

# Chapter 2

## Disciplinary system

2.1 The references committee's report on Australia's military justice system found the ADF's discipline system was not effective in some areas and needed to be changed. This chapter deals with recent assessments of the investigative capabilities of the ADF and the relationship between the military and civilian authorities in the investigation and prosecution of criminal matters.

### Investigative capabilities of the ADF

2.2 The investigative capability of the ADF came under strong criticism from the references committee in its 2005 report on Australia's military justice system. The 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'.<sup>1</sup> Supported by the findings of numerous earlier reports and its own deliberations, the committee 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.<sup>2</sup>

2.3 The committee made a number of recommendations including 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. It suggested that a scoping exercise also be undertaken to examine the benefit of establishing a tri-service criminal investigation unit.<sup>3</sup>

2.4 In its response to the committee's recommendations, 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 (SP) to establish the best means for developing investigative capabilities.<sup>4</sup>

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

2 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.118, p. 54.

3 Recommendations 5 and 6.

4 Government response to recommendation 6.

## The Audit of the ADF investigative capability

2.5 In February 2006, the CDF appointed Rear Admiral Brian Adams (Rtd), Mr Adrian Whiddett and Provost Marshal–ADF (as required) to conduct an audit into the ADF's investigative capability. It was to identify reform measures required to provide the ADF with an effective and efficient investigative capability.<sup>5</sup> On 31 July 2006, the *Report of the 2006 Audit of the ADF Investigative Capability* was presented to the CDF and made public in December 2006.

2.6 This audit was not the first review of the ADF's investigative capability. Recent inquiries into such matters date back to 1998 with the Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*.<sup>6</sup> This and subsequent reports were consistent in their findings and identified a raft of problems including:

- lack of experience and inappropriate training of those undertaking the investigation;<sup>7</sup>
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users;<sup>8</sup>
- inadequate questioning techniques, recording of interviews and statement taking, for example, pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response;<sup>9</sup>
- lack of guidance about evidence gathering and analysis;<sup>10</sup>
- absence of a structured process for supervising or monitoring the progress of investigations;<sup>11</sup>

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5 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, Annex A, p. 97.

6 See also the 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report 'Military Justice Procedures in the Australian Defence Force'; the 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'; The 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC

7 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

8 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15. DFDA means Defence Force Discipline Act.

9 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 3.12–13.

10 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

- inadequate record keeping;<sup>12</sup>
- failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations under the auspices of the DFDA;<sup>13</sup>
- secrecy in the investigation process, poor management practices, inadequate resourcing, and excessively long investigation and offence clearance times;<sup>14</sup>
- delayed investigations;<sup>15</sup>
- unreasonable exertion of influence from commanding officer during investigative processes;<sup>16</sup> and
- procedural fairness and competence issues in investigation conduct.<sup>17</sup>

2.7 The committee's 2005 findings reinforced the findings of these previous reviews of ADF's investigatory capability. Its recommendations built on those contained in these reviews and were concerned particularly with improving the training of SP and raising their professional standing.

2.8 The most recent report, the audit of the investigative capability of the ADF, acknowledged the findings of earlier reports that had identified deficiencies in this capability. Consistent with these reports, the audit found that the ADF investigative capability was in serious decline. According to the report, however, the findings of previous reviews 'did not seem to have produced decisive, measurable reforms or improvements'. It recognised the magnitude of the task faced by ADF in achieving effective reform. The report stated that 'remediation, even if approached with unremitting resolve and commitment, is likely to take no less than five years'.<sup>18</sup>

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- 11 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12. The Ombudsman noted at paragraph 6.34, that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.
  - 12 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.13.
  - 13 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15.
  - 14 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.19.
  - 15 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.
  - 16 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.
  - 17 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.
  - 18 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 3.

2.9 The audit report was of the view that the viability of the investigative elements of the three services was seriously threatened on several fronts. It noted:

- all are experiencing problems related to allocated staff numbers and their quality and experience; and
- many investigators have high workloads, poor administrative support and outdated and inadequate information technology support systems.

2.10 It stressed that despite being reviewed, re-organised, restructured and downsized over the last fifteen years, 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'. It argued that as a consequence, investigator motivation and morale was suffering and capable people were considering leaving the ADF. A higher tempo of operations, integrated military and civilian workforces, and new investigative challenges were deemed to exacerbate the 'plight of the investigative capability'.<sup>19</sup> The audit found that from senior commanders down, and even among SP themselves, there was 'no shared view as to the place, purpose and standing of investigators in fulfilling the mission of the contemporary ADF'.<sup>20</sup>

2.11 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.<sup>21</sup>

2.12 The committee does not go into detail about the audit's findings and its many recommendations. It has selected for consideration a few areas of major concern including the basic skills required of an investigator, the chain of command influence in an investigation, the referral of criminal matters to civilian authorities and the relationship between service and civilian police. Where relevant, it also refers to the Board of Inquiry into the death of Private Kovco.

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19 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraphs 4 and 5.

20 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 6.

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

## Basic skills

2.13 The audit team recognised the need for all SP to have 'good crime scene skills in order to preserve and protect the scene and any evidence'. It noted further that SP are also required to 'handle offenders, suspects and witnesses so that any spontaneous statements made and their visible actions or reactions are recorded contemporaneously in SP official notebooks and, as far as is possible, they be required to remain at the scene'. The audit team, however, identified a number of deficiencies in SP investigations including a lack of timeliness, inferior quality briefs of evidence and poor investigation planning. It also noted:

...the less-than-impartial pursuit by SP of alleged offenders in order to achieve a successful prosecution, a focus on finding guilt rather than simply inquiring thoroughly and collecting material for possible evidentiary purposes, and a lack of investigation experience, capacity and skill.<sup>22</sup>

2.14 One of its many recommendations went to the basic skills required of SP:

SP and investigator training needs be reviewed to emphasise and reinforce the basic core skills and competencies of policing. These include the taking of statements from witnesses, interviewing suspects and offenders, and the rules governing the admissibility of evidence, including the value and use of exculpatory as well as inculpatory evidence.<sup>23</sup>

2.15 Despite repeated calls over many years for the appropriate care and management of incident scenes, the audit also found the urgent need for improvement in this area. It recommended:

The proper care and management of incident and crime scenes, at least in terms of basic protection and preservation techniques, ought to be an element of all pre-command training courses in the ADF and be reinforced periodically during career advancement.<sup>24</sup>

2.16 In response to the recommendations of the audit report, the ADF stated that it would include the proper care and management of incident and crime scenes as an element of all pre-command training courses in the ADF.<sup>25</sup>

2.17 It also agreed to review SP and investigator training needs in line with the audit team's recommendation, noting that a Training Needs Analysis (TNA) of investigator training conducted by the Defence Police Training Centre (DPTC) was

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22 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.8, paragraph 2.1, p. 6.

23 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.1, paragraph 5.3, p. 49.

24 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.8, paragraph 5.31, p. 49.

25 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 5.8.

completed in October 2005 and the revised investigator training continuum is being implemented.<sup>26</sup>

***The Report of the Board of Inquiry into the Death of Private Jacob Kovco***

2.18 The findings of the *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, presented to the CDF on 27 October 2006, further underlined the concerns about the competence 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. In particular, the report highlighted inadequate education and training of those undertaking the investigation, poor questioning techniques, recording of interviews and statement taking, and lack of process, monitoring or quality control.

2.19 To be more specific, the Report of the Board of Inquiry 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.<sup>27</sup> 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'.<sup>28</sup>

2.20 The Board also found that statements taken by the special investigators branch (SIB) from all relevant 9th Security Detachment (Iraq) (SECDET IX) 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'.<sup>29</sup> The Board recommended that:

- ADF personnel at all levels, receive basic training on the critical need for scene preservation where there has been a 'notifiable incident';
- a protocol for the preservation and handling of serious incident sites should be considered for future training or battle preparation activities with coalition forces overseas;
- a similar protocol should also be developed within general service training regarding:
  - (i) the need to preserve and quarantine scenes of serious injuries or incidents, and
  - (ii) control and responsibility for initial scene preservation to reside with the senior ADF member at the scene;

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26 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 5.1.

27 Paragraph 285, Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovoc.

28 Paragraph 282(h), Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovoc.

29 Paragraph 192, Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovoc.

- Provost Marshal-ADF investigate the viability of military police SIB undertaking civilian police training on DNA collection and preservation; and
- the ADF deploy with military police special investigators, branch investigators who are properly equipped and trained.<sup>30</sup>

Again the ADF accepted the recommendations and indicated that they would be implemented.<sup>31</sup>

2.21 Without doubt, the findings of these two most 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.

2.22 Noting that the audit report referred to a five-year remediation period, the committee sought assurances from the CDF that progress is being made. It also asked for some indication about the timeframe for, and nature of, the implementation plan and some of the benchmarks set for the implementation. The CDF undertook to obtain that information for the committee.<sup>32</sup>

### **Chain of command and influence on investigations**

2.23 The audit team identified the influence exerted on SP investigations by the dominant ADF command culture as a most significant finding. In particular, it recognised the influence that commanders may have over a SP called to the scene of an incident.

It is clear that many commanders are ignorant or dismissive of the limitations of, or restraints on, their command authority when an incident leads to an SP investigation. The apparent level of obstruction of, and interference by commanders into, SP investigations, suggests that there is at least a poor understanding that a SP investigation is an integral component of the ADF military justice system and must be allowed to proceed independently and without interference.<sup>33</sup>

2.24 Again, this finding is not new. The potential for, and the perception of, improper influence of the chain of command in investigations, both disciplinary and administrative systems, was a dominant theme in the committee's 2005 report on Australia's military justice system.

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30 Paragraph 287 (c), (e), (f) (g) and (h), Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco

31 *Implementation Plan for Board of Inquiry (BOI) Recommendations: Death of Pte Jacob Kovco, p. 1 and 2 of 11.*

32 *Committee Hansard*, 26 February 2007, p. 16.

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

2.25 The audit report recommended:

- ADF commanders of all ranks should be informed that a SP of any rank who has undergone scene of incident and crime scene management training at the Defence Police Training Centre (DPTC) is more qualified than they to assess and control a crime or incident scene.<sup>34</sup>
- The Australian Defence Force Investigation Service (ADFIS) be established outside the service chains of command, answerable directly to CDF through its commander the Provost Marshal-ADF, as the most effective, efficient and economic future use of ADF investigative resources.<sup>35</sup>
- The role of the ADFIS be established 'to assist the CDF to maintain ADF discipline through the lawful, ethical and effective investigation of matters involving ADF members, independent of Service chains of command.'<sup>36</sup>

2.26 The audit team also examined the procedures required involving notifiable incidents. It was critical of the Defence Instructions, DI(G) ADMIN. In particular, it was of the view that the importance is lost of the direction that a notifiable incident is a matter that should be investigated and referred expeditiously to SP in the first instance and thereafter to civilian police or other Defence Investigative Authorities if appropriate. It recommended that the following statement replace the current one at 4.24.

Without exception notifiable incidents are to be reported simultaneously to Service Police and the appropriate chain of command. Service Police are to inform civilian police and other Defence Investigative Authorities as appropriate.<sup>37</sup>

2.27 In its response to the audit team's findings and recommendations, the ADF recognised the need for measures to be taken to strengthen the standing of SP and to ensure that the chain of command could not improperly influence SP in carrying out their duties. Noting that the jurisdiction of the DFDA applies to all members of the ADF, the ADF undertook to take action to dispel any perception that some units are exempt from ADF disciplinary policy and processes.<sup>38</sup> It also agreed to:

- Ensure that ADF officers are informed that when a quick assessment suggests that a serious service or civilian offence may have been committed, they no

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34 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.19, paragraph 5.31, p. 50.

35 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 7.1, paragraph 7.80, p. 73.

36 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 7.5, paragraph 7.80, p. 74.

37 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.25.

38 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 2.2.



longer have any choice of action—they must refer the matter to SP forthwith. The SP will then arrange for civilian police involvement where necessary. Guidance will stipulate that, in the case of death or serious injury, a quick assessment is irrelevant and the incident must be reported forthwith to SP.<sup>39</sup>

- Implement a change program aimed at developing a new joint culture shared by all ADF investigators in order to begin the process of rebuilding the confidence of ADF people in the ADF investigative capability.<sup>40</sup>
- Take action as appropriate against any ADF members who knowingly fail to report a serious Service or civilian offence to Service Police, or are otherwise found to have kept knowledge of such a matter within their command or to have sought to have it dealt with by inappropriate administrative or other means, noting that:
  - current policy makes it mandatory for commanders, managers and all Defence personnel to report Notifiable Offences (which encapsulates serious Service or civilian offences) to a Defence Investigative Authority;
  - instances of failure to report a serious offence can be dealt with under the DFDA sections 29 (failing to comply with a general order), 35 (negligence in performance of duty) or 60 (prejudicial conduct); and
  - in all cases, natural justice and a fair hearing must be provided.<sup>41</sup>

2.28 The committee welcomes the ADF's undertakings to ensure that SP are promptly and appropriately informed of incidents requiring their attention and that their standing as independent investigators is recognised and not in any way influenced or compromised. The timely and appropriate involvement of civilian authorities is considered in the following section.

### **The referral of criminal matters to civilian authorities and the relationship between service and civilian police**

2.29 One of the persistent problems identified by the various reviews of the ADF's investigatory capability concerned the relationship and co-operation between SP and civilian law enforcement authorities. In 2005, the committee, supported by the findings of earlier reviews, highlighted the need to improve the working relationship between SP and civilian police and to better use the resources of the civilian authorities to assist in the training and development of SP. For example, to increase

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39 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.15.

40 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.16.

41 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.17.

the capacity of the SP to perform their investigative function, the committee recommended that the ADF:

- 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.

2.30 Although the government rejected the committee's proposal to have all criminal matters referred to civilian authorities, it stated that it 'would work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues'. It would:

- review and clarify the guidelines and examine the need for, and implement as necessary, formal arrangements with the States and Territories for referral of offences; and
- establish a common database for tracking referrals.<sup>42</sup>

2.31 Defence's second progress report advised the committee that an ADF policy on referring matters to civilian authorities was 'being finalised for consideration prior to discussion with civil jurisdictions'.<sup>43</sup> Both the audit report and the report into the death of Private Jacob Kovco, discussed below, underscore the importance of having this process completed.

2.32 The recently conducted audit of the ADF's investigatory capability noted the lack of co-operation and co-ordination between the SP and their civil counterparts as a significant impediment to the SP carrying out their duties. It concluded that:

This situation is likely to be remedied, at least in part, by developing closer and more formal relationships with the necessary external agencies including the negotiation of memoranda of understanding, co-opting if required the support of the mainstream police forces in 'recognising' SP as an affiliate body with a legitimate, albeit if confined, law enforcement role.

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42 Government Response to the Senate Foreign Affairs, Defence and Trade References Committee 'Report on the Effectiveness of Australia's military justice system', October 2005, summary contained in 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. This report is reproduced at appendix 4 in the committee's first progress report on reforms to Australia's military justice system.

43 Response to committee's recommendations, 1, 2, 3, 7, 8 and 9, ADF, *Report to the Senate Standing Committee on Foreign Affairs, Defence and Trade on Progress of Enhancements to the Military Justice System*, October 2006.

We recommend that Defence intensify its efforts to have DIA recognised as Commonwealth Law Enforcement Agencies.<sup>44</sup>

2.33 Defence accepted this recommendation. It has undertaken to 'establish and maintain formal and informal lines of communication and liaison with Federal, State and Territory law enforcement bodies'. It intends 'to build on existing membership or observer status of the relevant professional forums of those bodies, noting that such arrangements commenced at the 2006 Australian Police Commissioners' Conference'.<sup>45</sup> It also agreed to:

- seek to formalise its arrangements with the AFP, principally, and also State and Territory police, on the attendance of SP on relevant accredited training courses as an essential supplement to DPTC training and to improve professional competencies and advancement prospects, stating that the form of agreements with Federal, State and Territory jurisdictions is yet to be determined;<sup>46</sup>
- implement a program of ADFIS investigators undertaking selected training courses and suitable secondments available in the Federal, State and Territory police forces, subject to overall ADF/civilian police capability priorities and workforce considerations;<sup>47</sup>
- seek to build on the existing cooperation between the ADF and the civilian police authorities by entering into formal arrangements, principally with the Australian Federal Police (AFP), for the provision of forensic services in Australia and overseas with specific emphasis given to major incidents or crimes involving the non-combat related death of, or serious injury to, ADF personnel—this will build on the existing cooperation between the AFP and ADF to progress this endeavour;<sup>48</sup>
- formulate an agreement with the AFP, the nature of which is to be determined, for the ADF 'to contribute to the maintenance of a modestly priced forensic capability in the AFP and, in exchange, receive priority in major incidents and crimes'. It indicated that such an arrangement would be

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44 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.11. DIA means Defence Investigative Authority.

45 Defence's response to Recommendation 7.23, Defence Response to the Recommendations of the Audit of ADF Investigative Capability.

46 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 5.9.

47 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.28.

48 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.34.

subject to the overall priorities and capability requirements of both the ADF and AFP.<sup>49</sup>

2.34 The Board of Inquiry into the death of Private Jacob Kovco also drew attention to the need for improved co-operation between SP and their civil counterparts. It commented on the assistance provided by the New South Wales Police following the death of Private Kovco and recommended:

- the establishment of formal protocols with Australian State Police to allow military police secondments and to provide expertise, resources, and training where the ADF lacks this capacity; and
- the establishment of a pool of State Police investigators who are ADF 'force prepared' to accompany a counsel assisting team during the scoping of offshore inquiries.<sup>50</sup>

2.35 Defence responded by noting that the Australian Police Commissioners' Conference of May 2006 agreed to assist the ADF SP in providing training, secondments and specialist support.

2.36 The audit also had concerns about the status of SP in the eyes of the broader law enforcement community and how it impedes SP from carrying out their duties effectively. It explained:

SP have to rely on the goodwill of civil authorities for assistance where offences with a Service nexus occur other than on or in Defence property, and that frequently public and private sector agencies will not provide assistance as SP are not regarded as a Commonwealth Law Enforcement Agency. Investigators are therefore often faced with a dilemma where they require civil authorities to issue search warrants on their behalf, but do not have enough information on which to [grant] warrants or subpoenas.<sup>51</sup>

### ***Committee view***

2.37 The committee's confidence in the successful implementation of the ADF's undertakings is tempered by the repeated failures of the ADF to implement effective reforms following previous 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 SP were made in 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.

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49 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 7.35.

50 *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, Paragraph 287 (aa) (i).

51 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.11.

in his 2001 report into military justice in the ADF; the IGADF's commissioned report into the East Timor SAS investigation (confidential document); the 2004 Ernst & Young Report; and by this committee in June 2005.

2.38 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:

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.<sup>52</sup>

The same inadequacies, however, remain.

2.39 The committee notes the repeated failed attempts to improve the capability of SP and is looking for certainty that on this occasion definite and lasting improvements will be made. It is particularly concerned about the vague terminology used in some of the ADF's undertakings. For example, Defence stated its intention to review SP and investigator training needs to emphasise and reinforce the basic core skills and competencies of policing. This statement should have been followed with a clear commitment to ensure that all SP attain the necessary skills and competencies of policing.

2.40 Defence will also seek to formalise its arrangements with the AFP, principally, and also State and Territory police, on the attendance of SP on relevant accredited training courses. Such arrangements should already be in place and Defence should have indicated that this undertaking has the highest priority. It should be remembered that in 2005, the committee urged Defence to facilitate greater engagement of SP with civilian agencies, including secondments, reserve recruitment and participation in civilian investigative training. The committee believes that Defence, with a greater sense of urgency, should work toward establishing strong links between SP and civilian police and put in place a comprehensive program of secondments and training.

2.41 The committee takes special 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

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52 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.

of, or restraints on, their command authority when an incident leads to an SP investigation.<sup>53</sup>

2.42 The committee believes that armed with such a comprehensive audit, backed up by reports dating back to 1998, the ADF now has an opportunity to make lasting changes to its SP to improve its investigative capabilities. It supports the recommendations of the audit report and urges that speedy action be taken to implement them.

2.43 Although the committee remains to be persuaded by clear actions that real and effective reforms will lift the standard of the SP's investigative capability to an appropriately high standard, it commends the CDF for making public the audit report which revealed 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.

2.44 The committee awaits Defence's response to its request for more detailed information on the implementation plan for improving the investigative capability of the SP including a timetable and a set of benchmarks against which to measure progress.

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