

Executive Summary

Introduction

The committee has examined the Australian Defence Force's (ADF) second status report on the progress of reforms to Australia's military justice system. Since its last report in August 2006, a number of reforms have been implemented such as the establishment of a permanent military court. This court represents a significant change in the structure of the ADF's discipline system. It recognises the importance of military judges operating independently of the chain of command and with security of tenure and remuneration. There has also been a notable increase in the number of staff in the Office of the Director of Military Prosecutions. The committee also welcomes the development that all legal officers in the Office now hold practicing certificates. Finally, the committee is pleased to note preliminary indications that the redress of grievance process has improved.

The committee also looked critically at the findings of two recent reports: one inquiring into the ADF's investigative capability; and the other into the learning culture in ADF training establishments.¹ In addition, it considered inquiries into the sudden death of Private Jacob Kovco and of Trooper Angus Lawrence. All inquiries exposed continuing deficiencies in procedures and practices. The committee was particularly concerned about the close connection between their findings and those of the 2005 inquiry into Australia's military justice system.

Investigative capability

A recent audit of the investigative capability of the ADF found that the ADF investigative capability was in serious decline. It stressed that despite being reviewed, re-organised, restructured and downsized over the last fifteen years, Service Police (SP) still lacked 'clear purpose and direction, a senior "champion" or advocate to advance their interests, adequate leadership, and modern policy, doctrine, training and tradecraft'. The audit report concluded that the SP investigative capability had:

...reached the point where fundamental questions could be asked whether the service it provides justifies the significant resources expended on it. However, given the Government's decision that the ADF will retain its investigative capability, remediation must not be further delayed. It is very likely that unless action is taken as a matter of priority, the capability's depleted condition will eventually be evidenced either by its collapse or by the inability of the ADF to respond appropriately to a serious, sensitive event.²

1 Department of Defence, *Report of an Audit of the Australian Defence Force investigative capability*, July 2006 and *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006

2 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 8.

The committee takes particular note of the finding by the audit team that the dominant ADF command culture exerts influence on SP investigations. The audit report observed that many commanders were ignorant or dismissive of the limitations of, or restraints on, their command authority when an incident leads to a SP investigation.³

The findings of the Board of Inquiry into the death of Private Jacob Kovco further underlined concerns about the capacity of investigating authorities in the ADF. It emphasised the need for immediate and decisive action by the ADF to rectify the many problems besetting its military police service. It found shortcomings in ADF processes concerning the handling and preservation of serious incident sites and physical evidence and of the passage of information about the details of serious incidents.⁴ For example, the inquiry found that the room in which Private Kovco died was not properly secured for the preservation of all evidence in the room. The Board stated, 'Put simply, there were too many ADF personnel entering Room 8 after the shooting'.⁵

It also found that statements taken by the special investigators branch from all relevant SECDet IX (9th Security Detachment (Iraq)) members as part of the investigation 'were in part "templated" in order to save time'. It regarded this practice, 'irrespective of the reason, as less than ideal'.⁶

The ADF has undertaken to adopt most of the recommendations coming out of these reports. The committee's confidence in the successful implementation of the ADF's undertakings, however, is tempered by the repeated failures of the ADF to implement effective reforms following the reports and reviews of the investigative capability of the military police service. It should be noted that recommendations to improve the investigative capability of the service police were made as far back as 1998 by the Commonwealth Ombudsman; by the Joint Standing Committee on Foreign Affairs, Defence and Trade in 1999, again by the Joint Standing Committee in 2001; by Mr J. C. S. Burchett Q.C. in his 2001 report into military justice in the Australian Defence Force; the commissioned report by the Inspector General ADF into the East Timor Special Air Service investigation (confidential document); the 2004 Ernst & Young Report; and by this committee in June 2005.

Following each report, the ADF indicated that reforms were under way that would address the many problems plaguing the military police services. For example in January 1998, the Commonwealth Ombudsman stated:

3 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraphs 6 and 7.

4 Department of Defence, *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, paragraph 285.

5 Department of Defence, *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, paragraph 282(h).

6 Department of Defence, *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, paragraph 192.

Looking ahead, during 1998 the ADF is intending to commence a review into the tri-service investigation and policing capability for the ADF, which I understand will also address training issues. I am satisfied that every effort is being made to ensure that Service police will be adequately trained in the future, and that accreditation processes will promote adequate guidance and documentation for their investigative functions.⁷

The same inadequacies, however, remain.

Without doubt, the findings of the two recent reports add to the long-standing and increasingly urgent call for the investigatory competence of SP to be addressed. The committee believes that the intended and promised reforms must be implemented on this occasion or the operation of the SP will be fatally imperilled.

Although the committee is cautious in accepting that this time real and effective reforms will lift the standard of the SP's investigatory capability to an appropriately high standard, it commends the Chief of the Defence Force, Air Chief Marshal Angus Houston, for making public the audit report which exposed such inadequacies. The committee recommends that the ADF follow-up its audit of the ADF's investigatory capability with another similar comprehensive and independent review in three years time that would use the recent audit as a benchmark.

Independence of investigating officers

During the public hearing on 26 February 2007, the committee raised the matter of the independence and impartiality of an investigating officer involved in the inquiry into the death of Trooper Angus Lawrence. Angus Lawrence died from acute heat stroke while attending a Subject One Course for Corporal. The coroner recommended that:

...the Chief of Army review (once again) the position of some of those responsible for allowing the exercise to occur during which the deceased became ill. I accept the evidence of WO2 Wallace that he specifically warned higher command that exercises at the place, and at the time of year, during which the deceased became ill would lead to death. This warning was echoed to a significant extent by WO1 Lucas. I note that WO2 Wallace gave oral evidence about this warning at the Inquest, as well as in his statement which had been made quite some time before the Inquest. Nothing I heard or read suggests that this explicit warning was not given. I remain unsure that this warning was taken seriously enough or that the response was appropriate enough in the circumstances.⁸

According to evidence taken at the committee's public hearing on 26 February, as a result of the coroner's statement, the Chief of Army asked Colonel Mike Charles, who was the initial investigating officer, to inquire into the circumstances of the statements

7 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, January 1998, paragraph 5.10.

8 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, paragraph 40.

made by Warrant Officer Wallace. The results of Colonel Charles' review were presented to General Leahy on 26 January 2006.

The committee raises a number of concerns about the conduct and findings of Colonel Charles' third review. The most significant is the perceived independence of the investigator. Indeed, the request by Lieutenant General Leahy for an officer to review his own investigation goes to the heart of the matter of the investigator's independence. The coroner had already questioned the findings of Colonel Charles that only systemic failures caused or contributed to the death. Yet he was the very officer asked to review his own initial findings.

This concern, however, is not the only one. The committee has serious misgivings about a number of aspects of the investigations into Trooper Lawrence's death. They relate not only to the independence of the investigator reviewing his own investigations, but to the work done by Army in preparing a report for the coroner, Army's response to the coroner's findings and the manner in which, after its third review, Army informed the coroner of 'new evidence'.

The committee intends to pursue this matter further. It will be seeking additional information from the Army and will report in greater detail on its findings.

For the moment, the committee takes this opportunity to repeat its findings contained in the 2005 report into Australia's military justice system:

One of the most persistent concerns raised by witnesses involved conflicts of interest and the perceived unfairness of the investigation process. Any perception that an ADF inquiry lacks objectivity and impartiality undermines the integrity of the whole military justice system.⁹

In the committee's view, the ADF must address this problem of perceived bias which undermines the integrity of the administrative inquiry process. It should do more to eliminate this perception.¹⁰

Review of the Defence Force Disciplinary Act

The Report of an Audit of the Australian Defence Force Investigative Capability found the Defence Force Disciplinary Act (DFDA) had 'simply had its day'. It described the document as 'outdated and anachronistic' and suggested that it 'does not match modern disciplinary, legal and policing requirements'.¹¹ The audit noted that the DFDA had not undergone a fundamental review for over a quarter of a century.

9 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 8.55 and 8.75.

10 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 8.55 and 8.75.

11 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.8.

The call for a review, however, is not new. The audit's finding that the DFDA needs to be up-dated is consistent with those of previous reports dating back to the 1989 Report of the Defence Force Discipline Legislation Board Review.

The committee supports the call for a comprehensive review of the DFDA. It notes Defence's response and its intention to 'continue a more detailed review'. The committee would hope that the intention is for an independent, thorough and complete review of the DFDA and not ad hoc changes to it. The committee suggests further that the independent review be made public.

ADF culture

A recently conducted audit into the learning culture of the ADF did not appear to have a benchmark against which to measure changes. Even so, it went on to find clear evidence of improvements in behavioural standards in all the training establishments it visited and of 'universal knowledge of ADF policies of zero tolerance of bullying and harassment'.¹²

Although the audit team gained a strong impression that the level of direct bullying of those perceived to be performing poorly by trainers or trainees was generally low given the rules on inappropriate behaviour, they found other forms of more subtle abuse 'not uncommon'.¹³ For example:

More generally, it was apparent that few trainees were assisted to develop skills in working and dealing with others, other than through the forceful promotion of 'teamwork'. One trainee said: 'People become victims because they let the team down.' Another said: 'There needs to be a change of culture where we can ask for help with a discipline problem. Now I feel I have failed my job if I ask for help.' Those who were not contributing to the team tended to be isolated and ignored (with the risk of being bullied), rather than being assisted and supported by their peers, or their peers seeking assistance. The culture seems to encourage trainees to be negatively judgmental about their peers as demonstrated by the frequency of terms such as 'chitters', 'malingerers', 'marginals', 'jack', 'gobbing off' and 'bludgers'.¹⁴

Other examples taken from the audit report and cited in the main body of this committee's report describe a culture that 'seems to be so judgemental and disrespectful' toward those deemed to be 'on the wrong bus'.

12 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 106.

13 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 196.

14 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 54.

Reports in 2001 and 2003 and the 2005 report on Australia's military justice system found elements of the same culture. The committee is deeply concerned that three years on from the 2003 report into the death of Jeremy Williams and after much publicity, especially after the committee's 2005 report, such attitudes can still be detected in ADF training schools.

Despite indications that incidents of disrespect toward, and denigration and ostracism of, ADF members deemed to be 'failures' still occur, the committee commends the ADF and in particular, the CDF for commissioning the recent audit and for making public its findings. It also notes the firmness and resolve of the CDF in asserting that the military justice system will be improved:

Let me assure you, this is the most comprehensive implementation we have ever had of the military justice system in the ADF. The chiefs and I get a report every month from Admiral Bonser on how the implementation is going. We are leaving no stone unturned. We are totally committed to fixing the system.¹⁵

The findings of the inquiry into the learning culture in the ADF underscored the need for the ADF to continue, and strengthen, its endeavours to change its culture. The committee encourages the CDF to continue the practice of independent review of key aspects of the ADF. The committee also notes the chapter in Defence's Annual Report devoted to the military justice system that includes information such as the Defence Attitude Survey. Again, the committee encourages Defence to continue this type of open reporting.

15 *Committee Hansard*, 26 February 2007, p. 12.