

Chapter 3

The discipline system

3.1 The committee's recommendations contained in the report on the effectiveness of Australia's military justice system covering the discipline system were based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.

3.2 The government rejected the reference committee's recommendation to have all suspected criminal activity in and outside Australia referred to the relevant civilian police for investigation and prosecution before civilian courts as well as some other matters related to the responsibilities of civilian and defence law enforcement.¹

3.3 The government did, however, undertake to ensure that Defence would work to improve the management and effectiveness of the relationship between military and civilian authorities on referral issues. This was to include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with states and territories for referral of offences. Defence was also to establish a common database for tracking referrals.

3.4 The following section considers reforms to the three major phases of the disciplinary process—the investigation by Service Police of suspected criminal activity; the provision of legal advice for the initiation and conduct of prosecutions; and the structure of disciplinary tribunals.

Investigations under the discipline system

3.5 The references committee held grave concerns about the ADF's capacity to conduct rigorous and fair disciplinary investigations. Indeed, it was of the view that the ADF had 'proven itself manifestly incapable of adequately performing its investigatory function'.² It concluded:

The evidence before this committee reveals that a decade of rolling inquiries has not effected the kind of broad-based change required to improve the military police's investigative capacity. Despite constant scrutiny, the system is still plagued by delay and continually fails to equip personnel with the skills and experience necessary to conduct rigorous and fair investigations. Known problems have not been adequately addressed.³

1 Recommendations 1, 2, 3, 7, 8 and 9.

2 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 52.

3 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 54.

3.6 At the time the committee was drafting its report into the effectiveness of Australia's military justice system, Defence had already commissioned a major study by Ernst and Young into the capacity of service police to perform their investigative function. The committee endorsed the recommendations contained in this report. Furthermore, it urged Defence to facilitate greater engagement of service police with civilian agencies, including secondments, reserve recruitment and participation in civilian investigative training. It also recommended that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capability of the criminal investigations services.⁴

3.7 At the public hearing on 19 June 2006, the IGADF acknowledged that the standard of training for investigating officers required some improvement. He was aware that all of the investigative training for all three services was now conducted at the one police training school.⁵

3.8 It should also be noted that the IGADF, as part of his function in monitoring the health of the military justice system, is conducting an audit that is looking at both the discipline and administrative systems. Under this program, a team from the office of the IGADF is visiting selected units to examine, among other things, the unit disciplinary records for compliance and all authorisations to see that the subordinate summary authorities 'are properly authorised'. He explained, 'if they have cells, accommodation or detention accommodation we will go and have a look at that as well'.⁶ A detailed discussion of the audit process is at paragraph 4.51.

Police investigative capability audit

3.9 The government accepted that the current military police investigation capability had significant shortcomings and was inadequate for dealing with more serious offences that are not referred to civilian authorities. It agreed with the committee's recommendation to conduct a tri-service audit of the service police to establish the best means for developing investigative capabilities.⁷

3.10 The CDF informed the committee during estimates hearings that the initial phases of this tri-service police investigative capability audit had been completed.⁸ A senior retired AFP officer had been seconded to assist the audit that is looking at the requirements, standards and training development for service police investigators. The audit is to determine the 'best means for developing investigative capability'.

4 Recommendations 5 and 6.

5 *Committee Hansard*, 19 June 2006, p. 15.

6 *Committee Hansard*, 19 June 2006, p. 25.

7 Government response to recommendation 6.

8 *Committee Hansard*, Estimates, 31 May 2006, p. 7

3.11 Rear Admiral Bonser advised the committee that, although not completed, the audit has made some initial observations but that no findings or recommendations have yet been made. He noted that the final report was due to the CDF at the end of July 2006. The Rear Admiral explained that Defence would then use that report to inform the way ahead in developing the service police's investigative capability.⁹

3.12 It should be noted that the government also had in train plans to form a Serious Crime Investigation Unit. It advised the committee that in February 2004 the ADF had begun work to form the unit but that further steps to establish it have been suspended pending the findings of the audit.¹⁰

Provost Marshal

3.13 A new ADF Provost Marshal who stands outside the single service chains of command, however, has been appointed. Rear Admiral Bonser informed the committee of the appointment of the Provost Marshal:

With respect to investigations into serious notifiable incidents such as a death, there is the new Provost Marshal of the ADF... The new provost marshal and that unit are being set up under the direct command of the CDF so that they are outside normal single-service chains of command. That is the mechanism by which that is being achieved.¹¹

3.14 The CDF told the committee that because Defence have the Provost Marshal in place, dedicated service police investigators are to be deployed to Iraq, Afghanistan, the Solomon Islands and Timor Leste. He explained that the investigators would be responsible to him through the Provost Marshal ADF. He stated:

This further assures that the ADF military justice system delivers impartial, rigorous and fair outcomes both at home and, importantly, on deployed operations.¹²

3.15 The CDF explained in practical terms the way the system would work:

...if we have a situation, an incident, that is a potential crime scene, we will secure the site with these investigators. As soon as that happens, these investigators become responsive to the provost marshal. In fact, they are under the command of the Provost Marshal of the Australian Defence Force. The Provost Marshal of the Australian Defence Force works direct to me. So we have a very short chain—investigator, Provost Marshal ADF,

9 *Committee Hansard*, 19 June 2006, p. 16.

10 Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, *Report on the Effectiveness of Australia's Military Justice System*, October 2005, p. 2.

11 *Committee Hansard*, 19 June 2006, p. 20.

12 *Committee Hansard*, Estimates, 31 May 2006, p. 7.

CDF—which basically completely passes the operational chain of command.¹³

3.16 He stressed that there would be no command interference in the process of investigation:

If something happens and it is clear that there is a potential crime scene, that scene will be secured and placed in the hands of the investigator. The commander on the spot cannot interfere.¹⁴

The investigator then reports direct to the provost marshal, who is one of my staff in Canberra, and he reports to me. In effect, if anybody orders anything, it will be me. If there is a problem on the operational side, I will order that through the operational chain of command through the vice chief to the commander of the joint task force. I have the investigation running on a very short leash through the Provost Marshal ADF. I think they are very robust arrangements. They will work well and they are completely aligned with what was recommended in the military justice report with that process.¹⁵

3.17 The CDF believed that these reforms represented a huge step forward in establishing a 'more robust and a much more independent process'.¹⁶

3.18 The committee is not convinced that the procedures to be taken following a notifiable incident address the problems identified in the military justice report. It should be remembered that the references committee considered that the 'ADF had proven itself manifestly incapable of adequately performing its investigatory function'. The committee had recommended that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the criminal law.

3.19 The new arrangements whereby a potential crime scene will be secured by dedicated service police investigators who would be responsible to the CDF through the Provost Marshal ADF still means that Defence is investigating itself. The committee is not sure that the reforms will prevent interference by the chain of command or the perception of bias. This is the same concern the committee has expressed about the IGADF—and the Defence Force Ombudsman.

Civilian and service police

3.20 In the report on the effectiveness of Australia's military justice system, the references committee was particularly keen to see an increase in exchange programs

13 *Committee Hansard*, Estimates, 1 June 2006, p. 22.

14 *Committee Hansard*, Estimates, 1 June 2006, p. 23.

15 *Committee Hansard*, Estimates, 1 June 2006, p. 23.

16 *Committee Hansard*, Estimates, 1 June 2006, p. 23. See also comments by Rear Admiral Bonser, *Committee Hansard*, 19 June 2006, p. 20.

between civilian and military police and greater participation by military personnel in civilian investigative training courses.¹⁷ In answer to a question on the opportunities for greater engagement between civilian and military police, Rear Admiral Bonser explained:

We have had a standing arrangement for training with the New South Wales Police. Importantly, where we go in the future will be subject to the outcomes of the audit that is currently under way. Previously, we have been helped greatly by the participation of a retired senior police officer, a former deputy commissioner. The future training requirements will flow from the outcomes of that audit, whether it is an extension of some of what we are doing at the moment or perhaps something more broadly based, like relationships with other federal or state police authorities. It is not clear yet but will be when we have the final report of the audit. Part of the terms of reference will be to help define where we go in terms of training and particular training standards.¹⁸

Part of the terms of reference is to look at secondments and how we might benefit from secondments or mentoring by civilian police, and training with the civilian authorities—which ones would be ideal services for us to work with so that we establish common standards across the board.¹⁹

The disciplinary investigation manuals

3.21 The references committee found the manual on the conduct of disciplinary investigations grossly substandard.²⁰ Rear Admiral Bonser told the committee that consideration of the manual on the conduct of disciplinary investigations is part of the same audit currently under way. Part of the terms of reference required a review of the various manuals and the audit to make recommendations for future development.

3.22 The committee recognises that this review is well overdue. It notes, however, that while Defence regulations may clearly spell out procedures ensuring the impartiality, fairness and timelines of investigations and inquiries, they are ineffective if not observed. The committee highlights the need for ADF to go much further than review and update its manuals and instructions. Mechanisms must be in place to ensure that requirements set down in Defence regulations and instructions are rigorously enforced.

Committee view

3.23 The committee views the tri-service police investigative capability audit now underway as a critical exercise that will lay the foundation for far reaching

17 Recommendation 5.

18 *Committee Hansard*, 19 June 2006, p. 21.

19 *Committee Hansard*, 19 June 2006, p. 20.

20 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 45.

improvements in the service police. It awaits the completion of the audit and Defence's response to it before making any further comment. Even so, it takes this opportunity to underline its concern about poorly conducted investigations by the service police, especially the preliminary investigations undertaken following a notifiable incident. The references committee found:

The immediate stage involving activities such as securing and examining the scene of the incident was one area of concern in the investigation of a sudden death. A number of relatives of members who had committed suicide were critical of the initial examination, with many believing that it was flawed. This type of examination, reliant on specialist investigative skills, is rightly the province of the civil police in the first instance to determine whether any criminal act is involved.²¹

3.24 The committee draws attention to this finding and urges the current investigative capability audit to give close and careful consideration to this matter. The committee notes media reports of the handling of the investigation of the unfortunate death of Private Kovco in Iraq and is concerned that, despite the Department's assurances, there are ominous signs that much remains to be done with respect to police capability. The committee will monitor the progress of the inquiry carefully.

Initiation and conduct of prosecutions

Appointment of the Director of Military Prosecutions (DMP)

3.25 The references committee recommended that the government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.²²

3.26 On 12 June 2006, the DMP was made a statutory office. On 5 July 2006, the Minister assisting the Minister for Defence, the Hon. Bruce Billson MP, announced that the Minister for Defence had selected Lieutenant Colonel Lyn McDade to be appointed as the first Director of Military Prosecutions. She will be promoted to the rank of Brigadier and hold the DMP appointment for a term of five years. Mr Billson said:

LTCOL McDade has 23 years' military law experience gained through a mix of full-time and reserve Army service. She also has extensive legal experience in the Northern Territory as a Civil and Police Prosecutor, Deputy Coroner, Relieving Magistrate and at senior levels in Courts

21 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 186. This finding is included in chapter 9 of the report which deals specifically with inquiries into sudden death.

22 Recommendation 10. See also recommendations 11, 12, 13, 14 and 15.

Administration. More recently LTCOL McDade has been practising as a Barrister-at-Law.²³

3.27 At the same time, Mr Billson announced that Lieutenant Colonel Geoff Cameron CSC had been selected by the Minister for Defence to be the first Registrar of Military Justice. He will be promoted as colonel for a 5-year term.

3.28 The CDF advised the committee that a number of other important positions had been established including Chief Judge Advocate as a statutory appointment and the Director of Defence Counsel Services.²⁴

Permanent legal officers and practising certificates

3.29 The references committee recommended that all permanent legal officers hold current practising certificates. Although the government identified practical difficulties in implementing this requirement, it agreed that legal officers in the office of the DMP would be required to hold them and other permanent legal officers would be encouraged to take them out.²⁵

The creation of a permanent military court

3.30 The references committee also recommended that the government amend the *Defence Force Discipline Act 1982* (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.²⁶

3.31 ADF's status report noted that drafting instructions to create the Australian Military Court (AMC) were submitted to the Office of Parliamentary Council on 3 March 2006. The CDF advised the committee that Defence was aiming to have this legislation included in its submission for the 2006 sittings of parliament. Rear Admiral Bonser similarly stated that the matter should be finalised by end of calendar year 2006.

Committee view

3.32 The references committee made a number of specific recommendations with regard to the proposed permanent military court such as the right to elect trial by court

23 The Hon. Bruce Billson, MP, Minister Assisting the Minister for Defence, Media Release, MINASSIST 024/06, 5 July 2006. See also *Committee Hansard*, 19 June 2006, p. 13.

24 *Committee Hansard*, Estimates, 31 May 2006, p. 7 and recommendation 17 in government's response.

25 Recommendation 16 and government response to this recommendation.

26 Recommendation 18.

martial before the Permanent Military Court for summary offences.²⁷ The committee looks forward to the introduction of the legislation in the coming months.

27 See recommendations 19, 20, 21, 22 and 23.