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**Senate Foreign Affairs, Defence and Trade Committee
Fourth Progress Report
Into
Reforms to Australia's Military Justice System
Government Response**

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GOVERNMENT RESPONSE

Recommendation 1

The committee recommends that the Defence Force Discipline Act be amended to include provisions governing the conduct and protection of military jurors.
(*paragraph 2.31*).

Response

Agreed. The Government agrees that legislation should be enacted to provide for more comprehensive military jury provisions. Legislation will be introduced into Parliament this year.

Recommendation 2

The committee recommends that Defence undertake an audit of all legal officers in the ADF with a view to ensuring that the legal skills, expertise and experiences available to the ADF are being used to full advantage and to identify deficiencies that may need addressing (*paragraph 2.74*).

Response

Agreed. The Government has directed Defence to conduct a review of the establishments of both the permanent and Reserve forces to ascertain where legal officer positions are posted. A related audit survey is being undertaken of both the permanent and Reserve forces which reviews, by both Service and rank, qualifications (undergraduate, postgraduate and doctoral), years of experience since admission and specialist accreditations. Defence has also begun an audit of the types of legal work being undertaken by legal officers posted throughout the ADF.

Recommendation 3

The committee recommends that in 12 months, Defence report to the committee on its progress implementing reforms to improve the ADF's investigative capability (*paragraph 3.34*).

Response

Substantially Agreed. A further report on the progress of the implementation of the ADF's investigative capability reforms is agreed. However, a 2010 time frame for the report will take into account the implementation of the recommendations arising from the independent Street/Fisher review of the military justice reforms and the new structure and establishment of ADFIS recommended by a 2008 Unit Establishment Review.

Recommendation 4

The committee recommends that the government commission an independent review of the ADF's investigative capability at the conclusion of the 5-year remediation period (*paragraph 3.35*).

Response

Agreed. It would be very appropriate to conduct a further independent review of the ADF investigative capability at the conclusion of the five-year remediation period in December 2011.

Recommendation 5

The committee recommends that a specific time limit, for example 90 days, be imposed on referrals of redresses of grievance to the service chiefs (*paragraph 4.14*).

Response

Not Agreed. The Government will not impose a time limit on referrals to the Service Chiefs, but will adopt reasonable and achievable benchmarks to ensure the timely functioning of the overall redress of grievance (ROG) system.

The Government recognises that the right to complain is a core element of the military justice system and acknowledges the legitimate expectation that grievances should be responded to expeditiously. There are, however, issues concerning Defence's capacity to deal with applications for redress of grievance within a specified time limit, and what would happen to a complaint not finalised within that time limit.

The committee correctly identifies the primary cause of delay in ROGs referred to a Service Chief as the time taken to allocate the ROG to a case officer (due to a shortage of case officers), rather than the time taken for the inquiry itself – which currently averages about 75 work hours on a part-time basis by Reserve officers to inquire into the grievance and prepare a decision brief.

While this issue has been recognised as a problem for some years and action has been taken to address it, it remains difficult to attract and retain Reserve officers of appropriate rank who possess the suitable skills and experience to fill Reserve case officer positions. Other options have been, and are being, explored, such as remote Reserve service arrangements, civilian case officers and external service providers, but have not yet proven successful.

It should also be noted that the significantly improved performance of unit commanders in handling ROGs since mid-2006 has been achieved through the provision of more detailed advice and guidance from the case officers whose primary task is to manage ROGs referred to the Service Chiefs and the Chief of the Defence Force (CDF). In effect, this reduces the time taken at the unit level but increases it once referred to a Service Chief, due to the higher workload of case officers.

The imposition of a specified time limit on referrals of ROGs to a Service Chief also raises the question of what action should be taken upon the expiration of that time limit. The options would appear to include terminating action by the Service Chief on the grievance (thereby ceasing the member's legislated right to a Service Chief inquiry), elevating the grievance to the CDF (which would create a new right of review for all members below the rank of chief petty officer, warrant officer class 2, or flight sergeant, and create a significant extra workload for the CDF) or forcing the member to take the complaint to the Ombudsman (again, an increased workload and the Ombudsman has no power to provide redress should a member's grievance be found to have merit).

None of these options are in the best interests of ADF members as they simply move the resource requirement within Defence, or from Defence to the Ombudsman's office, without providing any benefit to the member and are inconsistent with Defence's policy of attempting to resolve all complaints at the lowest possible level.

The Government supports the implementation of benchmarks for handling ROGs rather than a time limit, but the benchmarks need to be both reasonable and achievable.

Experience over the past three years shows that an overall performance benchmark of 90 days would far exceed the current capability to process ROGs. As one of the central elements of the military justice system, the ROG process is thorough and rigorous. As such, it has a number of levels of review as well as the initial complaint handling, and these reviews inevitably add considerably to case handling time.

Under the current process, unit commanding officers have 90 days to finalise a ROG. Defence currently allocates Service Chief-level ROGs for management in accordance with the urgency of the matter under consideration. ROGs relating to 'termination of service' decisions, for example, are the highest priority, and for these ROGs a benchmark of 90 days is both reasonable and achievable. For lower priority matters, however, 180 days for finalisation would be a more reasonable benchmark.

A further benchmark would need to be set for those ROGs that are referred for review by the CDF. A 90-day benchmark is considered appropriate for these cases and could be applied from the time the member decides to refer the matter to CDF.

Recommendation 6

The committee recommends that the ADF commission an independent review of the learning culture in the ADF, along similar lines as the investigation conducted in 2006. The main purpose of the inquiry would be to assess whether the recommendations contained in the 2006 report have been effectively implemented and whether additional measures need to be taken to improve the learning culture in the ADF. This review should take place within five years and the report on its findings should be made public (*paragraph 4.39*).

Response

Agreed in Part. A learning culture assessment has been incorporated into planned regular external reviews on the health of the military justice system. The first of these has been conducted by Sir Laurence Street and Air Marshal Fisher (Retd). That review found evidence that ADF training establishments have embraced the intent and spirit espoused within the learning culture inquiry recommendations.

In addition, there are quarterly reports to the Chiefs of Service Committee on learning culture assessment. Rigorous evaluation measures are being developed to continuously monitor and provide assurance that the prevailing culture in training institutions aligns with the desired learning culture.

The Government does not support the commissioning of a further review along similar lines as the investigation conducted in 2006, given the extensive current oversight and the regular independent assessment mentioned above.

Recommendation 7

The committee recommends that the findings of Defence's attitude survey contain a greater level of detail and analysis than that provided in the most recent publication (*paragraph 4.42*).

Response

Agreed in Principle. The Inspector General – Australian Defence Force (IGADF) relies on a broad range of indicators to assess the health and effectiveness of the ADF's military justice system and the perceptions of its members, with the annual Defence Attitude Survey results being just one source element of military justice data used to inform the IGADF.

As an additional diagnostic tool, the IGADF is implementing a regime of detailed military justice feedback questionnaires targeted at ADF members with recent and actual exposure to the disciplinary and administrative complaint processes. The questionnaires will be introduced by the end of 2009.

In view of this new initiative, the practicality and necessity for the expansion of Defence Attitude Survey content and analysis will be the subject of close examination in collaboration with the agency responsible for its production.

Recommendation 8

The committee recommends that the government amend the Defence Force Discipline Act to require the Australian Military Court (AMC) to publish material such as court lists, transcripts of proceedings and judgments in a readily and easily accessible form (*paragraph 5.20*).

Response

Substantially Agreed. The Act will be amended to provide for the publication of the court lists, rulings, findings and sentencing remarks, subject to any non-publication orders made by a military judge.

The Government does not agree that full transcripts of proceedings should be published as a matter of course for reasons of privacy, practicality (particularly if a new trial were to be ordered) and because it is inconsistent with the practice in the civil courts.

Recommendation 9

The committee recommends that the CMJ appear before the committee to give evidence on the operation of the AMC and matters raised in the CMJ's annual report when invited by the committee to do so (*paragraph 5.30*).

Response

Agreed. The Chief Military Judge is available to appear before the committee to provide evidence, on appropriate matters, when invited to do so.

Recommendation 10

The committee recommends that the *Defence Act 1903* be amended to include in section 110 the requirement for the IGADF to, as soon as practicable after each 31 December, prepare and give to the Minister, for presentation to the Parliament a report relating to the functions of his office as set out in section 110C(1) (*paragraph 5.59*).

Response

Agreed. Action will be taken to amend section 110R of the *Defence Act 1903* to include a specific requirement in future for the IGADF to prepare, as soon as practicable after 31 December each year, an annual report on the functions of his or her office to be furnished to the Minister for presentation to the Parliament.

Section 110R provides for the IGADF to prepare and give to the Chief of the Defence Force such reports on the operations of the IGADF as the CDF directs. Pursuant to this section, the IGADF prepares an annual report on the functions of his office for the CDF.

For the past three years, extracts of this report have appeared in the *Justice and Fairness in Defence* chapter of the Defence Annual Report. In addition, the substantive IGADF Annual Report has been made available as part of the online material associated with the *Defence Annual Report 2007-08*.

Recommendation 11

The committee recommends that the government consider additional measures to strengthen the independence of the IGADF using the provisions governing the CMJ and the DMP as a template (*paragraph 5.61*).

Response

Agreed in Part. The need for the IGADF to be able to fulfil functions in an independent manner is important and is fully supported. While this has happened in practice since the commencement of the position in 2003, both the need for, and the perception of, the IGADF being able to act independently in fulfilling the role was given legislative underpinning in 2005 by the present provisions of sections 110A-S of the *Defence Act 1903* which established the position of IGADF as a statutory appointment.

The Government does not hold the committee's view that section 110A curtails the independence of the IGADF, particularly as the Government has agreed, under recommendation 10, that the IGADF will now make available an annual report for the Minister to present to the Parliament.

However, a measure to further strengthen the perception of independent action by the IGADF will be taken by amending sub-section 110D(2) to make it clear that, where the IGADF is directed to conduct an inquiry or investigation by the CDF, he or she may cease the inquiry or investigation if he or she forms a belief that the continuation of the inquiry or investigation is not otherwise warranted, having regard to all the circumstances. An amendment to this effect would align sub-section 110D(2) with the general scheme of the rest of section 110D and will improve the perception that the IGADF can exercise an independent judgement whether to continue to inquire into a matter, including where the inquiry has been initiated by CDF direction.

Recommendation 12

The committee recommends that the regulations governing the establishment of Commissions of Inquiry (COIs) be amended to require that COIs be conducted in public except in circumstances where the president deems there to be a compelling reason for privacy. In cases where the president makes such a decision, the regulations should require the president to issue a public statement containing the reasons for this decision (*paragraph 5.63*).

Response

Agreed. The Government appreciates the importance of conducting Commissions of Inquiry in a way that promotes public confidence in the integrity of inquiry processes. Indeed, it is now CDF's general practice to appoint Commissions of Inquiry as public inquiries, subject to considerations of security and the exercise of legal discretions by inquiry Presidents.

Accordingly, the Government agrees to pursue amendment to the Defence (Inquiry) Regulations to reflect the ADF's current practice by providing that Commissions of Inquiry be appointed as public inquiries. This would be subject to the CDF having authority to close public access for reasons of security, and inquiry Presidents retaining their existing authority to restrict public access (under regulation 62). It is further agreed that CDF and inquiry Presidents, as the case may be, should issue a public statement containing the reasons for an inquiry being closed to the public.

Recommendation 13

The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation, including subordinate legislation, that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia (*paragraph 5.91*).

Response

Agreed in Principle. The existing legislative process is rigorous. It is designed to ensure that prospective legislation is fully and publicly scrutinised and debated. As a part of this process, opportunities already exist for organisations (such as the Law Council of Australia) and individuals to make submissions on proposed legislation and established procedures allow for these submissions to be properly considered by the Parliament.

The Government acknowledges that the Law Council of Australia has made significant and influential submissions in relation to reforms to the military justice system in recent years. Furthermore, Defence has actively consulted the Law Council of Australia's Military Justice Working Group on reforms to the Defence Force Discipline Act, most recently over significant changes to the summary authority evidentiary regime.

The Government agrees there are benefits in such consultation with the Law Council and other interested external parties on military justice matters. Notwithstanding that general statement, there is a need to maintain flexibility and discretion regarding consultation on proposed legislation. The benefits of consultation can best be achieved through appropriate non-mandatory engagement case by case. Accordingly, the Government notes that Defence will continue to informally engage with the Law Council and any other interested external stakeholders, as circumstances permit and call for, on future proposed legislation that is intended to make significant changes to Australia's military justice system.