory for all inquiries into the accidental death of an ADF member on an ADF activity. The recommendation was resisted by Defence.

77. The ADF Administrative Inquiries Manual provides (at para. 1.17 et seq)

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41 *Committee Hansard*, 21 June 2004, p. 38.

42 Acumen Alliance, *The Defence Legal Service: Board of Inquiry Management Audit*, October 2003.

> …the selection of the type of inquiry most appropriate to a specific situation is critical to the efficient management and effective control of an inquiry. Occasionally the choice may be obvious, mandated for example, by the significance of the incident, eg an accident involving loss of life…Where the subject of an inquiry involves the accidental death of ADF members involved in ADF activities, the CDF and the Service Chiefs, as appropriate, will refer the matter to the Minister to determine whether the appointment of a General Court of Inquiry or a Board of Inquiry is appropriate.

78. Annex E to chapter 2 of the Manual indicates that a BOI is appropriate for death and serious injury. It indicates that an investigating officer (IO) may be used in the case of a single death or serious injury 'when the facts are not complex, when the member is not on duty or when it arises from a Motor vehicle accident but there are no suspicious or unusual circumstances'. The annex notes that an IO is not appropriate for 'serious systemic breakdown of Service discipline or morale' but a BOI is.

79. Despite this policy background, it was decided not to hold a BOI into any of the following recent serious incidents:

- major systemic problems involving brutality and harassment in at least two training schools,
- several suicides including the presence of alleged disturbing ethnic undertones and apparent systemic breakdown of morale,
- accidental death on a training base in an Army vehicle, where there were serious questions about the role of seatbelts in all such vehicles and whether they in fact should be used at all,
- two cadet incidents involving female minors,
- major equity problems in a training unit,
- major drug problems in a unit,
- major systemic morale and security problems.

80. These various incidents amounted to over twenty separate matters which Defence elected to inquire into by appointing an investigating officer, rather than by holding a public BOI during which evidence would be given under oath in public and be available for testing under cross-examination. The evidence given to the investigating officers was not on oath, not given in public, nor was it tested by cross-examination. The committee notes with alarm that no training or qualifications at all are required in an investigating officer: a public servant of APS 4 (a junior administrative level) can technically be appointed to conduct a complex investigation into the reasons for the death of a serviceman.

Review of administrative action

81. The committee received a large number of complaints about the internal review processes in Defence. The recurrent themes were, again, lack of independence and impartiality, delay, failure to apply policy and poor quality of decision-making.

82. The review action taken by the IGADF was favourably commented on by the SAS officer who had administrative action taken against him after the failure of the prosecution for the same alleged conduct. It is worth noting that by this stage the matter had been covered in national media and had caused considerable embarrassment to Defence. However other submissions were critical of the IGADF and his office. The heart of the complaints go to the independence of the office of IGADF who is appointed on a contract and is renewable at the discretion of the CDF.

83. As mentioned above, it is a truism of the law that justice must not only be done, it must be seen to be done. Many submissions to the committee were rightly concerned that current review mechanisms such as CRA and IGADF cannot be perceived as independent when they are part of Defence.

84. The number and variety of ADF agencies, policies and processes involved in the handling of complaints is itself problematic. In its supplementary submission, Defence wrote:

> Defence has a number of elements and organizations that manage certain types of complaints. Apart from the Complaint Resolution Agency, these organizations include the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution and Conflict Management. This can create some confusion for complainants and, to an extent, the organizations themselves, about their respective roles. This can result in the duplication of effort and delays. Closer cooperation would provide more effective outcomes.[43]

85. The committee notes and welcomes this acknowledgement by Defence which recognizes many of the problems raised in the submissions, which were observed and tested by the committee in oral hearings and also confirmed by the Ombudsman.

86. The complaint resolution system has been recognized for some ten years to be less than satisfactory. Money and resources have been thrown at the problems but not necessarily in a systematic way, as demonstrated by the plethora of agencies and processes. As with the discipline system, the compatibility of these administrative review functions with the 'core business' of the ADF is questionable.

87. This gives rise to the same question the committee asked about the criminal element of the discipline system. The question is, is the public interest, the public purse, and Australia's military personnel best served by maintaining several layers of a review process conducted by non-specialists in a system lacking transparency and independence and giving rise to a perception of institutional bias? The ADF has implemented a range of initiatives to address problems in the administrative system. All reforms made to date, however, have been broadly reactive and piecemeal. The committee firmly believes this should not continue. Our servicemen and women deserve to be confident that any complaints made by or about them will be investigated according to the highest professional standards. Currently many do not

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43 Defence, Supplementary submission, para. 3.7.

have this confidence, and could not be expected to, given the state of the relevant laws, procedures and practices.

88. Reform of the administrative investigation system must be root and branch, with the entire function being scrutinized and updated to meet the requirements of operational effectiveness and the public interest. The committee looked to other countries with similar legal systems to see how they had faced the challenge of extending modern rights and protections to their military personnel.

Reform

89. The importance of actual and perceived independence in administrative review was recognized and incorporated into the reforms of the Canadian military justice system in the late 1990s. The Canadian Forces Grievance Board (CFGB) is an administrative tribunal with quasi-judicial powers, and is independent of both the Department of National Defence and the Canadian Forces. It has a statutory mandate to review military grievances and submit recommendations and findings to the Chief of Defence Staff (CDS). The CDS must give written reasons for not accepting the recommendations of the Board, and the Board publishes an Annual Report on its activities.

90. The CFGB began operation in June 2000 and is designated as a department for the purposes of the Canadian *Financial Administration Act*. It consists of a chairperson (currently a senior civilian lawyer), a full-time vice-chairperson and several part-time members all appointed by the Governor in Council for terms of four years. All board members are civilians; two have had military service at some stage of their careers. The Board has a direct support staff including legal counsel.

91. The committee believes that a similar independent review authority in Australia would go a long way towards satisfying the concerns of those who made submissions to this committee. A consistent refrain from Defence in both the discipline and administrative areas, is that decision-makers have to have substantial military knowledge to properly perform their function. The CRA Director, for example, said:

> …you need to understand the environment in which complaints are made to understand where people are coming from when they make a complaint, to understand what access they have to advice and what difficulty they might face in putting in a complaint.[44]

92. The committee notes that the Defence Force Ombudsman and his staff have performed their administrative review function for many years without this military background. The Canadian Grievance Board is now in its fourth year of very successful operation using similar expertise without significant military background. The review of administrative action in a myriad of specialized areas is conducted in many boards and tribunals at the State and Federal level in Australia, by persons with

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44 Harris, *Committee Hansard*, 2 August 2004, p. 37.

no particular knowledge of the subject under review, but with expert skills in administrative law principles and practice.[45] The committee believes expert skills are equally important in doing ADF personnel justice than direct experience of the military 'environment'.

93. The rationale for an independent body was succinctly expressed before the committee by the Deputy Ombudsman who said:

> In essence, the issue is: why yet another level of review? The first critical feature is that we are independent and impartial. That very significantly changes the character of the review not just because it gives us a capacity to view issues with a freshness and an independence that you just cannot get within the system but also because it presents to the complainant an impartial and dispassionate review so that, even if the outcome is that we uphold the original decision, the fact that we have come to that conclusion can be a significant factor in satisfying the complainant that they have been fairly treated…The second important point is that, while the rate at which we find complaints to be upheld is relatively low, often the complaints that we do find upheld are very significant…Often the issue will be a more significant problem because, were it is a simple problem, the internal grievance processes would have been able to deal with it.[46]

94. What is needed is a statutorily independent body, with appropriately qualified and trained staff and the necessary resources to instill public confidence and efficiently address and resolve administrative matters in the ADF. The Ombudsman performs a review function, and cannot and should not be the primary investigator of grievances by the 70,000 (including Reserves) strong ADF.

ADF Administrative Review Board

95. The committee proposes an organization, called the ADF Administrative Review Board (ADFARB), which would have statutory independence along the lines of the Canadian Forces Grievances Board. The chairperson would be a senior lawyer with appropriate administrative law/policy experience. The organization would have administrative review as its core business. Its resources and skills could largely be obtained at neutral cost by subsuming the current staff positions and assets of the IGADF and the Defence Force Ombudsman, thereby eliminating the internal conflict in priority allocation, which the Commonwealth Ombudsman now faces[47] in addressing Defence matters.

96. The ADFARB would have two major areas of operation. One would be to deal with redresses of grievance (ROG) in a model similar to the Canadian Grievance Board. This could be done in several ways. One way would be to require all ROGs to be sent immediately from the unit to the ADFARB with an information copy to the CRA. Another way would be to specify only certain types of ROG to be referred to

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45 NSW Administrative Decisions Tribunal, VCAT, Social Security Appeals Tribunal etc.

46 *Committee Hansard*, 9 June 2004, p. 9.

47 Defence Force Ombudsman, *Submission P28.*

ADFARB, with discretion for CDF to refer them later to ADFARB. A third way would be to keep all ROG within Defence until finalized at the unit level and if not resolved there, or if the ROG involves the unit CO, or if it cannot be finalized within a set period, say 60 days from lodgement, it is referred to the ADFARB.

97. CRA statistics indicate that slightly more than half of ROGs are resolved at unit level.[48] Consequently it may be best to provide the opportunity for COs to manage these administrative problems initially and keep the first level of review within the unit for a reasonable period, the suggested 60 days, before it is referred to ADFARB. However, the volume of complaints received by the committee about the handling of ROG at the unit level and the degree of damage caused thereby suggests that some external accountability is required. Therefore, the committee recommends that notification be required to the ADFARB within 5 working days of the lodgement of every ROG at unit level, with 30 day progress reports to be provided to and progress monitored by ADFARB.

98. The program of training for investigators can be maintained within Defence with oversight by ADFARB and the panel of suitable investigators raised by the IGADF can be incorporated into this process (thereby preserving an asset for use on overseas operations as required). ADFARB can call upon such investigators as required or conduct its own investigations or formal hearings if necessary. Dr Nash, the Director of the Ombudsman's Defence Team, told the committee her team rarely needs to travel to investigate complaints. She said:

> Most of the time we get information from Defence and we do it [the review] on the papers etc…On occasion we need to interview somebody formally under an oath or affirmation using the formal powers of the Ombudsman Act but that happens fairly infrequently.[49]

99. The second major area of operation for the ADFARB would be concerned with investigations and inquiries into major incidents. These matters would be the notifiable incidents which all ADF units are currently required to report to higher command, such as death, serious injury, loss of major equipment and matters likely to attract media interest, whether they occur inside or outside of Australia. The chairperson of the ADFARB would be empowered to decide on the manner and means of inquiring into the cause of such incidents. The legal aspects of the relationship with the State and Territory civil authorities could be settled by overriding Commonwealth legislation or by the putative Memorandum of Understanding (MOU) with the States/Territory Coroners.[50]

100. The ADFARB legislation would include matters which the chairperson would take into consideration in determining the manner of inquiry. This might involve consultation with the relevant Ministers, State and Federal, the CDF and Service Chiefs, various civilian authorities and the families and next of kin of ADF members

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48 Harris, *Committee Hansard*, op. cit., p. 24.

49 *Committee Hansard*, 9 June 2004, p. 18.

50 Defence, Supplementary submission, para. 2.86.

involved. The Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary. The chairperson would determine the appropriate vehicle for the inquiry and, subject to security considerations, publish written reasons for the choice of inquiry vehicle.

101. If satisfied that an investigation would suffice, the chairperson could select a suitably qualified person from the panel of investigators or from the civilian community. CDF would have the right to nominate a suitably qualified military officer to assist the investigator. The investigator could also come from or be assisted by the ADFARB staff from the ROG area with relevant expertise and experience.

102. If the chairperson decided that a more formal inquiry process was required, akin to the present Boards of Inquiry, then the chairperson could refer the matter to a military division of the Administrative Appeals Tribunal (AAT). The AAT is a Federal merits review tribunal which has a President who is a Federal Court Judge, several Presidential members who are Federal or Family Court judges, Deputy Presidential members both full and part time who are very senior lawyers and a large number of full and part time members who include several retired senior military officers of one and two star rank.

103. The AAT has very considerable administrative law expertise and regularly deals with Defence related matters in Veterans Affairs, Military Compensation Scheme, Comcare and Security issues, in its various divisions. It has offices and conducts public hearings in all major cities and can utilise Commonwealth facilities in other places. Its large number of experienced administrative review members are appointed by the Governor General on fixed terms of appointment. There are sufficient part time members to cope with any surge capacity required for occasional military inquiries.

104. The cost effect of using this existing Federal agency and its state of the art infrastructure would be minimal in contrast to establishing a new agency or continuing with ad hoc BOI. The reputation of the AAT is impeccable and this would be of great importance for perceptions of independence. The members allocated to the military inquiry would be chosen by the AAT President in consultation with the ADFARB chairperson. CDF would have the right to nominate a suitably qualified military officer to sit as a member of the inquiry tribunal. The ADFARB chairperson would appoint the counsel assisting the inquiry from his standing panel of counsel or from the civilian bar. Potentially affected ADF personnel (PAP) would continue to have legal representation at Commonwealth expense, the counsel representing being nominated by the Chief of Defence Trial Counsel.

105. The AAT has the existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters at no additional cost and it could be established in this role almost immediately.

106. The results and findings of any AAT inquiry or other investigation undertaken by reference from the ADFARB would be returned in confidence to the chairperson for review. The chairperson if satisfied that the findings are correct would then

determine the further disposition of the matter and if no further action were required, would provide his findings and recommendations to the Minister and CDF. CDF would be required to provide written reasons for declining to accept any recommendations made by ADFARB. The chairperson would publish an annual report of all matters dealt with by ADFARB, including matters referred to CDF and responses to them.

Conclusion

107. The committee is unanimous in its view that the military justice system has reached a watershed in its development. It has been some twenty years since the last wholesale review of the discipline system. During that same period, as described by the Inspector General,[51] the civilian administrative law has undergone enormous change. The military system has attempted to keep up with this pace of change and has done so quite well but it has the appearance of having been largely reactive and piecemeal. There have been numerous initiatives but these lack a coherent and an independent structure.

108. Given the pace of change in the civilian world over the last twenty years, it is perhaps not surprising that the series of rolling inquiries beginning with Justice Abadee, has been happening for the past ten years. Defence is by nature one of the most conservative elements of the community and thus quite understandably somewhat resistant to change. There is a history of social changes which were initially fiercely resisted by Defence but are now accepted, for example, married servicewomen, working service mothers, same sex relationships, women in combat related positions etc.

109. Military command is in many ways defined by obedience and conformity. Discipline is, along with leadership, a crucial underpinning of command. The committee acknowledges that any interference—even parliamentary scrutiny—with the means of administering command through the military justice system is of great concern to the military.

110. It is in the public interest to have an efficient and effective military justice system. Just as importantly, it is in the interest of all servicemen and women to have an effective and fair military justice system. Currently they do not.

111. For ten years now, there have been increasing calls from servicemen and women and their families that all is not well in the military justice system. Repeated inquiries have resulted in piecemeal change but some fundamental principles remain unchallenged. The serious issues raised in the 150 plus submissions made to this committee—including by extremely senior ranks of the military—make it plain that wholesale review and reform of the principles underpinning the current system of military justice is now required. Modern management principles have been visited upon the military and 'core business' has become the guiding principle for most

51 Mr. Earley, *Committee Hansard*, 5 August 2004, p. 86 et seq.

functions. The military legal and administrative system should be subject to the same logic, and, in so doing Australian service personnel will become subject to consistent, professional processes whenever problems arise.

112. Finally, the committee recognises the measures introduced over the last decade by the ADF in response to many of the problems that have again been identified. The fact that these problems continue to be highlighted in this report demonstrates those initiatives are not fully resolving many critical issues.

113. In addition to overhauling 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 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 requested that the ADF submit an annual report to the Parliament outlining (but not limited to):

1. The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

2. The workload and effectiveness of various bodies within the military justice system, such as but not limited to;
   (i) Director of Military Prosecutions
   (ii) Inspector General of the ADF
   (iii) The Service Military Police Branches
   (iv) RMJ/CJA
   (v) Head of Trial Defence Counsel
   (vi) Head of ADR.

114. The following section lists the recommendations contained in the report.

Recommendations

The committee has made a number of major recommendations designed to restructure Australia's military justice system giving particular emphasis to ensuring the objectivity and independence of disciplinary processes and tribunals and administrative investigations and decision making. It has also made a number of additional recommendations intended to improve other aspects of the military justice system concerned mainly with raising the standards of investigations and decision making taken in the chain of command.

The discipline system

The major disciplinary recommendations provide for the referral of all civilian equivalent and Jervis Bay Territory Offences to the civilian authorities. The additional recommendations provide for the reform of current structures, in order to protect service personnel's rights in the event that the civilian authorities refer criminal activity back to the military for prosecution. The additional recommendations cover the prosecution, defence and adjudication functions, recommending the creation of a Director of Military Prosecutions, Director of Defence Counsel Service and a new tribunal system**. All recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.**

Major recommendations

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

Additional recommendations

Recommendation 3

3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Recommendation 4

3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA

can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Recommendation 5

3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- Fully implementing the recommendations contained in the Ernst & Young Report;
- Encouraging military personnel secondments and exchanges with civilian police authorities;
- Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;
- Increasing participation in civilian investigative training courses; and
- Designing clearer career paths and development goals for military police personnel

Recommendation 6

3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- Judges should be appointed by the Governor-General in Council;
- Judges should have tenure until retirement age.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

Recommendation 22

5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

The administrative system

This report has also identified serious problems with the administrative component of the military justice system. The problems emerge at the very earliest stage of reporting a complaint or lodging a grievance and carry through into the final stages of review or appeal. The problems are not new—they have dogged the system for many years—nor are they confined to specific ranks or areas of the Forces. Young recruits and senior officers, female and male members across the three services engaged in the full range of military activities have given evidence before the committee raising their concerns about the military justice system.

The committee accepts that, on face value, there is 'a system of internal checks and balances, of review and counter review'. The overall lack of rigour to adhere to the rules, regulations and written guidelines, the inadequate training of investigators, the potential and real conflicts of interest, the failure to protect the most basic rights of those caught up in the system and the inordinate delays in the system rob it of its very integrity. The committee believes that measures must be taken to build greater confidence in the system and most importantly to combat the perception that the system is corrupted by its lack of independence. The committee is recommending a major restructuring of the administrative system, in particular the establishment of a statutorily independent grievance review board.

Major recommendations

Recommendation 29

11.67 The committee makes the following recommendations—

a) The committee recommends that:

- the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
- the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
- the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
- the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
- all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
- the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;

- the CDF be required to give a written response to ADFARB findings/recommendations;
- if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
- the ADFARB be required to make an annual report to Parliament.

b) The committee recommends that this report

- contain information that will allow effective scrutiny of the performance of the ADFARB;
- provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
- comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.

c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:

- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
- where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.

d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.

e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:

- the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers

necessary to the full investigation and consideration of matters before it; and

- although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.

f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:

- improving the training of investigating officers;
- maintaining a register of investigating officers, and
- developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.

g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:

- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
- the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.

h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Recommendation 34

12.120 The committee recommends that:

- all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;
- the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);
- the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;

- the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and
- the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.

Additional recommendations

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that:

- the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and
- there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).[52]

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the

52 Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.

- A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.
- The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.
- The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

12.45 Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.

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.

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.

Recommendation 37

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

(d) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.

(e) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;

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

Recommendation 38

14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

Recommendation 39

14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Recommendation 40

14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.