

# Chapter 4

## The administrative system

4.1 In its report on the effectiveness of Australia's military justice system, the references committee accepted that, on face value, there was 'a system of internal checks and balances, of review and counter review'. It found, however, an overall lack of rigour to adhere to the rules, regulations and written guidelines, inadequate training of investigators, potential and real conflicts of interest, failure to protect the most basic rights of those caught up in the system and inordinate delays in the system. In the committee's view, these failings robbed the administrative system of its very integrity. The references committee recommended that measures be taken to build greater confidence in the system and to combat the perception that the system is corrupted by its lack of independence.

4.2 In light of the committee's concerns and the recommendations made in its report on the effectiveness of Australia's military justice system, this chapter looks in detail at the measures being taken by the ADF to remedy the identified problems.

### Defence's whistleblowing scheme

4.3 The references committee recommended that the ADF conduct a regular review of Defence's whistleblowing scheme especially the program it has in place to protect those reporting wrongdoing from reprisals. It also recommended that the Department of Defence include in its Annual Report a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. The committee suggested that, in addition to providing statistics, it contain a discussion on the possible under reporting of unacceptable behaviour.

4.4 The government agreed in part to this recommendation but was of the view that a report on potential under reporting of unacceptable behaviour, as an exercise, was 'necessarily speculative in nature'. It noted, however, that Defence has in place a range of initiatives to manage and coordinate its complaints processing function to raise awareness and encourage reporting as appropriate.<sup>1</sup> The IGADF is taking positive steps to encourage ADF members to report unacceptable behaviour (see paragraphs 4.49–4.54).

4.5 The ADF noted that the first of a series of regular reviews into Defence's Whistleblower scheme has been completed. The Status report indicates that the internal review is 'operating satisfactorily'.

### *Committee view*

4.6 The committee requests that the review be provided to the committee.

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1 Recommendation 25 and government response.

## **Administrative inquiries**

4.7 The references committee found that any shortcomings or failings during an administrative inquiry has the potential to set the proceedings on a long and troubled course that could drag through the system for years. The integrity of the inquiry and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and effectiveness. The committee made a number of recommendations to amend the Administrative Inquiries Manual to enhance transparency and accountability.<sup>2</sup> The government agreed to a number of these changes which have been implemented (see paragraph 2.4)

## **Redress of Grievance (ROG)**

4.8 In April 2005, the Department of Defence and the Office of the Commonwealth Ombudsman released a joint report that reviewed critically the ADF Redress of Grievance system. It made numerous recommendations including:

- the establishment of a common case tracking system or complaints database;
- the central management of DEO, Army Fair Go Hotline, SUBRIMS, DADRCM, Navy's SOSP program and any new initiatives in complaint management with a view to ensuring that their operations are complementary—where feasible, these agencies should be co-located under the same group;
- the development of a common complaint management information system to manage cases across all avenues of Defence complaint; and
- the establishment of an integrated complaint measurement, analysis and reporting system.

4.9 The review also recommended that the IGADF take the lead in defining the complaint statistics required for measuring the health of the military justice system across complaint areas and that all complaint areas comply with requirements.

4.10 The references committee accepted that the implementation of these recommendations would go some way to address the problems identified in the ROG Process. It was of the view, however, that comprehensive reform of the process was required.

4.11 At the moment, the newly established Fairness and Resolution Branch has the responsibility for ensuring that the recommendations coming out of the joint Defence Force Ombudsman/CDF report come into effect. It has also assumed the task of carrying out the government's undertakings contained in its response to the military justice report.

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2 Recommendations 26, 27, 28, 31, 32 and 33.

## The Fairness and Resolution Branch

### *Streamlining the handling and resolution of complaints*

4.12 The reference committee's report on the effectiveness of Australia's military justice system noted that following various inquiries, the ADF had responded by creating a number of bodies to deal with aspects of the administrative system. It concluded that the growing number of options presented ADF members 'with a mixed and confusing set of choices'. It believed that the administrative system 'would operate more effectively if it were less complicated and more streamlined'. This finding reinforced that of the joint Defence Force Ombudsman/CDF report.

4.13 The Fairness and Resolution Branch was established on 30 January 2006 as the central management body outside the normal line management. This initiative combined a number of former separate units within the department. In effect, it re-structured, renamed and brought together the Complaint Resolution Agency, the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution and Conflict Management.<sup>3</sup> The new system allows Defence 'to streamline the complaints and redress of grievance system in line with the recommendations of the 2004 joint Defence Force Ombudsman and CDF redress of grievance system review'.<sup>4</sup>

### *Committee view*

4.14 The restructuring of the ROG process under the direction of the Fairness and Resolution Branch is a positive step. Its effectiveness in tackling some of the long-term problems with ROGs is yet to be tested. While early indications are promising, the system will require further surveillance into the future.

### *Delays in the redress of grievance system*

4.15 Delays and other organisational failures that frustrated the timely completion of an investigation in resolving grievances was one of the major problems identified in the report on the effectiveness of Australia's military justice system. To tackle these problems, the references committee recommended that all complaints lodged with a commanding officer (CO) and being investigated within the chain of command be referred to the proposed Australian Defence Force Administrative Review Board (ADFARB) if the matter was not resolved 60 days from lodgement.<sup>5</sup>

4.16 The government did not take up the committee's recommendation for the establishment of the ADFARB. The Fairness and Resolution Branch has the responsibility for addressing the problem of delays and other organisational failings.

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3 *Committee Hansard*, 19 June 2006, pp. 2 and 11.

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

5 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2006, paragraph 8.114.

The Acting Director of the branch, Ms Diane Harris, told the committee that the branch has the capacity to look at a complaint when it is submitted and to determine whether the best process is being used to resolve the matter. She explained:

For example, if that complaint is around what might be a very difficult workplace relationship, it may well be that an alternative dispute resolution process is better suited to it. So we are in a position as a branch to go back to a CO right in the early stages and say, 'Well, yes, this is a formal complaint but have you considered this as an alternative approach,' and so they can use that instead. If it does not succeed, of course the individual still has the formal complaint on the books and it can then be preceded with as a formal complaint, but sometimes that is not the best way to get the outcome that the individual wants.<sup>6</sup>

We also have an enhanced advisory role. As of 1 July it will be mandated that all COs, on receiving a complaint, have five days to do their quick assessment to determine what their course of action is going to be and then to submit all of that to the Fairness and Resolution Branch where it will be reviewed. We will have our legal officer look at it, we will have an experienced case officer look at it and we will then provide advice to the CO in terms of the approach that has been proposed.<sup>7</sup>

We would expect that in most cases that approach will be fairly sound, but in some cases it will not be. We might go back, for example, and say: 'You have nominated Lieutenant Smith to be the inquiry officer. In this case we believe the issues are too complex for a junior officer. We recommend that you appoint a more senior officer to do it.' We might also, for example, say: 'This is a very complex issue. It will be quite involved.' So we might recommend a different inquiry officer altogether and we may put forward to the CO the name of somebody else from outside the unit who might be able to be the inquiry officer for the purposes of that complaint.<sup>8</sup>

4.17 The Defence Force Ombudsman, Professor John McMillan, informed the committee that there had been a substantial improvement in the processing of complaints, notably a reduction in the time frame for handling ROGs and in the number of complaints about delay that flow through to his office.<sup>9</sup> He explained:

Our experience a year ago was that it was common for matters to have been within the complaint resolution agency, or within the redress of grievance process, for six or nine months and sometimes longer before it came to our office. The evidence I gave last time was that the period of 60 days written into the Ombudsman Act back in about 1983 was a rather quaint hope about how quickly matters would be handled.<sup>10</sup>

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

7 *Committee Hansard*, 19 June 2006, p. 17.

8 *Committee Hansard*, 19 June 2006, p. 17.

9 *Committee Hansard*, 19 June 2006, pp. 2 and 6.

10 *Committee Hansard*, 19 June 2006, p. 7.

4.18 Professor McMillan attributed the better and faster handling of grievances to sounder structural coordination by the merger of the different branches.<sup>11</sup> He was of the view that the reduction in processing time is a positive improvement in the way that matters are handled within Defence and that it represents a more professional approach to handling complaints.<sup>12</sup>

4.19 He also commented on the commitment at the senior levels within the Defence Force to ensure that matters are addressed:

I have had meetings personally with the Chief of the Defence Force, and it is clear to me that there is a strong personal commitment and strong personal leadership in ensuring that the problems exposed by the military justice inquiry and by some of our own investigations have been accepted and recommendations are implemented, and I have been impressed by the positive response that I receive. Finally, my experience generally as Ombudsman is that leadership is particularly important in getting an organisation to address serious problems of a systemic or cultural nature that are exposed by investigations.<sup>13</sup>

4.20 He also noted that in the past his office sometimes experienced difficulty in having their requests to Defence receive priority but that the process in investigations 'are now proceeding much more efficiently in discussion with the defence department':<sup>14</sup>

For example, if we made a request for information or for an explanation there would be a delay on the part of the Department of Defence in providing that to my office, and that could hamper the efficiency of our own investigation. Again, we have seen a general improvement in responsiveness of the Defence portfolio to our requests.<sup>15</sup>

4.21 The positive results arising from this improvement have enabled the Office of the Defence Force Ombudsman to reduce their number of open cases and brought about a 'much more efficient dispatch of complaints about the defence portfolio'. Professor McMillan said:

One of the issues we raised earlier in our submission was that the delays and inefficiencies in the investigation process within Defence were then compounded by difficulties that we would experience in our own office, partly arising from liaison with Defence.<sup>16</sup>

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11 *Committee Hansard*, 19 June 2006, p. 2.

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

13 *Committee Hansard*, 19 June 2006, p. 8.

14 *Committee Hansard*, 19 June 2006, p. 7.

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

16 *Committee Hansard*, 19 June 2006, p. 2.

4.22 The Deputy Defence Force Ombudsman, Mr Ronald Brent, predicted a reduction of approximately 10 per cent in the number of complaints in the current financial year as against the previous one.<sup>17</sup>

### ***Backlog in outstanding ROGs***

4.23 At the time of reporting in June 2005, the references committee found that there were a number of complaints and ROGs that remained unresolved years after being lodged. It believed that the ADF should take immediate steps to deal with the backlog. It recommended 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 had been outstanding for over 12 months.<sup>18</sup> It should be noted that the Defence Force Ombudsman attributed the delay in processing ROGs to under-resourcing of the complaint resolution area.<sup>19</sup>

4.24 Defence's status report recorded that the backlog of grievance cases had been cleared—that there was no longer a backlog of cases which previously caused undue pressure on the complainants. The CDF also told the committee that the backlog of redress of grievances cases had been removed and that there was no longer pressure on ADF's complaints resolution.<sup>20</sup>

4.25 The Deputy Defence Force Ombudsman drew attention to the substantial reductions in the time taken to resolve complaints in his office citing in particular the reductions in the number of long-term complaints outstanding. The Defence Force Ombudsman quoted the following figures:<sup>21</sup>

Cases opened for over 12 months		Cases opened for over 24 months	
May 2005	May 2006	May 2005	May 2006
38 %	14 %	12 %	2 %

4.26 He noted that there was one case that had been opened for over three years. The committee also received correspondence indicating that there were a few long-standing grievances yet to be concluded.

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

18 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, paragraph 11.69.

19 *Committee Hansard*, 19 June 2006, p. 7.

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

21 *Committee Hansard*, 19 June 2006, p. 7.

### **Committee view**

4.27 Clearly, Defence has made a concerted effort both to expedite the ROG process and to remove the backlog of grievances. The committee commends Defence for its efforts to address these failings in the ROG process.

### **Perceived conflicts of interest**

4.28 One of the committee's main concerns with the handling of grievances was the potential for a perceived or real conflict of interest to exist by those investigating a grievance or making a decision based on a grievance. It concluded that without doubt reforms are needed to ensure the independence and impartiality of those investigating complaints or grievances.

4.29 In its response to the report on the effectiveness of Australia's military justice system, the government upheld the overarching principle guiding the ROG system—that complaints should be resolved at the lowest effective level: that primary responsibility to resolve complaints remains with the unit commanders.<sup>22</sup> The references committee's proposed reforms consistent with this principle but provided for a statutorily independent body (the ADFARB) to assume a strong presence as an appeals body. To address the problem of conflict of interest and fear of reprisal for reporting a wrongdoing, the committee recommended that this independent body be allowed to receive reports and complaints directly from ADF members where:

The investigating officer in the chain of command had a perceived or actual conflict of interest and had not withdrawn from the investigation.<sup>23</sup>

4.30 Ms Harris told the committee that at the moment a CO is required to investigate and to make a decision, and that decision is based on the merits of the complaint. She noted that under the current Defence Force regulation, the Fairness and Resolution Branch cannot intervene in terms of taking over the investigation of the complaint. She did state, however, that there is some allowance where the complaint is against the CO:

The only minor change to that is that, if the complaint is actually against the commanding officer, the commanding officer must pass that complaint up to his or her superior officer, who must be the CO for the purposes of the redress.<sup>24</sup>

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22 Government's response to recommendation 29.

23 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 231.

24 *Committee Hansard*, 19 June 2006, pp. 17–18.

4.31 Ms Harris explained that in the future, with the change to the regulation, the Fairness and Resolution Branch will be empowered to intervene if a decision is made that a complaint is best managed by the Branch rather than at the unit level.<sup>25</sup>

4.32 It should also be noted that, in line with the references committee's recommendation, Defence has amended the administrative inquiries manual so that inquiry officers are to produce statements of independence (see paragraph 2.4). The government, however, fell short in adopting in full the recommendation about statements of independence.<sup>26</sup>

### ***Committee view***

4.33 As noted above the Fairness and Resolution Branch is now in a stronger position to offer advice to COs with regard to ROGs and to monitor the progress of ROGs. This would seem to indicate that the problem of perceived conflict of interest is being addressed by the Fairness and Resolution Branch. The committee is unsure, however, about the effectiveness of the proposed new regulations in removing the opportunities for conflicts of interest, real or perceived, that undermine the integrity of the ROG system. It will continue to monitor this matter.

### ***Further improvements to the ROG system***

4.34 When asked whether the Defence Force Ombudsman could see room for further improvement in the ROG process, he responded:

The thrust of the proposals that were made was that my office could, for example, undertake a more routine auditing or monitoring function of the way matters were being handled. That could be undertaken, for example, by looking at timelines, by selecting individual cases at random and by reviewing, in a sense, after the event how they were being handled. That proposal has not gone any further, though I understand that the Fairness and Resolution Branch and the Inspector-General of the Australian Defence Force are undertaking more of that routine monitoring and auditing. But that is a roundabout way of saying that we do not see any problems that stand out in this area to a larger extent than they stand out in other government agencies. Our general experience, though, is that to avoid any slippage in quality it is necessary to implement quality assurance processes and regular monitoring and auditing of the way complaints handling and investigation are undertaken. That is really the major proposal we would make—just for a much more systematic process to be put in place for the future.<sup>27</sup>

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25 *Committee Hansard*, 19 June 2006, pp. 17–18.

26 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, recommendation 28.

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

4.35 Rear Admiral Bonser advised the committee that the Defence Force Ombudsman's proposal was being considered within the department.<sup>28</sup> The committee reinforces the Defence Force Ombudsman's advice that the ROG system requires continuous monitoring and preferably from a body outside the chain of command. The committee notes that the IGADF intends to take on this function (see paragraphs 4.49–4.62 below). The committee can see advantages in having another layer of oversight, particularly one that stands outside the ADF, as suggested by the Defence Force Ombudsman.

### ***ADF members' understanding of the administrative system***

4.36 The Fairness and Resolution Branch has the task of conveying to all ADF members the benefits to be gained from the reform program now underway and to help restore trust in the system. According to Ms Harris:

Since the start of this year we have had a communication strategy to try to get the information out there because there have been a number of important changes. We started with an article in the Australian Defence Magazine, which is read at a particular level. It was supported by a number of articles in all the service newspapers. Since then we have had a follow-up article in the most recent Australian Defence Magazine.<sup>29</sup>

Apart from that, we have a continuing education and training awareness program where we talk to all COs prior to taking up command. We speak to the pre-command or equivalent courses of the Army, Navy and Air Force. We send people out to talk to executive officer courses and administrative officer courses. We go around and do briefings at all the major regions and bases as well. We use every possible means we can think of to get the information out there. We put it on our website. We waste no opportunity. That said, it is always difficult to get the message out. We just keep working at it and keep pushing it out there.<sup>30</sup>

### ***Committee view***

4.37 The committee fully supports the work being undertaken by the Fairness and Resolution Branch to inform ADF members about the improvements to the military justice system. The committee acknowledges the difficult task that the Branch has in restoring trust in the system. It would encourage ADF members to take full advantage of the services now offered by this Branch. The committee believes that the credibility of this Branch is critical in that it cannot afford to be compromised in its independence and thoroughness. The proof of its success will depend on not just its timeliness, but on the quality of outcomes which might not become evident for some time.

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28 *Committee Hansard*, 19 June 2006, p. 14.

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

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

4.38 It also restates its support for the monitoring of the ROG system by an independent authority that would include assessing how well ADF members understand the ROG process, their rights under the system and the services available to them.

### **Notifiable incidents**

4.39 The committee recommended that all notifiable incidents including suicide, accidental death or serious injury be referred to its proposed Australian Defence Force Administrative Review Board (ADFARB) for investigation or inquiry. Although the government agreed that there was a need to demonstrate that ADF inquiries into serious incidents were independent and impartial, it rejected the recommendation to establish such a board. It has adopted an alternative proposal:

To meet the objectives of independence and impartiality, the government decided to create a Defence Force Commission of Inquiry. Under this proposal the CDF shall appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service.<sup>31</sup>

### ***Defence Force Commission of Inquiry***

4.40 On 31 May 2006, the CDF provided some detail about the interim arrangements in place whereby the CDF, the secretary and CDF operating jointly, the service chiefs or other authorised officers may commission a board of inquiry. To improve independence, impartiality and transparency, a civilian is to preside over this board of inquiry. According to the CDF, these inquiries, to be known as CDF commissions of inquiry, will be mandatory for all suicides and deaths in service. Rear Admiral Bonser explained:

The defence inquiry regulations have been amended to allow a civilian to preside over a board of inquiry. This enables CDF to implement interim arrangements for CDF commissions of inquiry using the BOI construct and, as such, CDF will convene these boards of inquiry into all ADF suicides and deaths in service. The president of such boards will be a civilian with judicial experience. These BOIs will be used in this manner until legislative changes have been made to stand up to permanent arrangements for CDF commissions of inquiry.<sup>32</sup>

4.41 The Government response explained further:

External independent legislative oversight by Comcare will continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of

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31 Government response to recommendation 34.

32 Committee Hansard, 19 June 2006, p. 11.

reference, as well as options for attendance or participation in the inquiry process.<sup>33</sup>

4.42 The committee raised the matter of the poor standard of investigations earlier in the report (paragraph 3.18–3.19) and cited, in particular, inquiries into sudden death. It urged the police investigative capability audit to pay particular attention to the committee's concerns.

### ***The role of the coroner***

4.43 The government response and Defence's status report stated that State and Territory coroners would continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF would work towards completing a Memorandum of Understanding with State and Territory coroners.<sup>34</sup>

4.44 Rear Admiral Bonser explained that there was work done on a memorandum of understanding with state coroners in the past. He noted, however, that:

...there was not a unanimous view from all of the state and territory coroners on where that might go, so it could not be finalised. I think there were some concerns that something as formal as it was becoming might have created some perceptions that were perhaps detrimental to their statutorily legislated obligations and responsibilities. We have taken that on board and we are working very closely now with the various jurisdictions for an exchange of letters to establish protocols between the ADF and the state and territory coroners. In the first instance...we are establishing that, working closely with the Victorian coroner and looking at adopting that across all of the jurisdictions once the coroners are happy with the process we have in place.<sup>35</sup>

We would expect to have this finalised around the end of this calendar year. It is really not an issue of agreeing relevant points. It is simply the nature of the protocol we are putting in place. Rather than a more formal memorandum of understanding, there will be letters that set out the protocols that we will use between the ADF and each of the relevant state and territory jurisdictions.<sup>36</sup>

4.45 It should be noted the Defence Force Ombudsman would continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF.

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33 Government response to recommendation 34.

34 Government response to recommendation 34.

35 *Committee Hansard*, 19 June 2006, pp. 26–27.

36 *Committee Hansard*, 19 June 2006, p. 27.

## **Inspector General of the Australian Defence Force (IGADF)**

4.46 The recurrent themes in the reference committee's report on Australia's military justice system were lack of independence and impartiality, delay, failure to apply policy and poor quality decision-making. The committee called for the establishment of a statutorily independent review authority (ADFARB) with appropriately qualified and trained staff equipped with the necessary resources to address and resolve administrative matters in the ADF efficiently and effectively. It believed that this independent body would provide the necessary oversight to ensure that any failure by investigating officers to observe the guidelines set out in the various ADF manuals would be brought to light and corrected. In the committee's view such a body offered greater assurances that the review process of administrative action would be independent and impartial. It would go a long way towards instilling public confidence in Australia's military justice system.

4.47 As noted a number of times in this report, the government rejected the reference committee's recommendation to establish the ADFARB. Much of the hope that the committee placed in the proposed review board to address the many failings in the administrative review process now rests with the Inspector General of the Australian Defence Force (IGADF).

4.48 The reference committee recommended that the proposed ADFARB assume responsibility for improving the training of investigating officers and for developing a database of administrative inquiries that would register and track grievances including the findings and recommendations of investigations. The IGADF has this responsibility.

4.49 The IGADF became a statutory office under the Defence Act in December 2005. The office provides independent internal oversight and audit of the military justice system.

### ***Quality of investigations***

4.50 An inquiry officer refers to a person who undertakes administrative inquiries. Mr Geoffrey Earley, the IGADF, acknowledged that the conduct of administrative inquiries had been criticised in the past in large part because of a lack of suitable training for inquiry officers. He informed the committee that a course to address this shortcoming is now conducted four times a year by his office. He said that about 155 potential inquiry officers had undertaken the course and that in July the eighth course would be held.<sup>37</sup> He informed the committee that the next stage will be to adopt a similar sort of oversight or audit of some agencies and how they operate, including the Fairness and Resolution Branch in Canberra.

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37 *Committee Hansard*, 19 June 2006, p. 12.

4.51 The Deputy Defence Force Ombudsman, Mr Brent, cited the significant improvements in the training of investigation officers within the Defence forces which he believed brought about a reduction in complaints. He noted that the IGADF is regularly conducting training in the conduct of inquiries and investigations. Mr Brent also stated that he regularly presents to the people likely to undertake those roles.<sup>38</sup>

### ***Audit program***

4.52 Mr Earley explained how his office intends to audit the health of the military justice system. He indicated that the audit will examine the unit disciplinary and administrative records for compliance. It will discuss any problems with relevant personnel and conduct focus group discussions across a range of representative rank groups 'to obtain an unattributable impression of how military justice in that particular unit is operating'.<sup>39</sup> He described the conduct of a typical audit which, it should be noted, covers both discipline and administrative systems:

...the leader will go in—sometimes it is me, sometimes it is the chief of staff and sometimes it is the director of performance review or perhaps a reserve 06 officer—and meet with the commanding officer. We will ask for any questions and explain. There is then a headquarters group with the executive team of the unit. They get a chance to tell us what they do. We get 20 minutes or so to tell them why we are there and what we do. Then the group splits up. There is always a lawyer in each group. One part of the team will go off and look at the disciplinary records. Another part of the audit team will go off and look at the administrative records—and by that I mean the grievances, inquiries, routine inquiries, quick assessments and so on. We will look at all the authorisations to see that the subordinate summary authorities, for example, of people who operate under the DFDA are properly authorised. If they have cells, accommodation or detention accommodation, we will go and have a look at that as well. While those people are doing that, the group leader will conduct the focus groups, which would probably go on throughout the day. We might have as many as four or five in the day. Generally, that is how it goes.<sup>40</sup>

We take a lot of trouble to make sure that they understand that that is not why we are there. They get two months notice. They get a very comprehensive pack of material, which lists exactly the documents, files and everything else that we are going to look for. We do not go in there cold. A considerable amount of work is done prior to an audit by interrogating fairness and resolution branch agencies, for example, as to how many complaints have come out of that unit. We talk to the DEO—that is, the equity hotline people—about whether there have been any particular problems noted there. We look at the disciplinary record of that unit to see whether there have been any great changes this year from last year. So we

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

39 *Committee Hansard*, 19 June 2006, p. 12.

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

go in there with a reasonable background knowledge and profile of what that unit looks like. We try to see whether that matches what we actually find on the ground.<sup>41</sup>

4.53 Fifty-one units have been subjected to audit, with 20 completed in calendar year 2005.<sup>42</sup> Mr Earley explained:

Now that the audit program is fully operational, we try to reserve one week per month for a particular area in Australia. Two teams will go to that area. It could be Townsville, Darwin, Perth or somewhere, and the teams will do perhaps up to four units, depending on the size of the unit. A battalion sized unit will take two days. A patrol boat will take half a day.<sup>43</sup>

4.54 He informed the committee that the audit program is an ongoing program and is fully operational.<sup>44</sup>

4.55 Mr Earley also noted that the audit is followed up with a report outlining the outcomes.<sup>45</sup> The report includes any recommendations that the audit team 'might have for improvement, and that goes to the CO of the unit and to other relevant authorities higher up in the chain of command'.<sup>46</sup> The intention was to achieve a process for long-term and lasting improvement:

This type of performance review has not previously been attempted in this form and the audits, or they could also be called performance checks, have been, by and large, well received by the services and represent, in my view, a very useful initiative in the continuous improvement of the standard and practice of military justice out there in the field<sup>47</sup> ...In the past, one of the difficulties in monitoring the overall operation of the system has been its decentralised nature and the consequent lack of visibility of military justice processes that resulted from that decentralisation.<sup>48</sup>

### ***Focus groups***

4.56 The references committee was particularly concerned about the failure of ADF members to report inappropriate behaviour. It found:

The experiences recounted in evidence provide some understanding of the reasons ADF members do not make complaints. Their reluctance to

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41 *Committee Hansard*, 19 June 2006, p. 26.

42 *Committee Hansard*, 19 June 2006, p. 12.

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

44 *Committee Hansard*, 19 June 2006, p. 12.

45 *Committee Hansard*, 19 June 2006, p. 12.

46 *Committee Hansard*, 19 June 2006, p. 12.

47 *Committee Hansard*, 19 June 2006, p. 12.

48 *Committee Hansard*, 19 June 2006, p. 12.

disclose wrongdoing to their superiors or senior officers is a certain indication of systemic problems in the reporting process. Evidence suggests that for many the reporting system does not inspire confidence and fails to counter the culture of silence.<sup>49</sup>

4.57 It identified a raft of reasons for this reticence including the requirement to use the chain of command and the potential conflicts of interest. It also cited institutional blind spots which made it difficult for some members to admit to failings in the organisation or their colleagues; the fear of stigma attached to making a report and the prospect of reprisals; a lack of awareness of alternative means of making or lodging a report; and the delays and frustrations in making a complaint and a sense that a complaint may prove futile.

4.58 The focus groups, which are part of the audit program, directly address these problems. Mr Earley explained the work of these groups:

We give them two months notice and we say that we require groups of people, of not more than 20, at various rank levels. The CO and the RSM or equivalent are not to be present; indeed, no seniors are to be present at a particular rank group. We leave it to the unit to select them because often people are on exercise and so on and we cannot predetermine who will actually show up at a focus group.

We do specifically ask them—it usually takes about 40 minutes—whether any pressure was put on them not to come, whether they were specially selected for some reason, and whether they know of anyone who wanted to come who was prevented from coming. When we go to units we give them a telephone number and make it clear that if there is anyone who, for whatever reason, is reluctant to put a view during a focus group, they are very welcome to contact any member of the audit team while we are there. We would be happy to see them in a hotel off the base, if necessary.<sup>50</sup>

4.59 He noted further:

Generally speaking, we do ask them straight-out about bullying and harassment: ‘Has anyone been bullied or harassed?’ Often one hears second-hand stories about someone whose friend had heard about someone who it happened to at some stage. There are very few who have first-hand experience of it, and the general consensus seems to be an awareness that this sort of thing is not tolerated.<sup>51</sup>

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49 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 139.

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

51 *Committee Hansard*, 19 June 2006, p. 22.

4.60 According to Mr Earley, more than 2,000 ADF members have participated in those focus groups so far.<sup>52</sup> When asked about reprisals against people who have complained about unacceptable behaviour, Mr Earley responded:

We find that sometimes that forms the subject of submissions that arrive in the office; it does not necessarily arise through focus groups. Again, they are quite few in number, but they happen from time to time.<sup>53</sup>

4.61 He explained in more detail:

In the 3½ years that we have been operating in this fashion, I have heard of a very small number of cases in which it has been alleged that someone in the chain of command has found out that somebody has contacted the office and has maybe taken a dim view of that. On every occasion that that has happened—and there have been very few; I am talking about maybe two or three—that has had an immediate reaction from the office, and within minutes it has been fixed.<sup>54</sup>

4.62 Asked to elaborate, Mr Earley stated:

I get in touch with the commanding officer and his chain of command. I take an extremely dim view, a very dim view indeed, of reprisal, and it is widely advertised that anyone who believes that they are suffering from any victimisation or reprisal as a result of approaching my office can expect the sky to descend.<sup>55</sup>

4.63 He believed that the focus groups were working well:

I think they are impressed that somebody from on high in Canberra is actually interested in what they have to say and, moreover, that they can say it freely. I think the trick is getting their confidence early on. Sometimes the younger ones are a bit reluctant to say anything. Usually in each group of about 15 or 20 you will find one who will have a lot to say. Sometimes it is a matter of trying to balance that and give everyone else a shot. Our experience by the end of the session is—and we have spoken to over something like 2,300 of these people now in various groups—that all participate freely and are appreciative of the experience.<sup>56</sup>

Mr Earley also told the committee that ADF members often take advantage of the opportunity that is presented to them on completion of the session where several remain behind and have a chat.

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52 *Committee Hansard*, 19 June 2006, p. 12.

53 *Committee Hansard*, 19 June 2006, p. 22.

54 *Committee Hansard*, 19 June 2006, p. 22.

55 *Committee Hansard*, 19 June 2006, p. 22.

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

**Committee view**

4.64 The committee is heartened by the IGADF's demonstrated commitment to conduct audits of the military justice system that are intended to reflect accurately the health of the system. It particularly welcomes the dedication shown by the IGADF towards ensuring that unacceptable behaviour will be reported and especially his determination to stamp out any form of reprisal directed at members reporting wrongdoing or making a complaint.

4.65 The committee again draws attention to the prevailing cultural environment of the ADF discussed at length in the military justice report. It notes that even where there are formal and known avenues for a person to disclose information or make a complaint about inappropriate conduct, the workplace may effectively render them useless. The committee stresses that a fundamental change in the ADF mindset must also occur to overcome the stigma attached to reporting wrongdoing or making a complaint.

4.66 Registering a complaint should not be contrived as seeking to subvert authority. Authority must command respect, not demand it.

**Tracking the progress of inquiries**

4.67 During the reference committee's inquiry into Australia's military justice system, the IGADF told the committee that he had under development 'a reporting system whereby all administrative inquiries above the level of investigating officer' were to be centrally reported to his office. He went on to explain that for the first time this initiative would 'enable a wider oversight, a wider visibility, of exactly what types of inquiries are going on out there'. Mr Earley informed the committee that:

Considerable work has been done recently to establish a means of reporting and tracking aspects of the military justice system that were not readily available before. A system for reporting disciplinary and adverse administrative processes—the DTCFMS, or discipline tracking and case flow management system—is already in operation. A system for reporting and tracking administrative inquiries has just been introduced in the last few months, and the new system for reporting and tracking grievances—that is, complaints—is being developed for introduction next year. The case management system used by service police and other ADF investigative agencies is also being updated. These are all positive moves that will contribute to a better military justice system.<sup>57</sup>

**Committee view**

The committee is interested in monitoring the implementation and success of this tracking system.

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57 *Committee Hansard*, 19 June 2006, p. 12.

### ***The IGADF's reporting regime***

4.68 The committee notes that the Director of Military Prosecutions must provide an annual report to the Minister for presentation to the parliament. The IGADF, however, must prepare and give to the Chief of Defence Force such reports on the operations of the IGADF as the CDF directs.

4.69 The references committee noted in its report on the military justice system that a reporting regime that is transparent and promotes accountability would greatly improve the perceived independence of the Office of the IGADF. It noted, however, that there does not appear to be any adequate avenue for the IGADF to air his or her concerns about the military justice system to any authority other than the CDF. It appeared to the committee that this constraint is a sound reason for providing the IGADF with effective reporting procedures.<sup>58</sup>

4.70 Indeed, the reference committee expressed concern in its report on the military justice system that adequate measures should be in place that would hold the CDF publicly accountable should he or she fail to act in part or in full on a recommendation by the IGADF.<sup>59</sup> It suggested that there should be a requirement for the CDF to provide written explanations to the IGADF for rejecting recommendations which would enable the IGADF to comment on any concerns related to such matters and which would be recorded, for example, in the Annual Report.

4.71 The IGADF told the committee that there is an obligation to provide a report as required by the CDF. He indicated that his office would coordinate an overview of the military justice system with a view to incorporation into the Defence annual report.<sup>60</sup> He was unsure of whether he could make a report independent of the ADF.<sup>61</sup>

### ***Committee view***

4.72 The committee repeats its concern about the reporting mechanism applying to the IGADF. It suggests that the government consider strengthening the independence of the IGADF by requiring him or her, as a statutory body, to furnish an annual report to the Minister for Defence for tabling in parliament.

### ***Acceptance of the office of the IGADF***

4.73 In the report on the effectiveness of Australia's military justice system, the references committee noted that one of the most frequently cited impediments to

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58 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 219.

59 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, paragraphs 11.10 and 11.11).

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

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

reporting wrongdoing or making a complaint was the lack of trust and confidence in a system that seemed 'riddled with conflicts of interest'.<sup>62</sup> It found that, in light of the failings of the current administrative system, one of the major challenges facing the IGADF is to win the trust and confidence of members of the ADF. The committee observed that:

Any suspicion that the office is susceptible to the influences of senior levels in the ADF will undermine its credibility. It must be seen to stand apart from the command structure, to be committed to the principles of procedural fairness and to be a professional organisation with adequate resources and staff equipped with the skills and training necessary to process grievances or complaints competently and expeditiously.<sup>63</sup>

4.74 The IGADF was of the view that his statutory status has strengthened 'both the perception and reality that the office is outside the normal chain of command and can and does act with impartiality'.<sup>64</sup> He stated that he was encouraged by the level of acceptance of the concept of the IGADF that, in his view, was now evident in the ADF.<sup>65</sup> He explained:

One of the great advantages of the office of IGADF being close to the military justice system but not being part of it in the sense of not having any executive responsibility for it, is it allows a good degree of what I might describe as informed objectivity. By that, I simply mean that an appreciation of the context in which the military justice system must operate is an extremely important advantage in being able to recognise what is good and useful about it as well as what is flawed about it.<sup>66</sup>

4.75 Mr Earley also drew attention to the increase in resources to his office.

### ***The office of the IGADF—staffing and resources***

4.76 The IGADF noted that approval was given to increase the staff resources of the office from about 12 to 25 permanent positions, which represents almost a 100 per cent increase. There is also provision for a further 11 part-time positions, through reservists, to be engaged as required. The additional 11 part-time positions would be used mainly in the audit function.<sup>67</sup> According to the IGADF, these additional resources will enable the office to restructure so that dedicated staff can be assigned 'to the audit and inquiry functions, and the full-time legal support available to the

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62 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 127.

63 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 219.

64 *Committee Hansard*, 19 June 2006, p. 12.

65 *Committee Hansard*, 19 June 2006, p. 12.

66 *Committee Hansard*, 19 June 2006, p. pp. 12–13.

67 *Committee Hansard*, 19 June 2006, p. 12.

office can also be enhanced'. The IGADF told the committee that the increase in staff resources in his office 'will enable the office to undertake a greater role in the monitoring and oversight of the military justice system as a whole in future'.<sup>68</sup>

### ***Committee view***

4.77 The committee is pleased to receive the IGADF's report that the IGADF is making some headway in establishing his credentials as an even-handed and independent authority committed to ensuring that Australia's military justice system is both fair and effective. The committee welcomes the additional resources allocated to the Office of the IGADF. It takes this opportunity to highlight the need to ensure that the Office of IGADF remains well-resourced and that his capacity is further enhanced.

4.78 Even so, the committee repeats its concerns that a major shift is required in the attitudes of all ADF personnel to achieve lasting change in the military justice system. It will take time and persistence. The IGADF cannot work in a vacuum. He needs the support and commitment of the ADF and the government to ensure that he has the necessary support to carry out his functions. He also needs the independence and authority to ensure that his office can help bring about the necessary reforms. However, at the same time, the IGADF must remain absolutely independent of the chain of command, free of influence and compromise.

### **The Defence Force Ombudsman and the IGADF**

4.79 The committee notes the Defence Force Ombudsman's assessment of the developments that have taken place in the military justice system:

My impression at the moment is that I think the current system is a nice balance of different elements—that is: the prime responsibility for handling internal complaints rests with the fairness and resolution branch, and it has always been our belief that the prime responsibility should rest within the agency; then there is a degree of independent oversight within the Defence system, through the Office of the Inspector-General of the Australian Defence Force; and then there is the external oversight agency in my own office in the role of Defence Force Ombudsman. So we have the collection of the three elements: an internal review for quick, informal and effective resolution; some degree of more formal monitoring, oversight and quality assurance through the IGADF—and, as Mr Brent mentioned, training; and then an external review. I think that is a nice model.<sup>69</sup>

4.80 He also related to the committee the excellent working relationship between his office and IGADF:

There has been some discussion for the past couple of years about cooperation and investigations between both offices, about the referral of

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68 *Committee Hansard*, 19 June 2006, p. 12.

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

parts of investigations from one office to the other and about cooperation between both offices in conducting joint projects—for example, there is a study at the moment into the problems that both agencies have with persistent or difficult complainants.<sup>70</sup>

### ***Committee view***

4.81 The committee sees great potential for both offices to work together to improve Australia's military justice system.

### ***Defence Force Ombudsman—Own-motion investigation into the management of complaints about unacceptable behaviour***

4.82 As noted earlier, one of the committee's main concerns was the failure of young soldiers in particular to report inappropriate behaviour. The references committee found that in some cases parents took the responsibility for reporting wrong doing. Professor McMillan told the committee that:

Currently, the only own-motion investigation my office has with the defence department is one that was recently commenced—an own-motion investigation into the management of complaints about unacceptable behaviour, like bullying, harassment and intimidation. My office receives a steady number of complaints each year about how complaints of unacceptable behaviour are handled and investigated. There is no particular area of concern we have at the moment with that process.<sup>71</sup>

4.83 Mr Brent stated further that this area was one in particular where the office believed that follow-up would provide information on how well 'the complaints referred back to the agency were being handled'.<sup>72</sup>

### ***Committee view***

4.84 The committee welcomes and is very interested in the Defence Force Ombudsman's investigation into the management of complaints about unacceptable behaviour.

### **Duty of care responsibilities in relation to people who enlist under the age of 18 years**

4.85 The references committee in its report on the effectiveness of Australia's military justice system acknowledged significant changes had been made to support the administration and training of cadet staff in recent years. It noted that the death of

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70 *Committee Hansard*, 19 June 2006, p. 3.

71 *Committee Hansard*, 19 June 2006, p. 3.

72 *Committee Hansard*, 19 June 2006, pp. 3–4.

Eleanore Tibble on 7 November 2000 brought about many of these changes.<sup>73</sup> Even so, it recommended that further changes be made to safeguard the rights of young cadets.

4.86 Rear Admiral Bonser informed the committee that an expert to examine whether the human rights of children are being respected has been engaged and further administrative positions across all three cadet organisations have been established and filled. He also advised that drafting instructions to ensure that the rights and responsibilities of defence and cadet staff are defined have been issued to the Office of Legislative Drafting and are expected to be completed.<sup>74</sup>

### ***Committee view***

4.87 The committee notes the implementation of these recommendations.

### **Definition of military justice system and duty of care**

4.88 The committee notes that the IGADF was concerned that the definition of military justice was being used by some people to incorporate matters and activities that 'really fall outside of the definition' of military justice matters. He maintained that the term military justice comprises four elements:

- matters specified under the Defence Force Disciplinary Act—or the discipline system itself;
- adverse administrative action the would include for example, censures, formal warnings, involuntary separations;
- the conduct of administrative inquiries; and
- the right of members to make complaints about their service.<sup>75</sup>

4.89 The report on military justice acknowledged that it was stepping outside the narrow definition of military justice when it considered evidence concerned with Defence's duty of care. Committee members, however, felt compelled to report on matters that had come before them that indicated that at times serious lapses occurred in reporting inappropriate behaviour. The references committee identified the apparent lack of awareness by those in middle management of inappropriate or risky behaviour as one particular factor that became increasingly obvious as the inquiry progressed. It concluded that 'their unawareness or inaction meant that unsafe work practices continued unchecked until an incident requiring investigation shed light on such practices'. The various cases before the references committee showed that all three services had at times failed to provide a safe work environment and highlighted the

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73 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 280.

74 *Committee Hansard*, 19 June 2006, p. 10.

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

need for the ADF to have mechanisms in place that would enable the early detection of unsafe work practices.

4.90 In its report, the references committee was also concerned that the ADF may not be meeting its duty of care in relation to mental health issues.<sup>76</sup> It found cases of poor record keeping, ADF members denied access to records, and the failure to convey advice to members. The committee stated that it:

...does not accept that an armed force with a budget running into billions, access to some of the most technologically advanced weapon systems in the region, and the sophisticated software to manage these, does not have an electronic information system sufficiently advanced to maintain adequate mental health records and service provision.<sup>77</sup>

4.91 It suggested that the ADF needs to improve its reporting and management systems.

4.92 The committee accepts that it is again departing from Defence's definition of military justice in touching on duty of care matters. But the committee again feels compelled to draw attention to these matters because of their importance. The committee suggests that as part of Defence's review process that it gives close consideration to the rights of ADF members with regard to psychological or psychiatric testing. For example, the review examine matters such as the circumstances under which an ADF member may be compelled to undergo a psychiatric assessment, who can order such an assessment and the rights or otherwise of a member to choose their own doctor. The review might also include the appeal mechanisms, the rights of a member to access his or her records and, indeed, the adequacy of the record keeping practices.

### **Recent correspondence regarding the military justice system**

4.93 The committee continues to receive correspondence from a number of former ADF members or relatives of former ADF members drawing attention to what they believe are problems with Australia's military justice system. They touch on matters such as failure to observe procedural fairness, conflicts of interests, failure to act on reports of wrongdoing and harassment that may have contributed to a suicide. The matters raised serve as a salutary reminder of the many shortcomings identified in the report on Australia's military justice system and underline the need to ensure that the reforms already in place and those still to be implemented will be effective. They highlight the need not only for changes to procedures and processes but to fundamental changes in attitudes.

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76 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, pp. 302–4.

77 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 307.

## Conclusion

4.94 The committee has reviewed the references committee's report into Australia's military justice system, the government's response to the report and Defence's first six-monthly report on the implementation of the recommendations contained in the government's response.

4.95 At this early stage of the implementation program, the ADF has demonstrated a clear commitment to improving Australia's military justice system. The committee notes the positive observations made by the Defence Force Ombudsman, particularly the reduction in the backlog of complaints and the more efficient processing of complaints. Not only does this mean that complaints are resolved in a timely fashion but this improvement assists the Defence Force Ombudsman in his handling of complaints.

4.96 The committee notes, however, that many of the problems that were identified in the military justice report were manifestations of a deeply entrenched culture. Improvements in process will not of themselves change the culture.

4.97 In particular, the committee was impressed with the work of the IGADF. As mentioned in the report, his office has a heavy responsibility to ensure that many of the reforms being implemented will in fact result in an effective and fair military justice system. His success depends in large measure on winning the trust and confidence of ADF members. It is also totally dependent on his complete independence from the military chain of command which was of such concern to the committee in its inquiry that it recommended the abolition of the function in favour of another structure where independence could be guaranteed.

4.98 The committee repeats its concerns that a major shift is required in the attitudes of all ADF personnel to achieve lasting change in the military justice system. It will take time and persistence. The IGADF must not only be independent, but he also needs the support and commitment of the ADF and the government to ensure that he has the necessary support to carry out his functions.

4.99 A dominant and recurring theme in the military justice report and in correspondence received by the committee was the prevailing culture in the ADF which may well undermine the success of the current reforms. The committee stresses that the ADF has a challenging road ahead in turning this culture around and encourages and commends any efforts to do that.