

The Senate

Foreign Affairs, Defence and
Trade Legislation Committee

Reforms to Australia's military justice system

First progress report

August 2006

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Summary of committee's findings

The committee has reviewed Defence's first six-monthly report on the implementation of the recommendations contained in the government's response to the reference committee's report on Australia's military justice system tabled in June 2005.

At this early stage of its implementation program, the ADF has demonstrated a 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.

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.

Tri-service police investigative capability audit

The committee views the tri-service police investigative capability audit now underway as a critical exercise that will lay the foundation for far reaching improvements in the service police. It awaits the completion of the audit and Defence's response to it before making any further comment. It takes this opportunity, however, to underline its concern about poorly conducted investigations by the service police, especially the preliminary investigations undertaken following a notifiable incident such as a sudden death. It urges the audit to give 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.

The Permanent Military Court

The reference committee in its report on the effectiveness of Australia's military justice system made a number of specific recommendations with regard to the proposed permanent military court such as the right to elect trial by court martial before the Permanent Military Court for summary offences.¹ The committee looks forward to the introduction of the legislation in the coming months.

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

The Fairness and Resolution Branch

The restructuring of the Redress of Grievance (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. Early indications, however, are promising. The Branch is now in a stronger position to offer advice to Commanding Officers (COs) with regard to ROGs and to monitor their progress. This would seem to indicate that the perceived conflict of interest in the process is being addressed by Defence. The committee is unsure, however, about the effectiveness of the proposed new regulations to remove the opportunities for real or perceived conflicts of interest that undermine the integrity of the ROG system. ADF's senior officers and the Parliament need to be vigilant to ensure that the changes taking place will have a lasting effect on improving the effectiveness and fairness of the system. The committee will continue to monitor this matter and requests it receive six-monthly updates on an ongoing basis.

The committee fully supports the work being undertaken by the 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.

The Inspector General of the Australian Defence Force (IGADF)

The committee is heartened by the positive approach taken by the IGADF in conducting audits of the military justice system that are intended to reflect accurately the health of the system. It particularly welcomes the commitment shown by the IGADF toward ensuring that unacceptable behaviour in the ADF will be reported and especially his determination to stamp out any form of reprisal directed at members reporting wrongdoing or making a complaint. His focus groups are a practical hands-on measure encouraging ADF members to report incidents of inappropriate behaviour.

The committee, however, 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.

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

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. 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.

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.

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 IGADF remains well-resourced and that his capacity is further enhanced.

The committee underlines 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.

The committee sees great potential for both the Defence Force Ombudsman and the IGADF to work together to improve Australia's military justice system.

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

The committee notes the implementation of the recommendations contained in the military justice report with regard to cadets in the Service.

Broader concerns

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 for fundamental changes in attitudes.

Conclusion

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 have a challenging road ahead in turning this culture around and encourages and commends any efforts to do that.

Chapter 1

Introduction

Background

1.1 On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The committee tabled the report, which contained 40 recommendations, on 16 June 2005.

1.2 At the time of drafting the report, the committee was aware that a number of inquiries into aspects of Australia's military justice system had been held over recent years. These various inquiries had clearly identified shortcomings in the system and made recommendations to improve it. Unfortunately, they had established a pattern of repeated failures. Serious allegations of wrongdoing would be made, an investigation undertaken, reforms implemented but within a short time concerns about the military justice system would again surface sparking yet another investigation and the cycle would start again. Concerned that the committee's inquiry and report would become part of this pattern, the committee saw a need to endeavour to break the cycle.

1.3 It wanted assurances that this time concrete and positive measures would be taken to address the identified flaws in Australia's military justice system. The committee believed that close, careful and regular monitoring was required to ensure that steps taken by the Australian Defence Force (ADF) to improve the military justice system would have the desired results. The committee recommended that the ADF submit an annual report to the Parliament on its military justice system. Recommendation 37 of the committee's report read:

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

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

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

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

Government's response to the committee's recommendations

1.4 In October 2005, the government tabled its response to the committee's recommendations. In this response, the ADF expressed its commitment to improving the military justice system to address the concerns of Defence, the Parliament and the community. The Chief of the Defence Force (CDF) gave his personal assurance that he would drive the reform process.¹

1.5 The government proposed what it termed 'significant enhancements' to the military justice system. In all, it accepted in whole, in part or in principle 30 of the committee's 40 recommendations. It indicated, however, that alternative solutions would be adopted 'to achieve the intent' of the committee's recommendations. The government asked Defence to implement these recommendations and enhancements within two years, and to report to the Senate committee twice a year throughout the implementation period.

Legislation committee assumes responsibility for monitoring

1.6 It should be noted that once the references committee tabled its report on Australia's military justice system, it no longer had the authority to inquire into or report on the implementation of measures designed to improve the military justice system. In light of Defence's undertaking to report to the committee, the committee held the view that, rather than seek a reference from the Senate to monitor and report on Australia's military justice system, the legislation arm of the Senate Foreign Affairs, Defence and Trade Committee should assume responsibility for the monitoring task.

1.7 As an interim measure, the legislation committee resolved to take on this responsibility. It did so under standing orders 25(2)(b) and 25(21). Standing order 25(2)(b) allows the committee 'to inquire into and report upon ... annual reports in accordance with a reference of such reports to them, and the performance of departments and agencies allocated to them'. Standing order 25(21) states that 'Annual reports of departments and agencies shall stand referred to the legislation committees in accordance with an allocation of departments and agencies in a resolution of the Senate'.

1.8 This arrangement allows the committee to receive the sixth monthly reports on the implementation process, to consider them and to take whatever measures it deems necessary to ensure that it can adequately monitor Defence's reform program. It would enable the committee to report to the Senate if it believed such action were appropriate.

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

Defence's first six-monthly report

1.9 In April 2006, the committee received from the Chief of the Australian Defence Force and the Secretary of Defence the first progress report on the enhancements to the military justice system. It was dated 13 April 2006.

Public hearing

1.10 The committee considered the report and decided to hold a public hearing on 19 June 2006 in order to gather further evidence on the progress being made to improve Australia's military justice system. It called and examined the Defence Force Ombudsman; the Head, Military Justice Implementation Team; the Inspector General of the Australian Defence Force; the Acting Director of Military Prosecutions; and the Acting Director of the Fairness and Resolutions Branch, Department of Defence. The names of witnesses who appeared are at Appendix 1.

Confidential material

1.11 The committee took evidence *in camera* during part of the hearing on 19 June. Much of this information was of a highly personal nature and in some cases reflected adversely on named individuals. The committee prefers all evidence to be public, but by taking evidence in private it had the opportunity to question Defence officials on highly sensitive matters. It also allowed the committee to alert Defence to particular concerns without jeopardising the privacy rights of all parties involved in allegations of wrongdoing. The committee found that this arrangement encouraged frank and honest discussion between committee members and Defence officers.

Individual grievances

1.12 A second matter relating to the committee's inquiry concerned correspondence from aggrieved members of the ADF. Since the report on Australia's military justice system was tabled in June 2005, the committee has received correspondence from a number of people wishing to draw attention to their specific grievance. As an interim measure, the committee agreed to forward such correspondence, with the author's consent, to the Chief of the ADF for his advice and action.

1.13 During the hearing on 19 June 2006, the committee discussed *in camera* with officers from the ADF its concern about such correspondence. Although committee members wanted action to be taken on the complaints, they, as a committee, did not feel equipped to resolve individual grievances—that the committee was not and could not be a *de facto* complaints resolution agency. Aware of its own limitations, the committee wanted to determine the best way to assist those who had approached it with grievances. It discussed this matter with Defence officers.

1.14 On 22 June 2006, following this discussion and after its own deliberations, the committee agreed to clarify its position by adopting a formal motion. It resolved:

1. to take responsibility under standing orders 25(2)(b) and 25(21) for inquiring into and reporting on Defence's progress in implementing the recommendations contained in the government's response to the committee's report on Australia's military justice system;
2. that it is not a de facto complaints resolution tribunal and is not able to inquire into individual circumstances;
3. as considered appropriate by the committee and with the permission of the complainant, to forward complaints it receives:
 - through the Minister assisting the Minister for Defence to Defence for its response,
 - to the Inspector-General of the ADF for his response, or
 - to the Defence Force Ombudsman for his responsethe complaint and comments to remain confidential until the committee decides otherwise;
4. to report to the Senate regularly (after each six-monthly meeting with Defence officials) on the committee's activities with regard to monitoring the implementation of the government's reforms of the military justice system;
5. to inform the Minister regularly in writing (after each six-monthly meeting with Defence officials or as required) about the committee's activities with regard to monitoring the implementation of the government's reforms of the military justice system;
6. at the end of the two-year period, to review the implementation process in light of the committee's recommendations and the government's response to these recommendations; and
7. to publish this motion on its web site in order to make the committee's intention and the limit of its jurisdiction clear to all interested parties.

Report structure

1.15 Much of the information gathered by the committee was based on questions arising from the government's response to the committee's report on Australia's military justice system and Defence's six-monthly report. Both documents are available on the committee's web site. Appendix 3 to this report provides a list of the committee's recommendations and the government's response to them. A copy of defence's six-monthly report is at Appendix 4.

1.16 The committee also drew on evidence taken during estimates hearings on 31 May and 1 June 2006. The transcripts of these hearings together with the transcript of the public hearing on 19 June are also available from the committee's web site.

1.17 During the public hearings, a number of documents were tabled. A list of them is at appendix 2. The committee also received answers from the Department of Defence to questions taken on notice at the public hearing. They were received too late to be incorporated into the body of the report and have been attached at appendix 6.

1.18 This report examines the six-monthly progress report against the findings of the references committee's report on the effectiveness of Australia's military justice system and the government's recommendations in its response to the committee's report.

Acknowledgments

The committee thanks those who appeared before it at the public hearing.

Chapter 2

Overview

2.1 In a joint statement that forms part of the Department of Defence's first six-monthly report to the committee, Air Chief Marshal, Angus Houston, and the Secretary of Defence, Mr Ric Smith, informed the committee that a Military Justice Implementation Team (MJIT) had been established. This team, under the direction of Rear Admiral Mark Bonser, is responsible for implementing the recommendations contained in the government's response to the report on the effectiveness of Australia's military justice system tabled in June 2005. It also has the task of implementing 'ongoing enhancements from a number of previous internal and external reviews of the military justice system'. The main part of Defence's report consists of a spread sheet that provides an overview of the progress made to date with Defence's reform program (see appendix 4).

2.2 This chapter examines the evidence presented to the committee in the six-monthly report and during the public hearing held on 19 June 2006. The committee's intention is to examine and report on the progress Defence is making in implementing reforms intended to redress identified shortcomings in the military justice system.

General findings of the progress report

2.3 The six-monthly report informed the committee that a total of seven full recommendations and significant elements of a further two recommendations contained in the government's response to the report on Australia's military justice system had been completed on, or ahead of, the Implementation Plan schedule.¹ These measures included:

- the establishment of the Director of Military Prosecutions (DMP) as a statutory position under legislation assented on 12 December 2005;
- the DMP appointed at one star rank;
- a determination made by the Commonwealth Remuneration Tribunal on the DMP's remuneration (the determination also covered the Inspector General ADF, Chief Judge Advocate and Registrar of Military Justice);
- the completion of the first of a series of regular reviews into the Defence Whistleblower Scheme—the operation of the Scheme is to be reported annually in the Defence Annual Report;
- the publication of a report of wrong-doing in the 2004–05 Defence Annual Report—a practice that will continue;
- the clearing of the backlog of Redress of Grievance cases; and

1 See *Report on the Progress of Enhancements to the Military Justice System*, 13 April 2006. See Appendix 2.

- a number of amendments to the Defence (Inquiry) Regulations 1985(D(1)R 33 completed as at 31 March 2006.²

2.4 A further nine recommendations were expected to be completed over the next reporting period. At the public hearing on 19 June, Rear Admiral Bonser provided an update on the implementation of these recommendations. He told the committee that the following eight recommendations had been completed:

- the establishment of a director of defence counsel services to coordinate and manage the access to, and availability of, defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve;
- amendments to the administrative inquiries manual clarifying and improving guidance on the use of quick assessments;
- amendments to the administrative inquiries manual improving guidance on the selection of inquiry officers;
- amendments to the administrative inquiries manual requiring inquiry officers to produce statements of independence;
- amendments to the administrative inquiries manual requiring the provision of evidence to an affected person who is not present at hearings;
- amendments to the administrative inquiries manual requiring the provision of a reasonable opportunity for familiarisation to be provided to those coming before a board late in the proceedings;
- the engagement of an expert to examine whether the human rights of children—that is, in the ADF, cadets—are being respected; and
- the filling of final additional administrative positions across all three cadet organisations.³

2.5 The ninth recommendation requires changes to regulations and was expected to be considered by the Federal Executive Council on 22 June. This involves an amendment to the ADF cadet regulations to ensure that the rights and responsibilities of defence and cadet staff are defined.

2.6 Rear Admiral Bonser indicated that steps had been taken to implement other recommendations including:

- The provision of additional resources to the office of the Director of Military Prosecutions to ensure that it can fulfil its functions, additional capacity to review the training requirements of the Office of the Director of Military Prosecutions, and oversight and reporting of the military justice system. These measures include amendments to the defence inquiry regulations to provide

2 *Report on the Progress of Enhancements to the Military Justice System*, April 2006.

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

for an annual report on the operation of the DIR, which is expected to be considered by the federal Executive Council.⁴

- An initiative to audit ADF schools and training establishments, with the results expected to inform the basis for any change in training systems that may be necessary.
- An audit of the service police investigative capability to establish the best means for its development. A senior retired Australian Federal Police (AFP) officer has been seconded to assist with that audit.

2.7 Overall, the CDF was pleased to report that, in the first six months of the two-year implementation period, significant achievements had been made in reforming this system to deliver impartial, rigorous and fair outcomes through enhanced oversight, greater transparency and improved timeliness.⁵ The Defence Force Ombudsman, Professor John McMillan, was confident that the Department of Defence had responded positively to the recommendations contained in reports made by his office:

...nearly all of the recommendations made in the joint report about the review of the redress of grievance system were accepted, all but one of the recommendations in the report about the management of service personnel under the age of 18 years were accepted and other recommendations that have been made in individual investigations—even in cases that were quite sensitive—have received a positive response and hearing from the defence department.⁶

2.8 The following chapters consider in more detail some of the measures taken to improve Australia's military justice system.

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

5 See *Report on the Progress of Enhancements to the Military Justice System*, 13 April 2006. See Appendix 2.

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

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.

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.¹ 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.

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.² 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.

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.³ 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'.⁴

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.⁵

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.

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.⁶

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.⁷

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.⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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.¹³

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':¹⁴

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.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸ It should be noted that the Defence Force Ombudsman attributed the delay in processing ROGs to under-resourcing of the complaint resolution area.¹⁹

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.²⁰

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:²¹

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.²² 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.²³

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.²⁴

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.²⁵

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.²⁶

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.²⁷

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.²⁸ 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.²⁹

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.³⁰

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.

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.³¹

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.³²

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

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.³³

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.³⁴

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.³⁵

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.³⁶

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.

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.³⁷ 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.

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.³⁸

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'.³⁹ 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.⁴⁰

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

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.⁴¹

4.53 Fifty-one units have been subjected to audit, with 20 completed in calendar year 2005.⁴² 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.⁴³

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

4.55 Mr Earley also noted that the audit is followed up with a report outlining the outcomes.⁴⁵ 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'.⁴⁶ 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 field⁴⁷ ...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.⁴⁸

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

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.⁴⁹

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.⁵⁰

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.⁵¹

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.⁵² 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.⁵³

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.⁵⁴

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.⁵⁵

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.⁵⁶

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.

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.⁵⁷

Committee view

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

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.⁵⁸

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.⁵⁹ 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.⁶⁰ He was unsure of whether he could make a report independent of the ADF.⁶¹

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

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'.⁶² 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.⁶³

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'.⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷ 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

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'.⁶⁸

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.⁶⁹

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

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.⁷⁰

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.⁷¹

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'.⁷²

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

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.⁷³ 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.⁷⁴

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.⁷⁵

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

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.⁷⁶ 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.⁷⁷

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.

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.

Appendix 1

Public hearing and witnesses

Monday, 19 June 2006—Canberra

BONSER, Rear Admiral Marcus Frederick, Head, Military Justice Implementation Team, Department of Defence

BRENT, Mr Ronald Ian, Deputy Ombudsman, Commonwealth Ombudsman

CUNLIFFE, Mr Mark Ernest, Head, Defence Legal, Department of Defence

EARLEY, Mr Geoffrey John, Inspector General, Australian Defence Force, Department of Defence

GAYNOR, Lieutenant Colonel James Morgan, Acting Director of Military Prosecutions, Department of Defence

HARRIS, Ms Diane, Acting Director General, Fairness and Resolutions Branch, Department of Defence

HARVEY, Air Commodore Simon John, Director-General, ADF Legal Services, Department of Defence

McMILLAN, Professor John Denison, Commonwealth Ombudsman, and Defence Force Ombudsman

Appendix 2

Tabled documents and additional information

Tabled documents

Monday, 19 June 2006—Canberra

BONSER, Rear Admiral Marcus Frederick, Head, Military Justice Implementation Team, Department of Defence

Opening comments and recommendations

BRENT, Mr Ronald Ian, Deputy Ombudsman, Commonwealth Ombudsman

Preliminary inquiries and Ombudsman investigations for the year 2004-2005

CUNLIFFE, Mr Mark Ernest, Head, Defence Legal, Department of Defence

Boards of inquiry, Part III, Regulation 33, subregulation (3) Appearance and representation

Additional information

Department of Defence – Answers to questions on notice of 19 June 2006.

Appendix 3

The Committee's recommendations and the Government's response

Committee's recommendations	Government response
<p>Recommendation 1</p> <p>3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 2</p> <p>3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 3</p> <p>3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 4</p> <p>3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.</p>	<p>Government Response: Agreed in part</p> <p>The Government agrees in part, noting that the ADF makes an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution. This determination is based on an assessment of whether dealing with the matter under the DFDA can be reasonably regarded as substantially serving the purpose of maintaining and enforcing Service discipline. Where civilian police do not pursue a matter and it can be regarded as substantially serving the purpose of maintaining and enforcing Service discipline, then the matter may be dealt with under the DFDA. Defence will work to improve the management and effectiveness of the relationship between the military and civilian</p>

Committee's recommendations	Government response
	<p>authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.</p>
<p>Recommendation 5</p> <p>3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:</p> <ul style="list-style-type: none"> • Fully implementing the recommendations contained in the Ernst & Young Report; • Encouraging military personnel secondments and exchanges with civilian police authorities; • Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces; • Increasing participation in civilian investigative training courses; and • Designing clearer career paths and development goals for military police personnel 	<p>Government Response: Agreed in part</p> <p>The Government agrees this recommendation with one exception. The Ernst and Young Report was a review of the Army police investigation service and did not address the Navy and Air Force police investigation services. Army accepted 53 of the 55 of Ernst and Young recommendations. Two were not accepted on the basis that they appeared to infringe on the individual rights of ADF members. Work to implement the 53 agreed recommendations commenced in August 2004, and is progressing well. 33 recommendations, including the two that are not accepted, are complete, including establishment of the Provost Marshal - Army in January 2005. 22 recommendations are pending additional work which is being progressed by Army.</p> <p>Some of the recommendations are specific to the Army and not directly relevant to the Navy and Air Force. The Government agrees that all Service police will act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.</p>
<p>Recommendation 6</p> <p>3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.</p>	<p>Agreed</p> <p>The Government will conduct a tri-service audit of Service police to establish the best means for developing investigative capability. Defence acknowledges that the current military police investigation capability has significant shortcomings and is inadequate for dealing with more serious offences that are not referred to civilian authorities. As identified by the Senate Committee, Defence has begun to rectify</p>

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	<p>shortfalls as part of the implementation of agreed recommendations from the recent Ernst and Young review into Army military police, including the establishment of the Provost Marshal</p> <ul style="list-style-type: none"> - Army, Navy and Air Force have completed or are conducting similar reviews to build on the outcomes of the Ernst and Young review. The recommended audit will bring together this work and establish the best way to develop the investigative capability of all Service police. <p>To supplement this, Defence will establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF began work to form a Serious Crime Investigation Unit in February 2004. Establishment of the unit has been in abeyance pending the outcomes of this Review. In-principle agreement has been reached with the AFP for a senior AFP officer to be seconded to mentor and provide oversight of this team, and implementation will now proceed. The unit will be headed by a new ADF Provost Marshal outside single Service chains of command. Service police may be supplemented by civilian investigators. The unit will deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Greater numbers of more skilled investigators will be available to investigate complex and serious issues in operational environments and contingencies inside and outside Australia.</p>
<p>Recommendation 7</p> <p>4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 8</p>	<p>*NOT AGREED. Referral of offences to</p>

Committee's recommendations	Government response
4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.	civilian authorities.
<p>Recommendation 9</p> <p>4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.</p>	*NOT AGREED. Referral of offences to civilian authorities.
<p>Recommendation 10</p> <p>4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.</p>	<p>Government Response: Agreed</p> <p>The Government agrees, noting that action has already commenced to establish the Director of Military Prosecutions as a statutory position. The statutory appointment will allow the Director of Military Prosecutions to operate independently and free from perceptions of command influence. It will also promote confidence among ADF members in the independence and impartiality of the appointment and in the functions of the Office.</p>
<p>Recommendation 11</p> <p>4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.</p>	<p>Government Response: Agreed</p> <p>The Government agrees. The Office of Director of Military Prosecutions was established on an interim basis in July 2003; it is timely to review the Office to ensure that it has sufficient resources to meet current and future work loads and is able to respond to operational requirements.</p>

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<p>Recommendation 12</p> <p>4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.</p>	<p>Government Response: Agreed</p> <p>The Government notes that the Committee recognised that the ODMP had been performing an admirable job and agrees to review the training requirements for permanent legal officers assigned to the Office of the DMP. The review will be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.</p>
<p>Recommendation 13</p> <p>4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.</p>	<p>Government Response: Agreed</p> <p>The Government notes that the ODMP has been actively engaged in increasing its profile over the last eighteen months, and agrees action should continue to raise the awareness and profile of the Office. Increased awareness and profile will help ADF members understand the role of the DMP, and ensure that Commanders have ready access to impartial and independent advice on the proper investigation and prosecution of Service offences, especially those that are serious criminal offences.</p>
<p>Recommendation 14</p> <p>4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to the statutory appointment of the Director of Military Prosecutions at the one star rank.</p>
<p>Recommendation 15</p> <p>4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to appropriate remuneration for the appointment of the Director of Military Prosecutions. In accordance with the Government's response to Recommendation 10, action is being taken to create a statutory appointment of the DMP. Remuneration of the statutory appointment will be determined by the Remuneration Tribunal (Cth).</p>
<p>Recommendation 16</p> <p>4.75 The committee recommends that all</p>	<p>Government Response: Agreed in principle</p>

Committee's recommendations	Government response
<p>Permanent Legal Officers be required to hold current practicing certificates.</p>	<p>The Government notes the Committee's underlying concern that the current ADF structures could give rise to a perception that ADF legal officers may not always exercise their legal duties independently of command influence.</p> <p>The independence of the ADF permanent legal officers was criticised in the ACT Supreme Court in <i>12 Vance v The Commonwealth (2004)</i>. In part, the case concerned legal professional privilege. A significant factor in the case was that ADF and Department of Defence legal officers do not normally have practising certificates and this was seen as an indication that they were not independent and impartial and entitled to legal professional privilege. In May 2005, the Commonwealth appealed the decision, and the ACT Court of Appeal unanimously upheld the appeal on 23 August 2005.</p> <p>Although there are practical difficulties in implementing Practising Certificates, the legal officers in the office of the DMP will be required to hold them, and other permanent legal officers will be encouraged to take them out. The matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).</p>
<p>Recommendation 17</p> <p>4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to establish a Director of Defence Counsel Services (DDCS) to improve the availability and management of defence counsel services to ADF personnel. The DDCS will be established as a military staff position within the Defence Legal Division to coordinate and manage the access to and availability of defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve.</p>
<p>Recommendation 18</p>	<p>Government Response: Agreed</p>

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<p>5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.</p>	<p>The Government agrees to create a permanent military court to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court will be established under appropriate Defence legislation. The court will satisfy the principles of impartiality and judicial independence through the statutory appointment of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). During the period of their appointment, the judge advocates will not be eligible for promotion, to further strengthen their independence from the chain of command. The appointments will be made by the Minister for Defence.</p> <p>The appointment of new military judge advocates would see the need to consider further, during implementation, the position of the Judge Advocate General. The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate and the Registrar of Military Justice. The Australian military court would consist of a Chief Judge Advocate and two permanent judge advocates, with a part-time reserve panel. The panel of judge advocates would be selected from any of the available qualified full or part-time legal officers. The court would be provided with appropriate para-legal support sufficient for it to function independent of the chain of command. In meeting all of the requirements of military justice, the court would include options for judge advocates to sit alone or, in more serious cases, with a military jury. The use of a jury would be mandatory for more serious military offences, including those committed in the face of the enemy, mutiny, desertion or commanding a service offence.</p>

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<p>Recommendation 19</p> <p>5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.</p> <ul style="list-style-type: none"> • Judges should be appointed by the Governor-General in Council; • Judges should have tenure until retirement age. 	<p>Government Response: Not agreed</p> <p>In response to Recommendation 18, the Government agreed to the option to establish an Australian military court. The Government does not support the creation of a permanent military court under Chapter III of the Constitution. Current advice is that there are significant policy and legal issues raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.</p> <p>Importantly, a military court is not an exercise of the ordinary criminal law. It is a military discipline system, the object of which is to maintain military discipline within the ADF. It is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The judicial authority must be able to sit in theatre and on operations. It must be deployable and have credibility with, and acceptance of, the Defence Force. The principal factor peculiar to the Defence Force is the military preparedness requirements and the physical demands of sitting in an operational environment. The Chapter III requirements are not consistent with these factors, and the Government does not support the Chapter III features for a military court.</p> <p>In addition, a Chapter III court would require its military judicial officers to be immune from the provisions of the DFDA subjecting them to military discipline. While this is appropriate regarding the performance of their judicial duties, the Government does not support making them exempt from military discipline in the performance of their non-</p>

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	<p>judicial duties such as training.</p> <p>The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.</p> <p>The Government will instead establish a permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.</p> <p>Advice to the Government indicates that a military court outside Chapter III would be valid provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.</p>
<p>Recommendation 20</p> <p>5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.</p>	<p>Government Response: Not agreed</p> <p>The Australian military court will have a permanent panel of military judge advocates with legislated independence. Appointment should be based on the same professional qualifications and experience that apply to other judicial appointments such as those applicable to a Federal Magistrate as set out in the <i>Federal Magistrates Act 1999</i> (Cth) Schedule 1 clause 1 (2). While recent civilian experience could be a factor to be taken into</p>

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	account, other qualified military legal practitioners should not be excluded on the basis that they do not have recent civilian experience.
<p>Recommendation 21</p> <p>5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees that judge advocates appointed to the Australian military court should have appropriate experience and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments, such as those applicable to a Federal Magistrate as set out in the <i>Federal Magistrates Act 1999</i> (Cth) Schedule 1 clause 1 (2).</p> <p>The Australian military court will have a permanent panel of military judge advocates with legislated independence. The Government notes that military judge advocates will predominantly be drawn from the Reserve, and would have adequate civilian and military experience. Nevertheless, other qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience.</p>
<p>Recommendation 22</p> <p>5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds will need to be determined once the structure of the Australian military court is established, but will be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.</p>
<p>Recommendation 23</p> <p>5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.</p>	<p>Government Response: Agreed</p> <p>The Government agrees with the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian military</p>

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	<p>court. The current process of review will be discontinued. The existing right of appeal from Courts Martial and Defence Force Magistrates (to be the Australian military court) to the DFDA Tribunal will be retained. Currently, the DFDA may only hear appeals on conviction on points of law, and may quash a conviction or substitute a conviction on an alternative offence. This will be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.</p>
<p>Recommendation 24</p> <p>7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that: the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).¹</p>	<p>Government Response: Agreed</p> <p>The Government will continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. Defence uses the Australian Standard for Whistleblower Protection Programs AS 8004-203, and the scheme is currently undergoing a comprehensive review by the Defence Inspector General. This review and its implementation will emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. The Government supports annual reporting of the operation of the scheme against documented performance standards.</p>
<p>Recommendation 25</p> <p>7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the</p>	<p>Government Response: Agreed in part</p> <p>The Government notes that Defence already reports statistics on reporting unacceptable behaviour in its annual report. The Government agrees that Defence will continue to include this data in the Defence annual report. The Government does not agree to report on potential under-reporting of unacceptable behaviour, as an exercise necessarily speculative in nature. Defence does, however, have in place a range of initiatives to manage and coordinate its complaints processing function to raise</p>

¹ Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

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ADF.	awareness and encourage reporting as appropriate.
<p>Recommendation 26</p> <p>8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of administrative inquiries. The Manual will provide improved guidance on the use of quick assessments.</p>
<p>Recommendation 27</p> <p>8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to improve guidance to Commanders who are responsible for the selection of inquiry officers to carry out administrative inquiries, such as routine unit inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. This will improve independence and impartiality, as well as enhance the quality of inquiry outcomes.</p>
<p>Recommendation 28</p> <p>8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers: Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry. A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the</p>	<p>Government Response: Agreed in part</p> <p>The Government agrees to consider proposals to enhance the transparency and accountability in the appointment of investigating officers. The Government agrees that investigating officers be required to produce statements of independence and to make known any potential conflicts of interest. The Government does not support the proposal that conflict of interest reports be included in reports to the Commanding Officer, rather, the Government will direct Defence to amend the Administrative Inquiries Manual to require that investigating officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the appointing authority to any potential conflict of interest or objection to an investigating officer.</p>

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<p>appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report. The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation. The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.</p>	<p>Resolution of any conflict would then occur prior to the commencement of the investigation.</p>
<p>Recommendation 29</p> <p>11.67 The committee makes the following recommendations—</p> <p>a) The committee recommends that:</p> <ul style="list-style-type: none"> • the Government establish an Australian Defence Force Administrative Review Board (ADFARB); • the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF; • the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term; • the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff; • all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement; • the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB; 	<p>Government Response: Not Agreed</p> <p>The Government agrees there is a need to improve the complaints and redress of grievance management system, and proposes that the shortfalls in the existing system would best be met by streamlining the existing ADF complaints management and redress of grievance system and retaining independent internal and external review and oversight agencies. The committee's recommended ADF Administrative Review Board (ADFARB) would not support the relationship between command and discipline, would reduce contestability and introduce duplication.</p> <p>The ADFARB concept proposed by the Senate Committee is based on the Canadian Forces Grievance Board (CFGB). The CFGB deals with only about 40 per cent of Canadian Defence Force grievances, is highly resource intensive and does not replace the Canadian internal complaints resolution body, or the Canadian Forces Ombudsman. Defence is concerned that the ADFARB concept would reduce contestability in the system by absorbing the ADF's only independent review authority, noting the proposal that the ADFARB take responsibility for and continue the work of the IGADF. As proposed, the ADFARB</p>

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<ul style="list-style-type: none"> • the CDF be required to give a written response to ADFARB findings/recommendations; if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint; • the ADFARB be required to make an annual report to Parliament. <p>b) The committee recommends that this report</p> <ul style="list-style-type: none"> • contain information that will allow effective scrutiny of the performance of the ADFARB; • provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and • comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions. <p>c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:</p> <ul style="list-style-type: none"> • a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, 	<p>would also duplicate the role of the Defence Force Ombudsman.</p> <p>The Government does not agree to establish an ADFARB on the basis that it would be a costly exercise 19 that would not provide real benefits in terms of increasing perceived independence. The Government is also concerned that an ADFARB would remove the responsibility and accountability of commanders for the well being of ADF personnel in their command.</p> <p>The Government proposes instead to reform and streamline the complaints and redress of grievance management system, in line with the recommendations of a joint Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. Implementation of these recommendations has commenced in line with a CDF Directive 2/2005. Changes to the system will improve the rigour, impartiality and timeliness of processing complaints.</p> <p>The overarching principle guiding the redress of grievance system remains that complaints should be resolved at the lowest effective level and in the quickest possible time. Primary responsibility to resolve complaints remains with the unit commanders.</p> <p>Defence's Complaint Resolution Agency (CRA) – an existing body which is established outside the ADF –will become the lead agency in the coordination of complaints and redresses of grievance.</p> <p>In its expanded role, the CRA will have three major functions.</p> <ul style="list-style-type: none"> • The CRA will initially provide advice to commanding officers on the management of every application for redress of grievance and monitor the handling of those redress applications at the unit level. It will have an enhanced advisory and oversight function of every application.

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<p>has or had any personal, financial or professional association with the grievor; and</p> <ul style="list-style-type: none"> • where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter. <p>d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.</p> <p>e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:</p> <ul style="list-style-type: none"> • the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and • although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires. <p>f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:</p> <ul style="list-style-type: none"> • improving the training of investigating 	<ul style="list-style-type: none"> • The CRA will have the authority to advise on appropriately trained and qualified investigating officers at this initial stage and, if necessary, will require an alternative investigating officer to that nominated by the commander. • Where ADF personnel refer their complaint to the Service Chief or the Chief of the Defence Force following the decision of the commanding officer, the Complaint Resolution Agency, as in the present situation, will conduct an independent review of the matter and provide recommendations to the decision maker. <p>All complaints will be registered with the Complaint Resolution Agency within five days of initiation and it will be empowered to take over the management of all cases unresolved by commanders 90 days after lodgment. In all cases, the Agency will be the central point for monitoring progress and resolution. A single register for tracking complaints across the ADF will be implemented.</p> <p>Other improvements to the ROG system being implemented include improvements in training of commanding officers and investigating officers, consolidating Defence complaint mechanisms, and managing centrally the various complaint hotlines operating in Defence.</p> <p>For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—the Inspector General of the ADF and the Defence Force Ombudsman.</p> <p>The existing Inspector General of the ADF was established as recommended by Mr Burchett QC to deal exclusively with military justice matters. The IGADF was established to provide the Chief of the Defence Force</p>

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<p>officers;</p> <ul style="list-style-type: none"> • maintaining a register of investigating officers, and • developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations. <p>g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:</p> <ul style="list-style-type: none"> • the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation; • the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or • the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint. <p>h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.</p>	<p>with a mechanism for internal audit and review of the military justice system 20 independent of the ordinary chain of command and an avenue by which failures and flaws in the military justice system can be exposed and examined so that any cause of any injustice may be remedied.</p> <p>Although it is not a general complaint handling agency like the CRA, it does provide an avenue for those with complaints about military justice who are, for some reason, unable to go through their chain of command, to have their complaints investigated and remedied. The Government has drafted legislation to establish the Inspector General of the ADF as a statutory appointment in order to further strengthen its independence.</p> <p>In addition to this review mechanism and completely external to the ADF is recourse to the Defence Force Ombudsman. This position will retain legislative authority to receive and review complaints and to initiate on its own motion investigations into ADF administration processes. The Defence Force Ombudsman has statutory power to investigate a matter, make findings and recommend a course of action to the appropriate decision maker and to table a report in Parliament if deemed necessary.</p>
<p>Recommendation 30</p> <p>11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for</p>	<p>Government Response: Agreed</p> <p>The Government has taken action to clear the backlog of grievances, in line with recommendations from Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. This is scheduled to be</p>

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over 12 months.	completed by the end of 2005, with no requirement for additional funding or a task force.
<p>Recommendation 31</p> <p>12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.</p>
<p>Recommendation 32</p> <p>12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings <u>will</u> be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case</p>
<p>Recommendation 33</p> <p>12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry <u>will</u> be authorized to appear before the Board and <u>will</u> have the right to appoint a legal practitioner to represent them.</p>	<p>Government Response: Agreed in part</p> <p>The Government notes that the substance of this recommendation was agreed to following the 1999 senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence (Inquiries) Regulation 33. The Government agrees that in cases where either the appointing authority, before the inquiry starts, or the President of a Board of Inquiry makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons will be entitled to appear before the Board and will have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Further, the Government agrees that where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation will be provided at</p>

Committee's recommendations	Government response
	<p>Commonwealth expense, in accordance with standing arrangements. The Government also agrees that the representatives of the estate of deceased persons who have died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, will be entitled to be legally represented before the Board of Inquiry into that incident. Consistently, the Government agrees that where the representative of the estate of such persons choose to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. It is noted that the identification of 'persons adversely affected' involves the application of the principles of natural justice; it does not automatically encompass every person who is, or may be, a witness or has some other interest in the inquiry.</p>
<p>Recommendation 34</p> <p>12.120 The committee recommends that: all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry; the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary); the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle; the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.</p>	<p>Government Response: Not agreed</p> <p>The Government agrees that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government will propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. CDF shall appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service. The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience will be the President. This form of inquiry will be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.</p> <p>External independent legislative oversight by Comcare will continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for</p>

Committee's recommendations	Government response
	<p>consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process.</p> <p>State and Territory Coroners will continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF is working towards completing a Memorandum of Understanding with State and 21 Territory Coroners. The Defence Force Ombudsman will 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.</p> <p>The Government does not support the concept of an ADFARB, as reflected in the response to recommendation 29, and so can not agree to refer notifiable incidents, including suicide, accidental death or serious injury to an ADFARB for investigation/inquiry.</p>
<p>Recommendation 35</p> <p>13.19 Building on the report by the Australian Law Reform Commission, <i>Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction</i>, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.</p>	<p>Government Response: Agreed in principle</p> <p>The report of the Australian Law Reform Commission <i>Principled Regulation: Federal Civil and 13 Administrative Penalties in Federal Jurisdiction</i> is focused on commercial and corporate law matters, and not the employment of personnel. Any review of the military justice system would require a broader basis that allows examination of all aspects of the military justice system.</p> <p>The Government agrees that in addition to ongoing internal monitoring and review, Defence will commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation</p>

Committee's recommendations	Government response
	period.
<p>Recommendation 36</p> <p>13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review will also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review will be undertaken outside the broad review proposed at recommendation 35, and will be completed within the two-year implementation period.</p>
<p>Recommendation 37</p> <p>13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):</p> <p>(d) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.</p> <p>(e) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;</p> <ul style="list-style-type: none"> • Director of Military Prosecutions • Inspector General of the ADF • The Service Military Police Branches • RMJ/CJA • Head of Trial Counsel • Head of ADR 	<p>Government Response: Agreed</p> <p>The Government supports the need for transparency and parliamentary oversight of the military justice system and will provide, in the Defence annual report, reporting on the state of health of the military justice system. Reporting will include progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system. Defence will also amend the Defence (Inquiry) Regulations to provide for an annual report on the operation of the D(I)R, fulfilling a recommendation of the Burchett report. Defence will also report twice a year to the Senate committee, on progress of the reforms throughout the two year implementation process.</p>
<p>Recommendation 38</p> <p>14.46 To ensure that the further development and implementation of</p>	<p>Government Response: Agreed</p> <p>The Government agrees to commission an expert to examine whether the human rights</p>

Committee's recommendations	Government response
<p>measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.</p>	<p>of children are being respected. The Government also notes that Defence has already implemented significant policy initiatives under the Government's Cadet Enhancement Program to address shortcomings in the care and control and rights of minors in the ADF Cadets, including:</p> <ul style="list-style-type: none"> • implementation of a behaviour policy, providing training and materials on the expected standards of behaviour, and including guidance and advice on the handling of sexual misconduct; • development of a wellbeing program, specifically targeted at the mental health wellbeing of ADFC cadets; • introduction of an ADFC cadet and adult cadet staff training enhancement program; • a review of child protection policy and processes in line with State and Territory legislation; • a review of screening processes for new staff; and • production of a youth development guide for adult cadet staff.
<p>Recommendation 39</p> <p>14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.</p>	<p>Government Response: Agreed</p> <p>The Government agrees, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that will more than meet the Committee's recommendations on the human rights of minors.</p>
<p>Recommendation 40</p> <p>14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully</p>	<p>Government Response: Agreed</p> <p>The Government agrees and notes that the Service Chiefs have already provided additional resources to the ADF Cadets to improve administrative support.</p>

Committee's recommendations	Government response
remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.	

*The Government does not agree to the recommendations (1, 2, 3, 7, 8, and 9) that taken together propose the automatic referral of investigation and prosecution of criminal offences with a Service connection to civilian authorities.

The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.

The maintenance of effective discipline is indivisible from the function of command in ensuring the day-to-day preparedness of the ADF for war and the conduct of operations. Justices Brennan and Toohey of the High Court in *Re Tracey; ex parte Ryan* (1989) (and repeated by Justice McHugh in *Re Colonel Aird; ex parte Alpert* (2004)) said ‘*Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful authority and the enhancing of efficiency in the performance of service functions.*’

As a core function of command, military justice cannot be administered solely by civilian authorities. Recourse to the ordinary criminal courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the Defence Force. Further, the capacity to investigate and prosecute offences under the Defence Force Discipline Act 1982 is necessary to support ADF operations both within and outside Australia. The Government does not accept that the DFDA—or more broadly the system of military justice—is a “duplication” of the criminal system.

Importantly, jurisdiction under the DFDA for any offence may only be exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline—a purpose different to that served by the criminal law. Moreover, extensive guidelines for the exercise of DFDA jurisdiction and the satisfaction of this service connection test are set out in comprehensive Defence instructions. It is a core element of the DFDA that not all criminal activity is or should be dealt with by the military police.

The Government is also concerned that the civil code does not have the disciplinary provisions required to keep order and encourage discipline and cohesive teamwork, and may actively undermine the ability of commanding officers to address disciplinary issues through the more expeditious summary action 15 available under the DFDA. This particularly applies to those cases that may be considered insignificant in a civilian context—petty theft for instance—that may have serious implications for service discipline and morale, and may

seriously undermine the authority of a commanding officer to maintain effective discipline. The proposed enhancements to the military justice system seek to provide a balance between military effectiveness and external oversight by ensuring that the system meets legal standards, conforms as far as possible to community expectations, and provides reassurance to the Parliament and the community that ADF members' rights are being protected without compromising the ADF's ability to remain an effective fighting force. It is based on the premise of maintaining effective discipline and protecting individuals and their rights, administered to provide impartial, timely, fair and rigorous outcomes with transparency and accountability. Where Defence prosecution substantially serves the purpose of maintaining and enforcing Service discipline, offences in Australia will be dealt with under the DFDA.

Past challenges to the system of retention or referral of cases in the High Court have been unsuccessful and the current system and thresholds will be maintained, with determination decisions undertaken by the Director of Military Prosecutions. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

The Government is also of the view that outsourcing the criminal investigative function would complicate proposed efforts to address the problem of the capability of the military police. Military police will still be required to perform criminal investigative roles if, for instance, civilian authorities decline to investigate a matter, and subsequently referred it back to the military police.

The Government has accepted recommendations 5 and 6, to improve the quality of criminal investigations conducted by Service police, including through the establishment of an ADF Joint Investigation Unit.

Appendix 4

**Department of Defence:
progress of reforms to the military justice system**

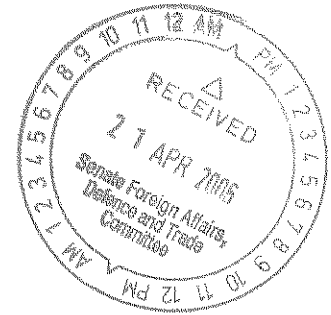


CHIEF OF
THE DEFENCE FORCE

CDF/OUT/2006/318
SEC/OUT/2006/202

Senator D. Johnston

Chair Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
Canberra ACT 2600



Dear Senator

REPORT ON THE PROGRESS OF ENHANCEMENTS TO THE MILITARY JUSTICE SYSTEM

In tabling the Government response to your Committee's report '*The Effectiveness of Australia's Military Justice System*' dated 16 June 2005, Senator Hill noted that: '*...as a further measure of the Government's determination to thoroughly and effectively reform the military justice system, Defence will provide six-monthly reports on progress to the Senate Foreign Affairs, Defence and Trade Committee throughout the two-year implementation period*' (Senate Hansard 5 Oct 2005 refers). We are pleased to provide the first report of the progress of enhancements to the military justice system, in accordance with the Government direction.

The Government response to the Senate report agreed in whole, in part, or in principle, with thirty of the forty Senate recommendations and advised alternative solutions to meet the outcomes sought by the reports recommendations concerning: the referral of offences to civil authorities; the legislative basis of a permanent military court; and the establishment of an Australian Defence Force (ADF) administrative review board. The significant enhancements directed by the Government will balance the maintenance of effective discipline, which is indivisible from the function of command and the preparedness of the ADF for operations, with the protection of individuals and their rights.

As indicated in the Government response, a dedicated team - the Military Justice Implementation Team (MJIT) under Rear Admiral Mark Bonser, RAN, was formed to ensure implementation of the enhancements. In addition, the Team is responsible for implementing ongoing enhancements from a number of previous internal and external reviews of the military justice system. Government requires Defence to implement these recommendations and enhancements within the two year implementation period.

To date, a total of seven full recommendations (10, 14, 15, 24, 25, 30, 33), and significant elements of a further two recommendations (6 and 29), have been completed on, or ahead of, the Implementation Plan schedule. A further nine full recommendations and significant elements of a further three recommendations are expected to be completed over the next reporting period. Considerable work is being undertaken in a number of other areas, in particular, on: the establishment of the Australian Military Court (recommendation 18); reforming and streamlining the complaints and redress of grievance management system

(recommendation 29); establishment of a CDF Commission of Inquiry (recommendation 34); and review and reporting of military justice (recommendation 35).

The enclosed spreadsheet provides, in more detail, an overview of progress to date. It outlines the action directed in the Government response; the planned completion date (in accordance with the Implementation Plan agreed by the Chiefs of Service Committee (COSC)); and the current status of implementation.

A number of additional positions have already been established, across the Portfolio, to implement the enhancements. In tabling the Government's response, the then Minister advised that *'...the Government will ensure that the system is adequately resourced by establishing, initially, an additional 35 positions, as well as two new permanent Judge Advocates in addition to the Chief Judge Advocate, for the Australian Military Court, at an approximate cost of \$3.5 per annum'*. Additional positions are being considered for establishment as they are identified in the implementation process. The additional positions will enhance the capacity of a number of existing agencies, support the establishment of new agencies or capabilities and provide for enhanced oversight of the military justice system. Initial funding to implement the enhancements has been agreed by Defence and is available from within current allocations.

Together with the Service Chiefs, we are committed to a fair and just military workplace and are personally driving the required changes. We are reviewing progress on a monthly basis as a standing item at the meetings of the COSC.

We trust that this report provides you with the information necessary to enable an informed assessment of our progress with implementing enhancements to the military justice system.



A.G. HOUSTON, AO, AFC
Air Chief Marshal
Chief of the Defence Force

13 April 2006



R.C. SMITH, AO, PSM
Secretary

13 April 2006

Enclosures:

1. ADF Report to the Senate Foreign Affairs, Defence and Trade Legislation Committee on Progress of Enhancements to the Military Justice System April 2006

AUSTRALIAN DEFENCE FORCE





REPORT TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

ON

PROGRESS OF ENHANCEMENTS TO THE MILITARY JUSTICE SYSTEM

APRIL 2006

LEGEND:

	Complete, no outstanding action is required
	Problematic, requires attention to ensure implementation is on track and/or significant risks to implementation are emerging.
	Highly problematic, requires urgent and decisive attention to get implementation on track and/or major risks are emerging.
	Underway or has not yet started (awaiting precursor actions), no significant risks foreseen

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
<p>1, 2, 3, 7, 8 and 9</p>	<p>In response to Recommendations 1, 2, 3, 7, 8 and 9, the Government agreed that:</p> <ul style="list-style-type: none"> Defence would work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This would include: <ul style="list-style-type: none"> reviewing and clarifying the guidelines, and examining the need for, and implementing as necessary, formal arrangements with the States and Territories for referral of offences; and establishing a common database for tracking referrals. 	<p>Oct 2007</p> <p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> An ADF policy is being prepared for consideration prior to discussion with civil jurisdictions. A major upgrade to the Defence Policing and Security Management System (DPSMS) currently underway, is expected to meet this requirement.
<p>4</p>	<p>The Government agreed in part, noting that the ADF made an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution; and that:</p> <ul style="list-style-type: none"> Defence would as for Recommendations 1, 2 and 3 above. 	<p>As for Rec 1</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action as per Recommendation 1
<p>5</p>	<p>The Government agreed in part that all Service police would act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.</p> <p>The Government [also] agreed to:</p> <ul style="list-style-type: none"> encourage military personnel secondments and exchanges with civilian police authorities; undertake a reserve recruitment drive to attract civilian police into the Defence Forces; increase participation in civilian investigative training courses; and design clearer career paths and development goals for military police personnel 	<p>June 2006</p> <p>Dec 2006</p> <p>Dec 2006</p> <p>Dec 2006</p> <p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action upon accepted recommendations of the Ernst & Young Report, appropriate to each Service has commenced. Further implementation will be informed by the outcomes of the audit of ADF investigative capability (Recommendation 6). These [additional] actions will be informed by the outcomes of the audit of ADF investigative capability

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
6	<p>The Government agreed:</p> <ul style="list-style-type: none"> To conduct a Tri-Service audit of Service police to establish the best means for developing investigative capability. That Defence would establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The [investigative] unit would be headed by a new ADF Provost Marshal outside single Service chains of command. Service police may be supplemented by civilian investigators. The unit would deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. 	<p>June 2006</p> <p>Dec 2006</p> <p>June 2006</p> <p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> The audit, which commenced in Feb 06, is well underway. A final report is due to CDF by 30 Jul 06. A retired AFP Deputy Commissioner has been seconded, initially to assist in the conduct of the audit of ADF Service police investigative capability. The ongoing requirement for secondment of an AFP officer will be informed by the outcome of the audit. Initial positions, to staff the planned investigation unit, have been established. The requirement for and/or shape of the unit will be informed by the outcomes of the audit. A recommendation on the initial selection for the position of Provost Marshal ADF is with CDF for consideration.
10	<p>The Government agreed to legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions (DMP).</p>	<p>Jun 2006</p>	<p>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The statutory position of DMP was established under the <i>Defence Legislation Amendment Bill (No. 2) 2005 which was assented on 12 Dec 05.</i>
11	<p>The Government agreed that it is timely to review the Office of the DMP to ensure that it had sufficient resources to meet current and future work loads and was able to respond to operational requirements.</p>	<p>Dec 2006</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Additional positions have been identified and are awaiting final endorsement for approval.
12	<p>The Government agreed to review the training requirements for permanent legal officers assigned to the Office of the DMP. The review would be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.</p>	<p>Dec 2006</p>	<p>AWAITING PRECURSOR ACTIONS</p> <ul style="list-style-type: none"> Action is expected to commence once the additional positions to adequately resource the Office of the DMP are filled.
13	<p>The Government noted that the ODMP has been actively engaged in increasing its profile over the last eighteen months, and agreed that action should continue to raise the awareness and profile of the Office.</p>	<p>Jun 2007</p>	<p>AWAITING PRECURSOR ACTIONS</p> <ul style="list-style-type: none"> Action is expected to commence once the additional positions to adequately resource the Office of the DMP are filled.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
14	The Government agreed to the statutory appointment of DMP at one star rank	Dec 2005	<p>COMPLETED (MAR 06)</p> <ul style="list-style-type: none"> DMP has been established at one star rank.
15	The Government agreed to appropriate remuneration for the appointment of the DMP, the remuneration to be determined by the Commonwealth Remuneration Tribunal.	Jun 2006	<p>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The Commonwealth Remuneration Tribunal made a determination on remuneration for the DMP, effective 12 Dec 05. (<i>The determination also covered the Inspector General ADF (IGADF), Chief Judge Advocate (CJA) and Registrar of Military Justice (RMJ).</i>)
16	<p>The Government agreed in-principle that:</p> <ul style="list-style-type: none"> legal officers in the office of the DMP would be required to hold Practising Certificates, and other permanent legal officers would be encouraged to take them out; and that the matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society). 	Oct 2007	<p>AWAITING PRECURSOR ACTIONS</p> <ul style="list-style-type: none"> Action is expected to commence once the additional positions to adequately resource the Office of the DMP are filled.
17	The Government agreed to establish a Director of Defence Counsel Services (DDCS) as a military staff position within the Defence Legal Division, to coordinate and manage the access to and availability of Defence counsel services by identifying and promulgating a Defence panel of legal officers, permanent and reserve.	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> The position of Director of Defence Counsel Services has been established and it is expected to be filled in Apr 06.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
<p>18, 19 and 20</p>	<p>The Government agreed to create a permanent military court – the Australian Military Court (AMC), to replace the current system of individually convened trials by Court Martial and Defence Force Magistrate. The AMC would be established under appropriate Defence legislation.</p> <ul style="list-style-type: none"> • The Court would satisfy the principles of impartiality and independence through the statutory appointment of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). During the period of their appointment, the judge advocates would not be eligible for promotion, to further strengthen their independence from the chain of command. • The Court would consist of a Chief Judge Advocate and two permanent judge advocates, with a part-time reserve panel. • The panel of judge advocates would be selected from any of the available qualified full or part-time legal officers. • The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate and the Registrar of Military Justice • The court would be provided with appropriate para-legal support sufficient for it to function independent of the chain of command. • The court would include options for judge advocates to sit alone or, in more serious cases, with a military jury. • The use of a jury would be mandatory for more serious military offences, including those committed in the face of the enemy, mutiny, desertion or commanding a service offence. • Appointments would be made by the Minister for Defence. 	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Drafting instructions to create the Australian Military Court (AMC) were submitted to the Office of Parliamentary Council (OPC) on 03 Mar 06 with a view to the legislation being introduced in the 2006 Winter sittings of Parliament. Priority was given to this initiative in order that the legislation may be passed by the end of 2006.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
<p>21</p>	<p>The Government:</p> <ul style="list-style-type: none"> agreed in principle that judge advocates appointed to the Australian Military Court should have appropriate experience, and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments; and noted that military judge advocates would predominantly be drawn from the Reserve and would have adequate civilian and military experience, nevertheless, qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience. 	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action as per Recommendation 18
<p>22</p>	<p>The Government agreed in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds would be determined once the structure of the Australian Military Court was established, but would be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.</p>	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action as per Recommendation 18 and will be included in the subsequent changes to summary procedures.
<p>23</p>	<p>The Government agreed the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian Military Court. The current process of review would be discontinued. The existing right of appeal from Court Martial and Defence Force Magistrate to the Defence Force Discipline Appeals Tribunal (DFDAT) would be retained. Currently, the DFDAT may only hear appeals on conviction on points of law, and may quash a conviction or substitute a conviction on an alternative offence. This would be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.</p>	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action as per Recommendation 18

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
24	<p>The Government:</p> <ul style="list-style-type: none"> Agreed to continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. The current comprehensive review and its implementation would emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. Supported annual reporting of the operation of the scheme against documented performance standards. 	Dec 2005 Jun 2006	<p>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The first of a series of regular reviews was completed into the Defence Whistleblower Scheme and the operation of the Scheme is to be reported annually in the Defence Annual Report (<i>This internal review indicates that the scheme is operating satisfactorily</i>).
25	<p>The Government noted that Defence already reported statistics on reporting unacceptable behaviour in its annual report. The Government agreed in part that Defence would continue to include this data in the Defence Annual Report.</p>	Jun 2006	<p>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> Reporting of wrong-doing was included in the 2004-05 Defence Annual Report and will continue to be reported. (<i>Wrongdoing is generally accepted as being inappropriate behaviour</i>).
26	<p>The Government agreed to amend the Administrative Inquiries Manual to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of administrative inquiries. The Manual would provide improved guidance on the use of quick assessments.</p>	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> Amendments to the Administrative Inquiries Manual are expected to be complete and promulgated by Jun 06. In addition to covering these recommendations, it would also incorporate agreed amendments from the earlier Acumen Alliance Review.
27	<p>The Government agreed to amend the Administrative Inquiries Manual to improve guidance to Commanders who are responsible for the selection of inquiry officers to carry out administrative inquiries, such as routine inquiries, or those appointed as Investigating Officers under the Defence [Inquiry] Regulations.</p>	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> As for Recommendation 26

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
<p>28</p>	<p>The Government agreed in part:</p> <ul style="list-style-type: none"> to consider proposals to enhance the transparency and accountability in the appointment of investigating officers, and that investigating officers be required to produce statements of independence and to make known any potential conflicts of interest. <p>The Government did not support the proposal that conflict of interest reports be included in reports to the Commanding Officer, rather, the Government would direct Defence to:</p> <ul style="list-style-type: none"> amend the Administrative Inquiries Manual to require that investigating officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the appointing authority to any potential conflict of interest or objection to an investigating officer. Resolution of any conflict would then occur prior to the commencement of the investigation. 	<p>Jun 2006</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> As for Recommendation 26
<p>29</p>	<p>In response to Recommendation 29, the Government agreed the need to improve the complaints and redress of grievance management system and proposed that the shortfalls in the existing system would best be met by streamlining the existing ADF complaints management and redress of grievance system and retaining independent internal and external review and oversight agencies.</p> <p>The Government proposed to reform and streamline the complaints and redress of grievance management system in line with the recommendations of a Joint Defence Force Ombudsman/ CDF Redress of Grievance System Review 2004. Implementation of these recommendations has commenced in line with a CDF Directive 2/2005</p>	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> The Defence Fairness and Resolution Branch (F&RB) was established (vide CDF/Sec Directive dated 27 Feb 06) as the central management body, outside of normal line-management, for managing all complaints and grievances. Implementation of the ROG Review recommendations is being monitored through a senior-level ROG Review Working Group. The IGADF has been established as a statutory position, remuneration has been determined, and Mr Earley appointed to the position.
<p>30</p>	<p>The Government has taken action to clear the backlog of grievances in line with recommendations from the DFO/CDF Redress of Grievance Review 2004. This is scheduled to be completed by the end 2005, with no requirement for additional funding or a task force.</p>	<p>Dec 2005</p>	<p>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The backlog of Redresses of Grievance cases has been cleared (<i>There is no longer a backlog of cases which previously caused undue pressure on the complaints resolution system</i>).

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
31	<p>The Government agreed to amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It would be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.</p>	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> Amendments to the Administrative Inquiries Manual are expected to be agreed and promulgated by Jun 06.
32	<p>The Government agreed to amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case.</p>	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> Amendments to the Administrative Inquiries Manual are expected to be agreed and promulgated by Jun 06.
33	<p>The Government noted that the substance of this recommendation was agreed to following the 1999 Senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence [Inquiry] Regulations 33. The Government agreed in part that:</p> <ul style="list-style-type: none"> In cases where either the appointing authority, before the inquiry starts, or the President of a BOI makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons would be entitled to appear before the Board and would have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements. The representatives of the estate of deceased persons who had died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, would be entitled to be legally represented before the BOI into that incident. Where the representative of the estate of such persons choose to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements. 	<p>Dec 2006</p> <p>Dec 2006</p> <p>Dec 2006</p>	<p>COMPLETED (MAR 06)</p> <ul style="list-style-type: none"> Amendments to the Defence (Inquiry) Regulations 1985 (D(1)R) 33 were completed as at 31 Mar 06.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
<p style="text-align: center;">34</p>	<p>In response to Recommendation 34, the Government agreed that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government would:</p> <ul style="list-style-type: none"> • propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. • CDF should appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in Service. • The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience would be the President. • This form of inquiry would be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry. • External independent legislative oversight by Comcare would continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process. • 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. • 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. 	<p style="text-align: center;">Dec 2006</p> <p style="text-align: center;">Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Amendments to the Defence (Inquiry) Regulations (D(IR) have been made to allow a civilian to preside over a Board of Inquiry (BOI), pending the legislative changes necessary to establish the mature CDF Commission of Inquiry (CDF COI) framework. • Drafting instructions, to amend section 124 of the Defence Act 1903, establishing a more permanent CDF COI framework, were included in drafting instructions for the Australian Military Court which were submitted to the Office of Parliamentary Counsel on 03 Mar 06, with subsequent amendments to the D(IR) to follow. • An initial panel of suitably qualified persons with judicial experience to preside over/sit on a CDF COI has been recommended to CDF for consideration.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
35	The Government agreed in principle that, in addition to ongoing internal monitoring and review, Defence would commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Arrangements for the conduct of a review of the effectiveness of the overhauled military justice system at the conclusion of the two-year implementation period will be made early in 2007. • In addition to the Government response, as announced by the CDF in Oct 2005, an audit of the learning culture in ADF schools and training establishments has commenced. A final report is due to be submitted to the CDF by 30 Jun this year. The aim of this audit is to establish a baseline from which to drive change in the ADF's schools and training culture, where necessary.
36	The Government agreed in principle to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review would also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review would be undertaken outside the broad review proposed at recommendation 35, and would be completed within the two-year implementation period.	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Preliminary advice has been requested from the Office of the Australian Government Solicitor which, when received, will form the basis for this examination. The advice will additionally form a basis for further action necessary to develop summary procedures with simplified rules of evidence and the right of appeal on conviction and sentence to the Australian Military Court.
37	The Government supported the need for transparency and parliamentary oversight of the military justice system. The Government agreed to provide, in the Defence Annual Report, reporting on the state of health of the military justice system. Reporting would include: progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system. Defence would also amend the D(I)Rs to provide for an annual report on the operation of the D(I)R, fulfilling a recommendation of the Burchett report, and report twice a year to the Senate committee [April and October], on progress of the reforms throughout the two year implementation process.	Jun 2006 Jun 06	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Reporting on the state of health of the military justice system will be included in the 2005-2006 Defence Annual Report. • Drafting instructions to the Office of Legislative Drafting are currently being prepared to provide for an annual report on the operation of the D(I)R. • An initial report to the Senate FAD&T Legislation Committee has been submitted Apr. 06.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
38	The Government agreed to commission an expert to examine whether the human rights of children are being respected.	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> The expert is scheduled to be engaged before Jun 06.
39	The Government agreed that the ADF take steps immediately to draft and make regulations dealing with the ADF Cadets to ensure that the rights and responsibilities of Defence and cadet staff are aligned, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that would more than meet the Committee's recommendations on the human rights of minors.	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> Drafting instructions were issued to the Office of Legislative Drafting in Jan 06, to amend the Cadet Forces Regulations 1977. It is expected that the Federal Executive Council would consider these amendments by Jun 06.
40	The Government agreed that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations and noted that the Service Chiefs had already provided additional resources to the ADF Cadets to improve administrative support.	Jun 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> Further administrative positions across all three cadet organisations will have been established and filled by Jun 06. Recruitment and selection processes have commenced to fill the one remaining vacant position.

Appendix 5

Chief of Defence Force Interim Directive to 8272694

**Colonel T.A. Grützner, AM Provost Marshal Australian
Defence Force**

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Chief of the Defence Force

CDF Directive No 09/2006

**CHIEF OF DEFENCE FORCE INTERIM DIRECTIVE
TO
8272694 COLONEL T.A. GRÜTZNER, AM
PROVOST MARSHAL AUSTRALIAN DEFENCE FORCE**

INTRODUCTION

1. You are appointed as the Provost Marshal Australian Defence Force (PM-ADF).

PURPOSE

2. The purpose of this document is to set out your specific responsibilities and accountabilities and to form the instrument against which your performance will be measured.

BACKGROUND

3. The Senate Foreign Affairs, Defence and Trade References Committee report '*The Effectiveness of Australia's Military Justice System*' dated 16 June 2005, made a number of recommendations for change to the administration of military justice in the ADF. Recommendations 4, 5 and 6 pertained to referral of offences, the capacity of the Service police to perform their investigative function, and an audit of current Service police staffing, equipment, training and resources.
4. The 5 October 2005 Government response to the Senate Committee Report, specifically recommendations 4, 5 and 6, noted that:
 - a. Recommendation 4: '*Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues*'.
 - b. Recommendation 5: '*all Service Police will act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service*'.
 - c. Recommendation 6:
 - (i) '*The Government will conduct a tri-service audit of Service police to establish the best means for developing investigative capability*',
 - (ii) '*...Defence will establish a joint ADF investigation unit*', and
 - (ii) '*The new unit will be headed by a new ADF Provost Marshal outside single-Service chains of command*'.

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5. The audit of ADF investigative capability is underway (CDF Instrument of Appointment and Terms of Reference (TOR) dated 16 February 2006 refer). An interim report is required by 30 April and a final report by 30 July 2006. The accepted outcomes of this audit can be expected to inform the role/responsibilities of the PM-ADF, and the broader formation of aspects of the Service police investigation function.

6. Joint CDF and Sec Directive Number 18/2005, dated 7 October 2005, appoints Head Military Justice Implementation Team (HMJIT). He is responsible for ensuring:

- a. the completion of all implementation action in accordance with the Government response to the Senate report; and
- b. the completion of all implementation action in accordance with the Government or ADF responses to a number of previous inquiries or reviews (including the Ernst and Young Report).

ROLES AND RESPONSIBILITIES

7. Your initial role is to:

- a. Be responsible to CDF for the command and control of Service police investigations into specified Notifiable Incidents affecting the ADF in operational and non operational environments;
- b. Advise CDF on the investigative priorities and recommendations for the deployment and assignment of the ADF investigative force.
- c. Be responsible to CDF, through HMJIT, for implementation of the relevant aspects of the Government response to the Senate Report Recommendations 4-6, in accordance with the timeframes outlined in the Military Justice Implementation Plan dated November 2005;
- d. Be responsible to CDF, through HMJIT, for implementation of the relevant aspects of the Government or ADF responses to relevant previous inquiries or reviews, in accordance with the timeframes outlined in the Military Justice Implementation Plan dated November 2005 including:
 - (i) 1998 Commonwealth Ombudsman's *'Own Motion Investigation into how the ADF Responds to Allegations of Serious Incidents and Offences'*;
 - (ii) 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade report *'Military Justice Procedures for the Australian Defence Force'*;
 - (iii) 2001 Joint Standing Committee on Foreign Affairs, Defence and Trade report *'Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion'*;
 - (iv) 2001 *'Report of an Inquiry into Military Justice in the Australian Defence Force'* conducted by Mr J.C.S. Burchett QC;

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- (v) 2004 Ernst & Young *Review of the Military Police Battalion Investigation Capability*; and
 - (vi) 2005 Joint Standing Committee on Foreign Affairs, Defence and Trade '*Report on the Effectiveness of Australia's Military Justice System*'.
- e. Be responsible to CDF, through HMJIT, for implementation of the relevant accepted outcomes of the audit of ADF investigative capability.
 - f. Manage assigned financial and non-financial resources in accordance with relevant Defence policy and Government legislation.

FINANCE AND ADMINISTRATION

8. The PM-ADF will be funded under CDF's budget. Financial and administrative support that you require is to be coordinated through HMJIT in the first instance and pending other support arrangements.

AUTHORISATIONS

9. You are authorised to:
- a. direct and task the Provosts Marshal Navy, Army and Air Force pursuant to your responsibilities as outlined at paragraph 7 above;
 - b. consult widely within Defence and with Government agencies -- in particular Federal, State and Territory Police Forces, pursuant to your responsibilities; and
 - c. expend allocated funds in accordance with requirements.

Reporting

10. The PM-ADF and Joint ADF Investigations Unit will reside with the MJIT in ADHQ initially and then in the VCDF Executive for administrative purposes.

11. You are to report to HMJIT in respect of implementation of the Government response to the Senate Committee report and relevant previous inquiries or reviews. In particular, all proposals for policy, process and resourcing in respect of your position, the proposed Joint ADF Investigation Unit and your relationship with existing Service Police capabilities, are to be staffed through HMJIT to ensure implementation action is in accordance with the Government response to the Senate Committee report.

Amendment Authority

12. I will periodically review this Directive to take account of changes in priorities, ADF organisation, or other changes.

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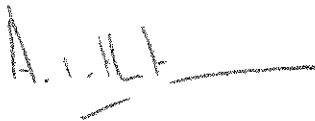
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13. You are to review this Directive:

- a. by September 2006, in conjunction with HMJIT, to ensure that it reflects the agreed outcomes of the audit of ADF investigative capability;
- b. by September 2007, in conjunction with HMJIT, and VCDF, to reflect necessary changes on completion of the two year timeframe for implementation of enhancements to the military justice system required by the Government response to the Senate Committee Report; and
- c. at any time to reflect proposals for change as they arise.

Acknowledgement

14. This Directive is effective upon receipt. You are to acknowledge receipt of the directive by returning Annex A to my Staff Officer (Administration).



A.G. HOUSTON, AO, AFC
Air Chief Marshal
Chief of the Defence Force

14 May 2006

Annex:

- A. Colonel T.A. GRÜTZNER, AM 8272694 – CDF Directive 09/2006 Acknowledgement Advice

Distribution:

PM-ADF

For Information:

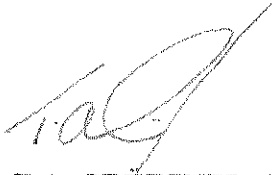
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OBJECT ID - R973952

Acknowledgement

I acknowledge receipt of CDF Interim Directive - Provost Marshal ADF (09/2006) and will comply with the directions contained within.



T.A. GRÜTZNER, AM
Colonel
Provost Marshal - ADF

15 May 2006

Appendix 6

Department of Defence

Answers to questions taken on notice – 19 June 2006

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE'S
REVIEW OF REFORM TO AUSTRALIA'S MILITARY JUSTICE SYSTEM**

**DEPARTMENT OF DEFENCE RESPONSES TO QUESTIONS TAKEN ON NOTICE
FROM 19 JUNE 2006 HEARING**

INDEX

QUESTION	TOPIC
1	Ombudsman's auditing/monitoring function
2	Army Aviation maintenance records investigation
3	Military Police Secondment and Exchanges
4	IGADF Reporting to the Minister
5	Psychiatric Assessment of ADF Personnel
6	Amendments to the Administrative Inquires Manual

Question 1**Senator Payne****Hansard 19 June 2006, p. 14****(see also page 5)****Ombudsman's auditing/monitoring function**

Could you please indicate whether Defence will adopt the Ombudsman's proposal in relation to him undertaking a more routine auditing and monitoring of the way in which cases are handled?

RESPONSE

Defence welcomes the Defence Force Ombudsman's (DFO's) proposal for a more routine audit and monitoring role in respect of the management of complaints. The finer detail and practical implementation of the necessary arrangements will be addressed as part of the broader enhancements to the military justice system being progressed in accordance with the Government response to the Senate Report.

Question 2

Senator Payne

Hansard 19 June 2006, p. 15

Army Aviation maintenance records investigation

The Joint Standing Committee on Foreign Affairs, Defence and Trade's hearing into the *Defence Annual Report 2004-05* on 16 June 2006 included a discussion on an investigation into an alleged forgery of work logs. Could you please comment on the discussion on the training and qualifications of the officer appointed to carry out the investigation?

RESPONSE

The investigation referred to was instigated by the Appointing Authority, Lieutenant Colonel Bryce Titcume, Chief of Staff, Headquarters 16th Brigade (Aviation), to investigate matters relating to the alleged falsifications of documents recording the attainment of trade competencies by aircraft technicians.

The allegations raised potential aircraft safety issues which the Brigade Commander wished to have resolved as soon as possible. The matter was originally referred to Military Police for action. Delays in the progress of the Military Police investigation led to the Commanding Officer's decision to progress the matter quickly by ordering an Administrative Inquiry.

The terms of reference for the Administrative Inquiry were primarily focussed on systemic training and maintenance implications arising from the alleged falsification of documentation that could compromise technical airworthiness, rather than any potential disciplinary aspects.

Consistent with the technical focus of the inquiry, the Inquiry Officer, Captain (now Major) Andrew Kelly, was selected for the task because of his particular trade background as an aviation technician. He had received some training on investigation techniques as part of a six-week aircraft accident investigation course, but had received no training specific to the conduct of Administrative Inquiries.

The facts of the alleged forgeries were not at issue given the admissions made by those involved. Nor were the technical and systemic issues in the terms of reference dependent on the evidence of Mr Nancarrow. Although it would have been preferable, and consistent with standard practice, for the Inquiry Officer to interview the complainant, Mr Nancarrow, this omission was not fatal to the objectives of the inquiry.

Question 3

Senator Hutchins

Hansard 19 June 2006, p. 21

Military Police Secondment and Exchanges

What progress has been made in military police secondments and exchanges with civilian police authorities, including the number of personnel who have participated in such exchanges and the period of time involved?

RESPONSE

On average, 14 ADF Service police undertake training with the Australian Federal Police (AFP) or NSW Police annually. These courses range in length from one to seven weeks and, in the case of the [seven week] NSW Police Scenes of Crime Course, involves a three week attachment to the NSW Police for confirmatory training on completion of the formal course. Defence also has in place long-standing arrangements at the operational level with the Australian Federal Police (AFP) and NSW Police for the provision of specialist instructional support to key courses. Additionally, the recent 2006 Australian Police Commissioner's Conference agreed to the formation of a working group to best coordinate Federal and State Police support, including for training, to the Service Police.

The requirement for, and nature of, future secondments and exchanges to Australian civilian police authorities, including for the provision of specialist training, will be informed by the outcomes of the current tri-Service audit of Service police.

Question 4

Senator Hutchins

Hansard 19 June 2006, p. 21

IGADF Reporting to the Minister

Can the IGADF make an annual report to the minister on his operations independent of the requirement to report to the CDF?

RESPONSE

Part VIII B of the *Defence Act 1903* deals with the Inspector General ADF statutory functions. Section 110A states, inter alia, that the object of Part VIII B is to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system, independent of the ordinary chain of command.

Reporting by the Inspector General ADF is provided for under Part VIII B of the *Defence Act 1903*, Section 110R, which is in the following terms: "*The Inspector General ADF must prepare and give to the Chief of the Defence Force such reports on the operations of the Inspector General ADF as the Chief of the Defence Force directs.*"

No express provision is made for the Inspector General ADF to make reports on the operations of his office independently of the requirements of this section. However, Part VIII B should be read in the context of the Act as a whole, including the powers of the Minister under Part II of the Act. Accordingly, it is possible for the Minister to direct CDF to require an annual report from the IGADF.

Question 5

Senator Hutchins

Hansard 19 June 2006, p. 24

Psychiatric Assessment of ADF Personnel

Can an ADF member be compelled to undergo psychiatric assessment?

RESPONSE

The ADF can direct a member to present for medical treatment (as a general order) but can not compel them to undertake the treatment. A failure to undertake the treatment however may then have administrative consequences, such as the member not being fit to deploy.

Question 6

Senator Payne

IN CAMERA Hansard 19 June 2006, p. 5

Amendments to the Administrative Inquiries Manual

Can the amendments to the Administrative Inquiries Manual please be provided to the Committee?

RESPONSE

The relevant pages of *Australian Defence Force Publication 06.1.4* (ADFP 06.1.4) the *Administrative Inquiries Manual* (AIM), Edition 2 dated June 2006, showing the amendments made as a result of the Government Response to the Committee's report are attached. The amendments made are as follows:

- a. Recommendation 26 – Amend the AIM to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of Administrative Inquiries.
 - (1) Chapter 2 paragraph 2.3 and Chapter 5 paragraph 5.18 provide for the required amendment.
- b. Recommendation 27 – Amend the AIM to improve guidance to commanders who are responsible for the selection of Inquiry Officers to carry out Administrative Inquiries, such as Routine Unit Inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. (*Note the Defence (Inquiry) Regulations have been separately amended to replace Investigating Officer with Inquiry Officer*).
 - (1) Chapter 4 (Routine Inquiries) paragraphs 4.3 to 4.6 provides guidance on the selection of Routine Inquiry Officers, including impartiality and independence and requisite 'core skills'.
 - (2) Chapter 5 (Appointing Authorities and Appointing Officers under the Defence (Inquiry) Regulations) paragraphs 5.7 and 5.28 – 5.34 provides guidance on the selection of Inquiry Officers and Inquiry Assistants, including: criteria for persons selected to inquire into complaints of unacceptable behaviour; requisite core skills and impartiality and independence.
- c. Recommendation 28 – Amend the AIM to require that Investigating Officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the Appointing Authority to any potential conflict of interest or objection to an Investigating Officer. Resolution of any conflict would then occur prior to the commencement of the investigation.
 - (1) Chapter 4 paragraph 4.6 and Chapter 5 paragraph 5.31 provide for a mandatory statement of independence and impartiality. Annex N to Chapter 5 is an example statement of impartiality and independence by an Inquiry Officer.

- d. Recommendation 31 – Amend the AIM to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.
 - (1) Chapter 7 paragraph 7.65 provides for the required amendment.
- e. Recommendation 32 – Amend the AIM to reflect the requirement that a person who comes before the board late in proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.
 - (1) Chapter 7 paragraph 7.58 provides for the required amendment.

Attachment:

- 1. Extracts from ADFP 06.1.4 (Administrative Inquiries Manual)

CHAPTER 2

QUICK ASSESSMENT

2.1 Quick Assessments are not inquiries under the Defence (Inquiry) Regulations and derive their authority from the inherent power of military rank and command.¹ Any commander may initiate a Quick Assessment into matters in connection with issues under their command and control.

Purpose of the Quick Assessment

2.2 The purposes of the Quick Assessment are:

- a. To enable a commander to determine the nature and gravity of the occurrence, the nature and extent of information required and the opportunity to decide what type of administrative inquiry, if any, is most likely to provide that information and is the most appropriate in the circumstances.
- b. To provide the Australian Defence Force (ADF) and commanders with a complete observable and auditable record of the initial details of an occurrence and the reasons underpinning any action taken with respect to that occurrence.
- c. To identify context management issues.

2.3 The Quick Assessment is not to be used as a vehicle for outcomes such as adverse findings, or to circumvent the need for further inquiry or investigation where such action would otherwise be necessary. Its primary purpose is to determine the manner in which the subject of the inquiry is most appropriately progressed, dealt with or finalised. It is not to be used to replace an administrative inquiry. The Quick Assessment is only the first part of the administrative inquiry process.

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Quick Assessment mandatory

2.4 Following the notification of an occurrence, incident or complaint, it is mandatory to conduct a Quick Assessment before taking any further action.

Appointment

2.5 Any ADF member may be directed to conduct a Quick Assessment. Instruments of Appointment are not required. The officer initiating the Quick Assessment should verbally brief the member and an outline of that brief should be documented by the officer conducting the Quick Assessment. Speed is essential in the conduct of a Quick Assessment. Both the Quick Assessment and the report to the officer initiating the Quick Assessment should be completed the same day.

2.6 The selection of a Quick Assessment officer must be consistent with paragraph 1.37(b) of this manual. Personnel selected to conduct a Quick Assessment must be free from bias and conflict of interest. The Quick Assessment officer must be able to conduct the assessment in a state that is impartial.

2.7 **Tracking** : All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities/ Officers and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the Quick Assessment is at the discretion of the commander or superior commander. Tracking on ADFAITS will usually be done by the Quick Assessment Officer. ADFAITs can be accessed via the DEFWEB under 'Online Tools'.

Quick Assessment and other investigations

2.8 In response to an incident or accident other investigations may be initiated, for example police or coroners investigations. A Quick Assessment can be conducted while other investigations are underway. The Quick Assessment

¹ See Section 9 of the Defence Act 1903

RESPONSIBILITIES OF APPOINTING AUTHORITIES AND APPOINTING OFFICERS
Quick Assessment

5.17 It is important that an Appointing Authority /Officer does not appoint an inquiry under the Defence (Inquiry) Regulations without first conducting a Quick Assessment.¹ The proper course to be followed for dealing with a matter cannot be determined until the preliminary issues and the context management issues² have been identified and there is some indication as to the expectations of complainants or affected persons. In all cases, this will involve inquiries of witnesses and affected persons, the collection of evidence and careful evaluation of the resulting report before deciding on the appropriate course of action. The matrix in annex E to chapter 2 provides guidance in selecting the most appropriate type of inquiry.

5.18 Any ADF member or an appropriate civilian may be directed to conduct a Quick Assessment. A Quick Assessment must not be used to replace other forms of administrative inquiry. It is the first part of the administrative inquiry system. See Chapter 2 for further advice in relation to Quick Assessments.

5.19 From the Quick Assessment report it should be possible to identify the allegations of the complainant or the issues for the inquiry. The next step is to consider the desired outcomes of the inquiry. The Terms of Reference must focus on these outcomes, ie the reason why the Appointing Authority/Officer wants the information.

Alternative Applications of Administrative Inquiries

5.20 Current policy and legislation³ regarding the conduct of administrative inquiries provides commanders with some flexibility in terms of selection of an administrative inquiry process. The intent is to allow commanders to select an inquiry format or combination of formats suitable to the incident. In this respect experience in the conduct of inquiries reveals that good results can be achieved where the inquiry process is modified to best meet the circumstances of the inquiry at hand. An inquiry need not be progressed in conventional BOI or Inquiry Officer form. For example, the circumstances may suit the appointment of an Inquiry and a series of Assistant Inquiry Officers⁴ rather than the appointment of a Board of Inquiry, or the appointment of a series of Inquiry Officers to collate material in respect of defined areas of responsibility and report back to a Board of Inquiry.⁵ In both these circumstances the purpose of the inquiry format is to enable effective use of resources to efficiently collate, analyse and present a broad range of material for the inquiry in a timely manner.

5.21 The appropriate combination and format of inquiry will depend on the circumstances at hand. Appointing Authorities/Officers should discuss appropriate options for the format of an inquiry with a Legal Officer prior to finalising Terms of Reference and Appointment instruments as direction for the procedure of the inquiry will be contained in this documentation.

Tracking, Scoping and Planning the Inquiry

5.22 Tracking: All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities/Officers and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the inquiry on ADFAITS will usually be done by an Inquiry Officer, Board Member or Board Secretary. ADFAITs can be accessed via the DEFWEB under 'Online Tools'.

5.23 The Appointing Authority/Officer must ensure that scoping and planning are conducted. Scoping and planning are discrete tasks conducted at different points of the inquiry process which are essential to ensuring the inquiry proceeds effectively and efficiently.

5.24 Scoping: Prior to finalising the Terms of Reference for an inquiry the Appointing Authority/Officer is to arrange for scoping of the inquiry in order to ensure that the format and procedure to be followed by the Board or Inquiry Officer(s) is

¹ See chapter 2 – Quick Assessment

² See annex B to chapter 2

³ ADFP 6.1.4 , DGTDLS Directive 2/2003, TDLS Reserve Legal Officer standard Operating Procedures, Determination 2000/1 and the D(I)Rs

⁴ The Burchett Inquiry is an example of an inquiry progressed in this way.

⁵ The F1-11 Reseal Deseal Board of Inquiry was run in this format.

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CHAPTER 4

ROUTINE INQUIRIES

4.1 The purpose of this chapter is to provide guidance to commanders and Routine Inquiry officers on inquiries into the broad range of matters, which arise in a unit from day-to-day. These inquiries are conducted with as little formality as possible, free from the constraints and legal requirements of inquiries under the Defence (Inquiry) Regulations. The majority of inquiries conducted in units should be Routine Inquiries. Inquiries under the Defence (Inquiry) Regulations conducted by Inquiry Officers and Boards of Inquiry should be the exception rather than the rule. Annex E to Chapter 2 provides guidance on the selection of an appropriate type of inquiry.

Quick Assessment

4.2 A Routine Inquiry is not to be conducted until a Quick Assessment has been completed. The Quick Assessment is not to be used as a vehicle for outcomes such as adverse findings, or to circumvent the need for further inquiry where such inquiry would otherwise be necessary. After a Quick Assessment is completed, a commander must decide what further inquiry, if any, is appropriate. Annex E to chapter 2 provides guidance as to whether or not it is appropriate to conduct a Routine Inquiry.

Selection of personnel

4.3 If it is determined that a Routine Inquiry is the most appropriate type of inquiry to conduct, the commander must ensure that the member or civilian nominated to conduct that inquiry is the most suitable. Any member of the Defence Force who is an officer, warrant officer or senior non-commissioned officer may be directed to conduct a Routine Inquiry. Particular care should be taken in the selection of the person to inquire into allegations of unacceptable behaviour, however minor. The selection should be made having regard to the capability, standing and expertise of the person. An experienced, mature and well-respected person should be chosen. The selection of the right person may facilitate the resolution of the incident or occurrence without the matter escalating to an inquiry under the Defence (Inquiry) Regulations.

4.4 Impartiality and independence. The following guidance must be adhered to in selecting a Routine Inquiry Officer.

- a. The person or persons selected must be free from bias and conflict of interest. Bias may arise as a result of a relationship between the inquiry officer and a party; such as a close family relationship, a close personal friendship (although not mere acquaintance) or strong personal animosity. Persons selected must be able to carry out the investigation in an independent manner. They are to be reminded of these obligations by the Appointing Authority.
- b. A member of the same unit must not be selected if they are directly responsible in the chain of command for the personnel or activities under inquiry.
- c. A commander (who by definition is likely to be involved in the implementation of recommendations with respect to members under their command) is not to be appointed to inquire into the conduct of any member under their command.
- d. Issues relating to the impartiality or independence of the inquiry officer must be resolved prior to the inquiry commencing.

4.5 The requisite skills, knowledge, experience and rank required of a Routine Inquiry Officer or Inquiry Assistant will differ depending on the role of the appointee and the circumstances of the inquiry. Core skills suited to the discharge of duties as a Routine Inquiry Officer include:

- a. prior experience in administrative processes or inquiries (dependent on the complexity of the matter under inquiry);
- b. relevant training in administrative inquiry processes (dependent on the complexity of the matter under inquiry);
- c. research skills;
- d. analytical skills;
- e. communication skills; and

- f. report writing skills.

Mandatory Statement of Independence and Impartiality

4.6 In addition to the guidance set out above, the guidance below must be adhered to in relation to Routine Inquiry Officers

- a. The person(s) selected as a Routine Inquiry Officer must sign a statement confirming their independence and ability to inquire into the matter in an unbiased manner. (See Annex N Chapter 5 for example statement.)
- b. Prior to an inquiry commencing a copy of that statement must be provided to the Appointing Officer, the complainant(s) and the respondent(s).
- c. If accepted the complainant(s) and respondent(s) shall endorse the statement of the Routine Inquiry Officer.
- d. If the complainant(s) or the respondent(s) has concerns relating to the impartiality or independence of the Routine Inquiry Officer they are not to endorse the statement and must inform the Appointing Officer.
- e. Issues relating to the impartiality or independence of the Inquiry Officer must be resolved prior to the inquiry commencing.

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Terms of Reference

4.7 The preparation of Terms of Reference for the conduct of Routine Inquiries is optional and is left to the discretion of the commander having regard to the circumstances of the case. Where no Terms of Reference are provided an appropriate briefing should be given and the Routine Inquiry officer should retain a written record of this briefing. Where no Terms of Reference are raised, the Instrument of Appointment should refer to the nature and scope of the inquiry. A form of Instrument of Appointment is in annex A for the guidance of commanders who wish to issue an Instrument of Appointment.

Tracking

4.8 All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the Routine Inquiry is at the discretion of the commander or superior commander. Tracking on ADFAITS will usually be done by the Inquiry Officer. ADFAITS can be accessed via the DEFWEB under 'Online Tools'.

ROUTINE INQUIRY¹

Principles applicable to a Routine Inquiry

- 4.9** Whilst the advantage of a Routine Inquiry is its informality, the following principles must be observed:
- a. The matter should be dealt with seriously, sensitively and swiftly.
 - b. The inquiry should be conducted without bias and with objectivity.
 - c. The inquiry should be conducted so that any perception of bias is avoided.
 - d. Assumptions should not be made about either a complainant or the person who is the subject of the complaint.

¹ Further guidance on the conduct of an inquiry is in chapter 6—'Inquiry Officer Inquiries'

- f. scoping of the inquiry and development of an inquiry plan;
- g. proper monitoring of the inquiry including the use of scoping and inquiry plans as a performance framework;
- h. information briefs for inquiry appointees; and
- i. engagement and support for NoK and potentially affected parties; and
- j. provision of appropriate levels of resources and administrative support.

Additionally, for Boards of Inquiry, legal officers should brief Appointing Authorities on the nature of their general responsibilities. This briefing will vary depending on the previous experience of the Appointing Authority. Legal officers should also brief Appointing Authorities on the factors which will influence the selection of personnel for BOI appointment (see paras 5.35 to 5.49)

5.6 Consideration must be given to the needs and positions of complainants, respondents and Potentially Affected Parties, the need to preserve discipline and the need to act without delay in order to:

- a. preserve evidence,
- b. preserve documents,
- c. avoid harm to an individual,
- d. prevent a recurrence of the matters complained of,
- e. separate parties in conflict and act fairly to the respondent,
- f. prevent a recurrence of an accident especially where death, serious injury or damage or loss of Defence property is involved, and
- g. generally act for the good of the Service.

5.7 Unacceptable behaviour. Complaints of unacceptable behaviour require particular skills. The principal criteria to be taken into account when selecting personnel to inquire into allegations of unacceptable behaviour are:

- a. freedom from any form of bias and the ability to carry out the inquiry in an independent manner;
- b. that personnel who are direct supervisors, personnel who have a close working relationship or a friendship with any of the parties or witnesses shall not be involved;
- c. an understanding of the advantages and disadvantages of ADR in resolving complaints;
- d. maturity and ability to conduct an inquiry, establish the facts, understand the nature of the allegations and be able to understand how to deal with the complainant and respondent, particularly where the complainant or respondent may be under the age of 18; and
- e. an ability to quickly identify the facts and solutions, which should be focused on the following outcomes:
 - (1) preserving a complainant's and respondent's safety, wellbeing and dignity;
 - (2) ensuring that any early signs of more serious situations, such as entrenched discrimination or harassment within a unit, are recognised and addressed; and
 - (3) ensuring that the objectives of military discipline and the integrity of the chain of command are preserved.

Powers of Appointment

5.8 An officer with authority to appoint a Board of Inquiry is referred to as the *Appointing Authority*. An officer with authority to appoint an Inquiry Officer Inquiry is referred to as the *Appointing Officer*.

5.9 Courts of Inquiry. In the case of a Court of Inquiry, the Minister will be the Appointing Authority.

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5.27 The Inquiry Plan is the means by which the Appointing Authority/ Officer is able to monitor and manage the inquiry process. The President of a Board of Inquiry or the Inquiry Officer is to present the Inquiry Plan to the Appointing Authority/Officer for the Appointing Authority/ Officer's approval. The President or Inquiry Officer is to ensure that the timetable set out in the Inquiry Plan is met.

Selection of personnel for Inquiry Officer Inquiries and Boards of Inquiry

5.28 It is vital that appropriately qualified and experienced personnel be selected for the conduct of inquiries. Accepting that operational constraints may often work against commanders in this regard, this chapter contains general guidance designed to ensure that all necessary considerations are covered in the selection of personnel for Inquiry Officer Inquiries and Boards of Inquiry. The selection of appropriately qualified civilians for appointment to Boards of Inquiry should be considered.

5.29 Poor selection of personnel to conduct inquiries may result in:

- a. failure to adhere to the Terms of Reference,
- b. unnecessary delay,
- c. flawed processes leading to the inquiry being set aside,
- d. bias,
- e. failure to appreciate the gravity or sensitivity of complaints,
- f. intimidation and pressure upon complainants and witnesses,
- g. attempts to resist or hamper inquiries by outside agencies, or
- h. lack of adequate documentation.

5.30 Impartiality and independence. The following guidance must be adhered to in selecting appropriate personnel for inquiry duties.

- a. The person or persons selected must be free from bias and conflict of interest. Bias may arise as a result of a relationship between the inquiry officer or member of a Board of Inquiry and another person involved in the inquiry. The types of relationships that may result in actual or perceived bias include; a close family relationship, a close personal friendship (although not mere acquaintance) or strong personal animosity. Persons selected must be able to carry out the inquiry in an independent manner. They are to be reminded of these obligations by the Appointing Authority.
- b. A member of the same unit must not be selected if they are directly responsible in the chain of command for the personnel or activities under inquiry.
- c. A commanding officer will usually be responsible for the implementation of recommendations with respect to members under their command. Accordingly, a Commanding Officer is not to be appointed to inquire into the conduct of any member or incident under their command.

5.31 Mandatory Statement of Independence and Impartiality. In addition to the guidance set out above, the guidance below must be adhered to in relation to Inquiry Officer Inquiries.

- a. The person(s) selected as an Inquiry Officer must sign and provide the Appointing Authority a statement of impartiality and independence and make known any potential conflict of interest. (See Annex N for an example statement.)
- b. Prior to an inquiry commencing a copy of that statement must be provided to the Appointing Officer, the complainant(s) and the respondent(s) or other party as appropriate in the circumstances.
- c. If accepted the complainant(s) and respondent(s) is to endorse the statement of the Inquiry Officer.
- d. If the complainant(s) or the respondent(s) has concerns relating to the impartiality or independence of the Inquiry Officer they are not to endorse the statement and must inform the Appointing Officer.

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- e. Issues relating to the impartiality or independence of the Inquiry Officer must be resolved by the Appointing Authority prior to the inquiry commencing.

5.32 Consideration should be given to appointing an inquiry officer from a unit other than that to which the personnel under inquiry belong in serious or sensitive matters and/or matters involving unacceptable behaviour. Such action will also be appropriate where there is likely to be media interest and potential for criticism of and embarrassment for the Australian Defence Force (ADF), where it is practical to do so. If a suitably qualified inquiry officer can not be identified, the Appointing Officer should consult their superior Commander.

Selection of an Inquiry Officer or Inquiry Assistant

5.33 An Appointing Authority may appoint an Inquiry Officer and one or more Inquiry Assistants to inquire into a matter. The D(I)Rs provide that an Inquiry Officer and any Inquiry Assistants must be :

- a. an officer;
- b. a warrant officer,
- c. an ongoing member of the APS performing duties at or above the classification of APS 4⁶, or
- d. any other person approved by the CDF, CN, CA or CAF.

5.34 The requisite skills, knowledge, experience and rank required of an Inquiry Officer or Inquiry Assistant will differ depending on the role of the appointee and the circumstances of the inquiry. Core skills suited to the discharge of duties as an Inquiry Officer or Inquiry Assistant include:

- a. prior experience in administrative processes or inquiries;
- b. relevant training in administrative inquiry processes;
- c. research skills;
- d. analytical skills;
- e. communication skills; and
- f. report writing skills.

Selection of Personnel for Boards of Inquiry

5.35 There are five key areas of appointment which need to be considered by the Appointing Authority in respect of a BOI. These are:

- (i) the board president
- (ii) the board members;
- (iii) counsel assisting;
- (iv) secretary or secretariat; and
- (v) counsel representing affected parties.

5.36 The requisite skills, knowledge and experience will differ depending on the role of the appointee and the circumstances of the inquiry. Further guidance is provided below.

5.37 The Board President. Regulation 27 provides that the Appointing Authority shall appoint one of the board members to be President of the Board.⁷The Board President is responsible to the Appointing Authority for the

⁶ Regulation 70 Defence (Inquiry) Regulations

- c. to identify persons who may be adversely affected.

7.57 Proceeding without statements. There may be cases where Counsel Assisting will advise the Board that preliminary statements need not be taken. This would be unusual, but there may be cases where Counsel Assisting and the Board consider that they are more likely to get to the truth of the matter by examining a witness without having first afforded them the opportunity to reduce their version of the evidence to writing in the form of a statement.

Affected persons

7.58 It may be possible to identify affected persons from the scoping of the inquiry, from the Terms of Reference, or from preliminary statements taken in anticipation of the Board sitting. Affected persons are authorised to appear before the Board and to be represented by another person who may be a legal practitioner. Whether a person may be affected, is a matter of judgment for the President to be exercised in conjunction with advice from Counsel Assisting. On the one hand, the more people who are represented before the Board, the more cumbersome the proceedings and the longer the inquiry will take to complete. On the other hand, the Board cannot make adverse findings against a person who has not been given the opportunity to be heard. If an affected person is notified of their PAP status late in proceedings, they will, if they request, be granted an adjournment to allow a reasonable opportunity to familiarise themselves with the evidence. Further, they may require witnesses to be recalled so that additional matters can be put to them. This will cause significant delays, if there are a number of witnesses involved. Fewer delays will occur if affected persons can be identified early in the proceedings or before proceedings commence.

7.59 Legal representation. An affected person may appoint another person (who may be a legal practitioner) to represent them before the Board.²⁰

7.60 Legal representation—deceased persons. A deceased member may be an affected person. In that event, a single representative of the deceased member can appear before the Board or choose to be represented by another person (who may be a legal practitioner) before the Board. Should the representative wish the deceased member to be represented by a civilian legal practitioner, this is to be at their own expense.

Possible adverse findings—natural justice

7.61 The rules of natural justice require that where the Board contemplates making findings which are adverse to the interests of any person, the Board must give that person the opportunity to put before it any material which might deter it from reaching that conclusion or making that finding²¹. The Board will be required, at the conclusion of the evidence, to give notice to any individual against whom it is contemplated that adverse findings may be made. The Board should be alert to this so that there is no significant delay in compiling the notices at the end of the taking of evidence. If the affected person has been present or represented throughout the proceedings, the issue need only be identified in broad terms²².

7.62 The term 'interests' with respect to a person likely to be adversely affected by the Board's findings includes the person's career or reputation, not just the possibility of administrative action or a recommendation that a disciplinary investigation be conducted.

7.63 A person who is likely to be adversely affected is limited to making submissions and putting material before the Board with respect to the matters that may be the subject of the Board's adverse findings with respect to them. They are not entitled to make submissions on the general subject matter before the board²³. In making submissions, persons are

²⁰ Defence (Inquiry) Regulation 33(3).

²¹ The majority in *Annetts & Others v McCann & Ors* (1990) 97 ALR 177 held that:

'The issues in respect of which findings adverse to the appellants may possibly be made can be isolated and, once isolated, counsel for the appellants is not entitled to address the Coroner on matters which are not relevant to those issues. At the same time, the Coroner has a responsibility to define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address and limit the scope of that address.'

²² It is recommended that the affected person be sent a minute worded as follows:

'The issues contained in annex A are within the contemplation of the Board and it is possible that an adverse finding affecting you may be made. You are invited to put any submissions with respect to items contained in annex A to the Board however, you are not obliged to do so.'

²³ *Legal Officers See Annetts & Others v McCann & Ors* (1990) 97 ALR 177.

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not limited simply to denials or assertions and are entitled to put every rational argument open on the evidence and where necessary, to refer to and analyse the evidence to support their submissions.

7.64 No bias rule. The rules of natural justice require that any decision that affects a member will be made by impartial and unbiased decision makers. The courts have adopted the position that a person cannot sit in judgment where their own interests may be affected by the outcome of the case; for example, if they have had a professional association with an affected person or any witness has in the past expressed hostility to the views being put by an affected person or that the findings of the Board may affect the career of a member of the Board. Any person who is a member of a Board where there is a real or potential conflict of interest should disqualify themselves. The general standard used by the courts is to ask whether a reasonable person would have suspected that the decision made by the body was not free from bias, that is to say, that the decision maker could not be seen to bring an open and impartial mind to the making of the decision.

7.65 Evidence affecting a person not present Where the President of a Board of Inquiry considers that any evidence given before the Board may affect a person who was not present or represented before the Board when the evidence was given, the President is to forward a copy of the relevant evidence to the person. The President is to inform the person that they have a right to apply to appear before the Board and to submit any written statement.

7.66 Orders to appear. Members of the ADF (except reservists who are not on duty) may be ordered to give evidence and refusal to attend may be an offence. A request for the attendance of an ADF witness is to be made in the first instance to the person's commanding officer. Any difficulty in securing the attendance of a witness should be referred to the Appointing Authority.

7.67 Summons. The President may summons civilians and reservists (who are not on duty) (See annex D). It is an offence for a person who has been summonsed to fail, without reasonable excuse, to appear and report at the time and place specified in the summons, and then from day-to-day, unless excused by the President, provided that they have been given reasonable travel costs.

7.68 Production of documents. Members of the Defence Force (except reservists who are not on duty) may be ordered to produce documents or articles to the Board of Inquiry but civilians and reservists not actually rendering military service must be summonsed (See annex D). It is an offence for a person who has been summoned to appear as a witness and to produce a document or article relevant to the Board of Inquiry which is within their custody or control, to fail, without reasonable excuse, to do so. Where the Board of Inquiry is held in public, it may be an excuse if the witness considers, on reasonable grounds, that the production might disclose a secret process of manufacture or be prejudicial to the defence of the Commonwealth. The President should decide whether the grounds claimed for refusal are reasonable; if they are not, the President should again order the witness to produce the document or article.

7.69 Taking of oath or affirmation. Where the Appointing Authority directs that evidence is to be taken on oath or affirmation, the Secretary to the President is to administer to each witness the oath or affirmation in accordance with annex E. The President may, however, allow a person to take the oath in such form as they declare to be binding upon their conscience.

7.70 Refusal or failure to take the oath or to affirm. When a Board has been directed to take evidence on oath or affirmation, it is an offence for a witness, without reasonable excuse, to refuse or fail to be sworn or make affirmation when called upon to do so by the President.

7.71 Refusal or failure to answer questions. All witnesses appearing before a Board of Inquiry are required to answer all questions put to them by the President, or approved by them, unless they have a reasonable excuse not to do so. It is no excuse before a Board of Inquiry to refuse to answer questions on the grounds that the answer to the question might incriminate the witness²⁴ but in such a case the answer may not be used in any subsequent civil or criminal proceedings, or proceedings before Service tribunals against that person, except when the witness is charged with giving false evidence to the Board of Inquiry²⁵. Where the Board of Inquiry is held in public it may be an excuse if the witness considers, on reasonable grounds, that the answering of the question in public might disclose a secret process of manufacturer or be prejudicial to the defence of the Commonwealth. Whether the Board is held in public or private, it may be an excuse if the witness considers, on reasonable grounds, that the question is one that is not relevant, having regard to the Terms of Reference of the Board of Inquiry. The President should decide whether the grounds claimed for refusal are reasonable; if they are not, the President should cause the question to be put again. Refusal or failure to answer a question may be an offence²⁶.

²⁴ Defence (Inquiry) Regulation 32(5).

²⁵ Defence Act 1903 section 124.

²⁶ Defence (Inquiry) Regulation 32(3).

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EXAMPLE STATEMENT OF IMPARTIALITY AND INDEPENDENCE BY INQUIRY OFFICER

Pursuant to Appointment of (date) I (insert name, rank and service number or APS details as appropriate) have been appointed to inquire into (general statement of incident) and to collect evidence, make findings and recommendations and submit a written report in relation to that matter.

I confirm that I am able to undertake this inquiry in an impartial, unbiased and independent manner.

I confirm I have no personal or professional affiliation or other relationship with the complainant or respondent, or any other person involved in the inquiry with any potential interest in the outcome of this inquiry, which may impact my impartiality or independence.

* I have had minor personal affiliation with the complainant / respondent / witness or other person as listed below but believe that the listed affiliation/s will not affect my impartiality or independence:

(a) (list nature of previous affiliations including timing and duration of affiliation and general nature of relationship)

(b)

* delete as appropriate

I undertake to immediately advise the Appointing Officer at any stage at which my impartiality or independence may be impacted.

.....

(complainant signature)

.....

(respondent signature)

(signature and address block Inquiry Officer)

.....

(signature and address block Appointing Officer)

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