Senate Foreign Affairs, Defence and Trade References Committee

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: **P5B**

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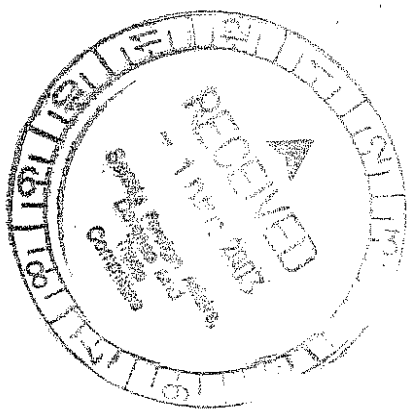

Mr B. Holmes
Secretary,
Foreign Affairs, Defence and Trade
(References Committee)
Department of the Senate
Parliament House
Canberra
ACT 2600

Dear Secretary,

Re: Senate References Committee Inquiry into Military Justice System

This submission address (1)(a) and (1)(b)(ii) of the Terms of Reference for this Senate Inquiry.

The Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into Military Justice Procedures in the Australian Defence Force (ADF), submitted its report to Parliament in June 1999. At para 5.24 (p165) it said, in part:

> *"The committee accepted that vindictive or improper action against an individual would be unlikely to survive all processes of review and avenues of appeal inherent in the current system. Indeed, the Committee considered that the review and appeal provisions in place to protect ADF members from unfair dismissal were comprehensive. Nonetheless, the Committee was of the view that the process rather than the review and appeal provisions should provide inherent safeguards against the improper termination of a member's serve with the ADF."*

By itself this statement enshrines the notion of procedural fairness and judicial outcomes can be expected by current operational procedures. However examination of substantial evidence readily demonstrates that the praxis of this reported position reveals that vindictive and/or improper action against an individual can survive all the layers of review and appeal processes both internal and external to the ADF. One must ask how does it happen? This is especially so in cases where abuse of process is blatant and easily understood by any reader. And so it is in my case 1981 to-date.

In 1981 Defence used legal procedures with supporting administrative procedures to wrongfully force termination of my officer career. The several subsequent processes of review and appeal failed to provide safeguards against the improper termination of a member's military career. In August 1993, a most senior army general admitted under cross-examination to an Administrative Appeals Tribunal (AAT) hearing that my 1981 reply in defence to the Notice to Show Cause had not been properly

considered by Army. But the general argued there had been no need for Army to do so as Major Warren had clearly refused to admit to the charges and hence he could not be rehabilitated. The general then presented his own misleading evidence against Warren. The AAT ruled against the general.

In spite of the alleged safeguards within the ADF and subsequent appeal systems through the:

(i) Responsible Minister
(ii) Office of the Defence force Ombudsman
(iii) Commonwealth Ombudsman

back to:
(i) Responsible Minister
(ii) Prime Minister
(iii) "Comprehensive and objective investigation" at the behest of the Governor-General to Defence

back to:
(i) Responsible Minister
(ii) Prime Minister

it was left to the AAT, which after 13 years, was able to clearly determine that not only was the case a tragic one, but there was not one scintilla of evidence produced by the ADF to justify the charges of unprofessionalism and incompetence brought against me.

Senator John Woodley responded to the AAT findings and formally raised with Senator R. Ray, the then Minster for Defence, major concerns about serious improbities within the military justice system. As a consequence Ray established yet another investigation into the circumstances of the improper termination of my officer career.

The then Chief of Army appointed an Army QC to investigate the Warren case. The Terms of Reference included examination of any "unfair, misleading or improper Defence administration." The Army's QC's report found no evidence of abuse of Defence administration and that no-one acted improperly. I made critical representation to the Responsible Minister and then subsequently to the Prime Minister, John Howard, on this QC's findings. My concerns were arbitrarily dismissed and I was advised the case was closed.

Later, under FOI Act, I was able to access documents relating to the Army QC's investigation report. These documents vindicated my criticisms of it. The QC had made it substantively clear that he had not done an investigation into procedural fairness. The documents exposing the QC's conduct are:

a) a penned note to an officer within the Directorate of Army legal Office (DALS), where he wrote:

"Tom-
"Unfairness" is not a legal term, though it might be a judgement value

I cannot sign the report (on Warren) making the distinction between "legal unfairness" and moral "unfairness"

The terms of reference mention "unfair Defence administration" "unfair" in the general sense not as part of a decision-making process

and

b) a follow-up fax dated 8 December 1994 to confirm with the then Director of Army Legal Service that he had not investigated issues of "procedural fairness" in his investigation of my case. In part, it read:

"3. I have given some further though to some amendments to the draft suggested by Lt Col Berkely, distinguishing between "legal fairness" and "moral fairness". I think the distinction he is drawing was between "procedural fairness" in the course of decision-making and the concept of fairness in a more general sense. As I was inquiring into the propriety and fairness of "Defence administration, I was not called upon to make decisions concerning the strict application of the rules of "procedural fairness".

Army's QC avoided an investigation into "procedural fairness" in the <u>legal</u> sense. Instead he deliberately interpreted the Terms of Reference in the general <u>moral</u> sense of "fairness". This had the effect of protecting the chain of command involved in the abuses of procedural fairness with deliberate intent to bring about the dishonourable termination of my officer career. The Army QC's handwritten note and FAX are the indictments of his decision not to adhere to the Terms of Reference in the <u>legal</u> sense. The FAX is tantamount to a disclaimer by him to cunningly deny any knowledge of the evidence at hand of abuses of procedural fairness by my superior officers.

What is obvious is that the responsible ministerial or political implementation of these review and appeal safeguards, be they internal or external, provide no protection against the behaviour of those holding arbitrary or discretionary decision-making power. This process of malfeasance and nonfeasance does permeate all layers in this 'due process' mechanism. To deliberately deny the existence of 'old-boy' networks and the evilness of their behaviour to achieve the improper termination of a subordinates' career is to elevate their attitudes and actions above the rule of law. It also brings chaos and violence into the use of public office and primary decision-making. Unless ferreted out these disintegrate authority and substitute arbitrary violence in their place.

This is the behaviour that the 1999 Parliamentary Inquiry Report into Military Justice Procedures failed to acknowledge or comprehend, or deliberately wrote out of its support for the process of review and appeal. Its omission leaves and continues to

leave, a culture of corruption within the ADF untouched and unaccountable. Such is the evidence in my case.

Mechanisms of improbity clearly identified in my case has identified a senior officer culture that is so adapt that it can operate alongside and untouched by any governing political party. In so doing it means there can be no confidence in procedural safeguards for ADF personnel implemented by this Inquiry or any inquiries before it.

Parliamentary Committees of Inquiry repeatedly fail to address this culture because they focus only on the theory of formalised checks and balances in their reports to the parliament and hence the public. This has the effect, deliberate or otherwise of:

a) aligning with one voice, senior military officers with their responsible minister, the Prime Minister, the Governor-General and Parliamentary Committees of Inquiry

b) fails to acknowledge how unaccountable discretionary power is used to abuse or evade the very safeguards of procedural fairness that these parliamentary inquiries have routinely upheld as inherent to the rule of law within the ADF as well as within society at large.

On 5 September 1997 the Hon. Justice Michael Kirby of the High Court of Australia, wrote to me and said:

> *" Without commenting on your experience, it is inevitable in any human justice system that wrongs will sometimes be done. What we have to ensure is that relevant decision-makers are vigilant and do not just give lip service to a commitment to justice according to law."*

What is particularly insidious and violent in the ex-Maj Warren case to-date, is that those officials involved in disintegrating these upheld safeguards have been identified. Their methods have been exposed. Their behaviour has been aligned with a time frame, 1979 to date. There are no fairies at the bottom of the garden! But there are parliamentarians who are applauding through their spin-doctoring, the democratic mechanisms of formal checks and balances as inherent safeguards against abuses of authority by responsible ministers and the Army generals. It is obvious to the public that massaging this spin facilitates greater exercise of dutiless power over the civic body.

On 29 January 2001 Admiral Barrie, Chief of Defence Force wrote to me in part, that:

> *"As you are aware, I have established a review of ADF leadership and management practises to ensure that all personnel who have complaints about the way they have been treated can be heard".*

He asserted that the audit would be independent and invited me to prepare a *"full submission for the Audit Team, so it can respond directly to you."*

I made submission to Admiral Barrie's Audit Team into military justice cases on 12 March 2001. The Audit Team refused to examine my case allegedly because the events occurred in 1980-81 and therefore argued were outside the post 1985 time scale of their Terms of Reference. This was a clear ploy to evade examination of the case because my submission detailed Defence's abuse of due process well past 1985 up to and including the 1994 Army's QC's investigation into procedural fairness. It give evidence and insight into how safeguards to the protection of ADF personnel are abused. It shows:

(i) corruption of due process by Defence in its reporting to the Governor-General;
(ii) corruption of Freedom of Information and Archives Act Laws in respect to the preservation of the history records of government
(iii) how Army's 1994 investigation into my case avoided investigation of abuses of procedural fairness in its legal sense.

A copy of my submission to Admiral Barrie's Audit Team was subsequently published as Submission No. 49 in Vol.3 to the Joint Standing Committee on Foreign Affairs, Trade and Defence 'Examination of the Defence Department Annual Report (Military Justice) April 2001.

My case is no ordinary case. It has been describe :

(i) by the Administrative Appeals Tribunal as "tragic;"
(ii) by Professor Martin Krygier, Professor of Law, University of New South Wales, as "serious and scandalous";
(iii) academics from both Wollongong and Macquarie University have said it will be a matter of political will on the part of the government for this case to be resolved.
(iv) It has been the basis on which the officer reporting system in Defence- Army has been subsequently overhauled and rewritten following an academic from South Cross University's scathing criticism of it.
(v) Former Labor Prime Minister, Gough Whitlam rang and expressed his sorry/apologies at what has happened to ex-Major Warren

To-date, people in positions of power and authority has been corrupting the appeal process to deliberately avoid resolution of this case. The tools used to circumvent this resolution are the same mechanisms of appeal and review that the 1999 Parliamentary Inquiry Report paras 5.22-5.24 have upheld as the very safeguards against such malfeasance and nonfeasance. Yet, in his correspondence to me of 5 September 1997, The Hon Justice Michael Kirby wrote, in part:

"I note that you have written to Members of the House of Representatives They are much more readily able to give you relieve than I can."

However, the political reality is that both Members of House of Representatives and the Senate, with the exceptions of Senators Woodley and Margettes, have been overridden by the abuse of power by the military. Worse is, both Houses of Parliament have knowingly allowed this to happen.

For more detailed accounts of the ex-Major Warren case go to the Internet search engine "Google" and type in 'Allan Warren'

Yours sincerely,

A Warren

Allan Warren