

The Senate

Standing Committee on
Foreign Affairs, Defence and Trade

Reforms to Australia's military justice system

Second progress report

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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.

Chapter 1

Review of the implementation of reforms to Australia's military justice system

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.

Government's response to the committee's recommendations

1.2 In October 2005, the government tabled its response to the committee's recommendations. In all, it accepted in whole, in part, or in principle 30 of the committee's 40 recommendations.¹ 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.²

Defence's first progress report and the committee's review of Defence's progress

1.3 In April 2006, the committee received from the Chief of the Defence Force (CDF) and the Secretary of Defence the first progress report on enhancements to the military justice system. Following close consideration of the progress report and evidence taken at a public hearing, the committee tabled its review of the implementation of Defence's reform program in August 2006.

1.4 It found that at this early stage of the implementation program, the Australian Defence Force (ADF) had demonstrated a clear commitment to improving Australia's military justice system. It noted the positive observations made by the Defence Force Ombudsman (DFO), particularly the reduction in the backlog of complaints and the more efficient processing of complaints.

1 See Appendix 2.

2 For a full explanation of the committee's terms of reference see the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system: First progress report*, p. 2.

1.5 The committee was also impressed with the work of the Inspector General Australian Defence Force (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. The committee understands that the IGADF needs the support and commitment of the ADF and the government to ensure that he has the necessary support to carry out his functions.

1.6 The committee remained concerned, however, about the prevailing culture in the ADF. It was of the view that improvements in processes would not of themselves change the culture, which it feared could undermine the success of the current reforms. The committee stated its belief that a major shift was required in the attitudes of all ADF personnel to achieve lasting change in the military justice system. It recognised that the ADF had a challenging road ahead in turning this culture around and encouraged and commended any efforts to do so.

Defence's second progress report

1.7 The CDF provided the ADF's second progress report to the committee in November 2006 (see appendix 3). It should also be noted that during the reporting period, Defence published a number of major reports that have direct relevance to Australia's military justice system. They are:

- *Report of an Audit of the Australian Defence Force investigative capability*, July 2006;
- *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006; and
- *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco at the SECDET Accommodation in the Australian Embassy Compound Baghdad on 21 April 2006*, 27 October 2006.

1.8 During a private meeting on 8 December 2006, the CDF briefed members of the committee and the Joint Standing Committee on Foreign Affairs, Defence and Trade on the three reports and answered questions put to him by committee members. In preparing this second review of reforms to the military justice system, the committee has taken account of the findings and recommendations contained in these reports.

1.9 The committee has also drawn on its consideration of the provisions of the Defence Legislation Amendment Bill 2006 in preparing this review. The intention of the proposed legislation was to replace the current system of trials by Courts Martial (CMs) and Defence Force Magistrates (DFMs) with an 'Australian Military Court'. This legislation and the establishment of a permanent military court are discussed in detail in chapter three.

Conduct of the inquiry

1.10 The committee held a public hearing on 26 February 2007. Defence officers were asked questions based on the ADF's second progress report, Defence's Annual Report, the three reports mentioned previously as well as the coroner's report following an inquest into the death of Trooper Angus Lawrence.

1.11 During the hearing, the committee placed a number of questions on notice. On 1 March 2007, it also submitted to Defence a number of written questions on notice. (See appendix 4). The response to these questions was not expected before the committee was to table its report. Defence's answers, however, will be the subject of further inquiry as part of the committee's continuing role in monitoring the implementation of reforms to Australia's military justice system.

Structure of the report

1.12 This report examines the second six-monthly progress report against the findings of the references committee's 2005 report on the effectiveness of Australia's military justice system and the government's recommendations in its response to the committee's report. As noted above, it also takes account of three recent reports and the legislation introduced to establish a permanent military court. It considers:

- the investigative capabilities of the SP including the recent audit of the ADF investigative capability;
- military tribunals particularly the newly established permanent military court;
- the redress of grievance process;
- investigations into notifiable incidents—CDF commissions of inquiry, state coroners and the independence of investigators;
- the Defence Force Disciplinary Act; and
- the ADF culture.

Acknowledgments

1.13 The committee thanks those who appeared before it at the public hearing including Lieutenant General Peter Leahy, Chief of Army. In particular, however, the committee wishes to thank Air Chief Marshal Angus Houston for taking the time to brief the committee on the three reports released in December 2006 and his attendance at the public hearing on 26 February. His willingness to assist the committee in its work is much appreciated and is an indication of his commitment to improve Australia's military justice system.

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'.¹ 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.²

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.³

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.⁴

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.⁵ 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*.⁶ 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;⁷
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users;⁸
- 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;⁹
- lack of guidance about evidence gathering and analysis;¹⁰
- absence of a structured process for supervising or monitoring the progress of investigations;¹¹

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

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'.¹⁸

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'.¹⁹ 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'.²⁰

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.²¹

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.

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.²²

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.²³

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.²⁴

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.²⁵

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

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.²⁶

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.²⁷ 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'.²⁸

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'.²⁹ 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;

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.³⁰

Again the ADF accepted the recommendations and indicated that they would be implemented.³¹

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.³²

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.³³

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.

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.³⁴
- 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.³⁵
- 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.'³⁶

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.³⁷

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.³⁸ 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

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.³⁹

- 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.⁴⁰
- 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.⁴¹

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

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.⁴²

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'.⁴³ 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.

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.⁴⁴

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'.⁴⁵ 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;⁴⁶
- 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;⁴⁷
- 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;⁴⁸
- 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

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.⁴⁹

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.⁵⁰

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.⁵¹

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.

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.⁵²

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

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.⁵³

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.

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

Chapter 3

Military tribunals

Office of the Director of Military Prosecutions

3.1 As noted in Defence's first progress report, the statutory position of Director, Military Prosecutions (DMP) was established under legislation assented on 12 December 2005. The position is at one star rank and the Commonwealth Remuneration Tribunal determines the remuneration for the DMP. Defence informed the committee that in line with recommendations made by the committee, eleven additional positions have been established and are being filled and additional resources such as IT and accommodation have been reviewed and are being progressed. Other measures taken include:

- two new training positions have been established in the Office of the Director of Military Prosecutions (ODMP) to facilitate the training of newly assigned officers;
- the Commonwealth Director of Public Prosecutions (DPP) is providing assistance in the training of newly assigned officers to the ODMP;
- the DMP has commenced a range of briefs to the services and various command and staff courses to raise the awareness of the ODMP;
- a web page has been developed to further assist raising awareness and the profile of the DMP;
- all legal officers in the ODMP now hold practicing certificates; and
- relevant professional ethical standards are under consideration.¹

3.2 The DMP, Brigadier Lynette McDade, informed the committee that she had 12 prosecutors, including herself, and anticipated two more joining the team in June. According to the DMP, the current number of prosecutors represented a significant increase in that resource. She also explained that no one in the ODMP had yet been seconded to civilian practice. It was her intention, however, to have people seconded to work with the State and Commonwealth DPPS and legal aid services for short periods of time to give them exposure and experience 'to enable them to become effective prosecutors'. In her view, rather than rely on the reserve which it had done in the past, the ODMP would develop a very good capacity to prosecute.²

1 *Australian Defence Force Report to the Senate Standing Committee on Foreign Affairs, Defence and Trade on Progress of Enhancements to the Military Justice System*, October 2006, recommendations 12–16.

2 *Committee Hansard*, 26 February 2007, p. 22.

Director of Defence Counsel Services

3.3 In its previous report, the committee noted that the position of Director of Defence Counsel Services (DDCS) had been established and filled. The committee notes, however, that in his annual report for 2005, the Judge Advocate General (JAG) referred to the desirability of the DDCS being established as an independent statutory position. He outlined the reasons for having the DDCS independent from the chain of command:

While DDCS remains as a staff officer within the chain of command, it seems to me inevitable that there will be the potential for conflicts so far as the expenditure of resources on an accused person's defence is concerned. On the other hand, if DDCS is independent of the chain of command, with a budget to manage and is answerable to Parliament for the expenditure of those funds and the provision of adequate legal representation to accused persons, this would free the discharge of the functions from any perception that resources were in some way being limited because of command influence.³

3.4 In his submission to the committee's inquiry into the Defence Legislation Amendment Bill 2006, the JAG reiterated his view that the DDCS should be a statutory appointment which to his mind was preferable to the approach of delegated authority from CDF taken in the bill.⁴

3.5 In its consideration of the proposed legislation, the committee suggested that as part of its review of the provisions of the bill, the government consider the desirability of establishing the DDCS as an independent statutory position.⁵ The committee reiterates this suggestion.

Permanent Military Court

3.6 During its inquiry into Australia's military justice system, the committee examined the ADF's disciplinary tribunals. It cast considerable doubt over the impartiality of current structures and argued that service personnel's right to access fair and independent tribunals was under threat. It found:

Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.⁶

3 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2005*, paragraph 69, pp. 16–17.

4 *Submission 3*, paragraph 24.

5 Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.26.

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

3.7 The committee recommended that the government establish an independent permanent military court. It would be staffed by independently appointed judges possessing extensive civilian and military experience that would extend and protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes.⁷

3.8 The government supported the committee's main recommendation to create a permanent military court. It was aware of the criticism directed at the current system that 'stemmed from the location of judge advocates and Defence Force Magistrates (DFMs) within the military chain of command and the implications for their (actual and perceived) independence'.⁸

3.9 On 14 September 2006, the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, introduced the Defence Legislation Amendment Bill 2006 into the House of Representatives. The main purpose of the bill was to give effect to the government's undertaking to enhance Australia's military justice system as outlined in its response to recommendations contained in the 2005 report on Australia's military justice system.

3.10 The bill proposed to replace the current system of trials by Courts Martial (CMs) and DFMs, with an 'Australian Military Court' (AMC) that was to consist of the Chief Military Judge (CMJ), two full-time Military Judges (MJs) and no more than 8 part-time MJs. A service offence would be tried by a MJ alone or MJ with a military jury depending on the classification of the offence. In some cases, the accused person could elect to be tried by a MJ alone or a MJ and military jury.

3.11 The provisions of the bill were referred to the committee for inquiry and report. In its report on the proposed legislation, the committee acknowledged that the bill introduced a number of positive features that would confer a greater degree of independence on the proposed AMC. While it recognised that the bill was intended to improve service tribunals, the committee was disappointed that the government did not go further in strengthening the independence of the court and in guarding against possible influence from the chain of command. The evidence before the committee identified a number of areas of concern including :

- the jurisdiction of military court and the possibility of a successful High Court challenge to its validity (military tribunals are not constituted in the same manner as courts created under Chapter III of the Constitution);
- the 5-year fixed terms and the possible adverse effect on the judicial experience of the court and its ability to attract high quality legal officers;

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

8 *Explanatory Memorandum*, paragraph 2.

- the renewable five-year terms, which are not automatic and which, according to the JAG, 'considerably reduces the actual and perceived independence of the judges of the AMC';
- the provisions for terminating an appointment which, under specified circumstances, provides for the minister to terminate an appointment, not the Governor-General on address by both Houses of Parliament;
- compulsory retirement for MJs from the ADF upon ceasing office as a MJ and the likelihood that this provision would diminish the attractiveness of the position and dissuade suitable appointees from applying for the office;
- the lack of incentive for an accused to opt for the more administratively convenient trial by MJ alone;
- the composition of a military jury especially in light of the jurisdiction of the AMC extending to criminal offences committed overseas—it should be noted that the Senate Standing Committee for the Scrutiny of Bills expressed concerns about the constitution of the proposed military jury and sought advice from the Minister;⁹
- the failure to stipulate that the AMC was to be a court of record;
- the transitional arrangements from the current service tribunals to the Military Court.¹⁰

3.12 The committee concluded that overall:

...the government settled for the barest minimum reforms required to its service tribunals to escape a constitutional challenge...that, in striving for the minimum, the government has not removed the risk that at some stage the High Court may find that the AMC is constitutionally invalid. In addition to this concern, the committee believes that some of the provisions would:

- lead to greater inefficiencies in the court;
- fail to strengthen the independence and impartiality of the court;
and
- undermine its experience and hence the court's standing as a judicial institution.¹¹

3.13 The government decided to delay debate on the bill to allow time for amendments to be drafted and presented to parliament. On 29 November 2006, the

9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 11 of 2006, 11 October 2006, p. 20.

10 The Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.22.

11 The Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, paragraph 1.24, pp. 5–6.

government introduced amendments. They were to give effect to the matters raised by the committee in its consideration of the bill. The most significant amendments included:

- extending the term of appointment of the CMJ and MJs from a 5-year to a fixed ten-year period;
- the automatic promotion of the CMJ and MJs at the mid-point of their 10-year appointment;
- the Governor-General, not the Minister, to appoint the CMJ and MJs;
- the Governor-General, not the Minister, to have the authority to terminate the appointment of the Chief Military Judge and Military Judges;¹²
- removing the requirement for the automatic retirement of a member from the ADF following his or her tenure as the CMJ or a MJ;¹³
- a jury of 12 members required for class 1 offences (the more serious offences);¹⁴
- a decision of a military jury to be unanimous or alternatively, by a five-sixths majority but only in the following circumstances:
 - where it had deliberated for at least 8 hours and unanimous agreement had not been reached but a five-sixths majority agreement had; and
 - the court was satisfied that the deliberation time was reasonable, having regard to the nature and complexity of the case; and
 - after examining one or more jurors (on oath or affirmation) it was unlikely that the jurors would reach unanimous agreement following further deliberation;¹⁵
- according the AMC the status of a court of record but with a provision that would limit the publication of proceedings in the interests of the security and

12 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 19, 20, 24, 26, 29, 31, 39 and 41.

13 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 27 and 42.

14 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 15.

15 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 16.

defence of Australia, the proper administration of justice or public morals or any other matter the court considers relevant.¹⁶

3.14 The amendments were a positive step toward providing members of the AMC with security of tenure and judicial independence.¹⁷ They also included additional safeguards that would protect the right of an accused to a fair trial. The bill as amended was passed by parliament and received assent on 11 December 2006.

3.15 The CDF informed the committee that with the legislation coming into force, the ADF was putting in place procedural and administrative matters to allow the AMC to commence on 1 October 2007 or earlier by proclamation.¹⁸

3.16 It should be noted that the form of the right to elect trial from summary procedures to the AMC is to be included in legislation to revise summary procedures. The right of appeal from summary authorities to a MJ of the AMC will also be included in legislation to revise summary procedures. Defence expect the legislation to be introduced into Parliament in 2007.

16 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraphs 12 and 13.

17 House of Representatives *Hansard*, 29 November 2006, p. 125.

18 *Committee Hansard*, 26 February 2007, p. 9.

Chapter 4

Administrative system

Redress of Grievance

4.1 In its first progress report the committee noted the concerted effort by Defence to expedite the redress of grievance (ROG) process and to remove the backlog of grievances. The committee commended Defence for its work to address failings in the ROG process. Defence has continued to reform this process.

4.2 During the committee's recent public hearing, the Acting Commonwealth Ombudsman informed the committee that based on the insights gained through investigative work there had been a marked reduction in the number of complaints received by the Ombudsman's office. She explained:

While the numbers are quite small, we are seeing fewer complaints relating to internal inquiries and investigations and fewer complaints relating to adverse administrative action, termination of service and the conduct of others. Our general assessment and sense of the progress of the implementation of these recommendations is that Defence has demonstrated an appropriate level of commitment to improving its military justice systems in the ways suggested through the recommendations from both reports.

It is also apparent, through our investigative work with Defence, through our interaction with staff from the Fairness and Resolution Branch and the Inspector-General of the Australian Defence Force, that the department has entered into a spirit of change through action taken to this point. From the Ombudsman's perspective, this is evident in a greater degree of trust, more open dialogue and willingness to engage with our office on key issues. Our requests for, and Defence's willingness to agree to, suspension of executive action in discharge action is a good example in this regard. In summary, it is our general view that the military justice systems in place within Defence have improved.¹

4.3 The committee drew attention to a survey published in Defence's most recent annual report which showed that 39% agreed, 8% disagreed and 53% were uncertain whether the adverse administrative action process takes too long. This survey was conducted in 2005.

4.4 According to the Acting Commonwealth Ombudsman, these statistics did not reflect findings of the Ombudsman's Office over the last 12 months which showed a decrease in complaints overall and delay not being a particular cause of complaint.²

1 *Committee Hansard*, 26 February 2007, p. 2.

2 *Committee Hansard*, 26 February 2007, p. 4.

Committee view

4.5 The committee endorses the approach taken by Defence in publishing the results of the Defence Attitude Survey in the department's Annual Report. It provides the type of information that allows parliamentary committees to carry out their monitoring function. The committee would be interested in the results of the next Defence Attitude Survey to establish whether they align with the observations of the Acting Commonwealth Ombudsman.

4.6 In the meantime, the committee welcomes the preliminary indications that the ROG process is much improved.

Chapter 5

Investigations into notifiable incidents

Commissions of Inquiry

5.1 In its 2005 report on Australia's military justice system, the committee raised concerns about administrative inquiries into grave and complex matters such as sudden death or serious accidents. It could not stress strongly enough the importance of having investigating authorities 'above any suspicion of partiality'. It 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. Instead, it undertook to establish a Defence Force Commission of Inquiry to meet the objectives of independence and impartiality.¹

5.2 In keeping with this principle, the government indicated that it would propose amendments to legislation to create the commission. Under the proposal, the CDF would appoint a mandatory commission of inquiry into suicide by ADF members and deaths in service. The commission would consist of one or more persons, with one being a civilian with judicial experience. Where the commission was to consist 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 appointing investigating officers and boards of inquiry.

5.3 On 14 September 2006, the government introduced into parliament the Defence Legislation Amendment Bill that would allow the Governor-General to make regulations in relation to the appointment, procedures and powers of CDF commissions of inquiry. This reference to a CDF commission of inquiry would enable such a commission to be established under the Defence (Inquiry) Regulations 1985. The bill received assent on 11 December 2006.

5.4 The CDF informed the committee that a panel of suitably qualified civilians has been identified and was now available to preside over a CDF commission of inquiry. He explained further:

The panel consists of six persons and is expected to increase this year. To date, three boards of inquiry have been conducted under interim arrangements with a civilian president from this panel. Other members of a CDF commission of inquiry may be either civilian or military and are

1 Government response to recommendation 34.

selected on the basis of their expertise relative to the nature of the incident under inquiry.²

The role of state coroners

5.5 Both the references committee's 2005 report on Australia's military justice system and the legislation committee's progress report on reforms to the military justice system, referred to the role of the coroner in cases of a sudden death of an ADF member.³ The government's response to the 2005 report and Defence's first status report stated that State and Territory coroners would continue to review the outcomes of ADF inquiries into deaths of personnel. Furthermore, they indicated that the ADF would work towards completing a Memorandum of Understanding with State and Territory coroners.⁴

5.6 During the committee's 2006 public hearing, Rear Admiral Bonser, leader of the Military Justice Implementation Team, explained that work had been 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.⁵

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.⁶

5.7 In its second status report, dated October 2006, Defence informed the committee that it was pursuing the adoption of 'protocols' with all State and Territory

2 Committee Hansard, 26 February 2007, p. 10.

3 Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 188–189; and *Reforms to Australia's military justice system: First progress report*, August 2006, paragraph 4.43.

4 Government response to recommendation 34.

5 Committee Hansard, 19 June 2006, pp. 26–27.

6 Committee Hansard, 19 June 2006, p. 27.

Coroners and that two jurisdictions—Tasmania and Victoria—had signed letters agreeing to the protocols. At the recent February public hearing, the CDF further indicated that South Australia had agreed to establish liaison arrangements.⁷

5.8 The committee has sought additional information on the powers of a coroner to investigate the sudden death of an ADF member and placed a number of questions on notice on this matter (see appendix 4).

Committee view

5.9 The committee notes that it will continue to monitor developments in, and reforms to, Defence administrative inquiries and in particular how they interact with State coroners.

The independence and impartiality of an investigator

5.10 During its inquiry into Australia's military justice system, the references committee identified the potential for conflicts of interest to taint the objectivity of an investigation into sudden deaths. Witnesses to that inquiry saw a need to have independent investigators.⁸

5.11 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. Trooper Angus Lawrence died from acute heat stroke while attending a Subject One Course for Corporal. In this case, the coroner noted ADF's responsibility to keep their members safe:

I acknowledge that soldiers must train in all climatic conditions and be placed under pressure to assess their performance, but I cannot understand why they should be put in life threatening situations during training, particularly when the evidence of experienced soldiers at the Inquest suggested that the defensive scenario practiced on subject one for corporal courses was 'archaic' and not in keeping with current operations being conducted by defence personnel...I remain concerned about the merit of the decision. However, I do not have to and do not make a conclusive finding on the merit or otherwise of the decision, that is a matter for others.⁹

5.12 He did, however, have reservations about an aspect of two comprehensive reports which highlighted a number of shortcomings and systemic failures—a Comcare report and an investigating officer's report by Colonel Michael Charles.¹⁰

7 *Committee Hansard*, 26 February 2007, p. 10.

8 Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's military justice system*, paragraph 9.15.

9 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, paragraph 16.

10 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, paragraph 34.

The coroner was not convinced that systemic weaknesses were the only factors contributing to the death of Trooper Lawrence:

My only concern about the reports is that both investigators conclude that systemic failures caused or contributed to the death. As I indicated at the Inquest, systems are made up of people who are required to make decisions that can affect others. In particular in the Defence Force, which is a disciplined hierarchical force, those holding senior appointments do make decisions that affect those who are subordinate (in rank) to them.¹¹

5.13 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.¹²

5.14 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 made by Warrant Officer Wallace.

5.15 This request goes to the heart of the matter of an 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 to review his initial findings.

5.16 The Chief of Army did not agree that this was a case of 'Caesar reviewing Caesar'. He said:

In the Charles' statement, Warrant Officer Class 2 Wallace was not interviewed by this inquiry officer in either of the two previous defence inquiries, as he had not been identified as a person of interest or anyone who had a direct involvement in the circumstances of Trooper Lawrence's death. So he is not reviewing his own work; he is actually interviewing him for the first time.¹³

11 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, paragraph 35.

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

13 *Committee Hansard*, 26 February 2007, p. 25.

5.17 The committee has no reason to doubt that Colonel Charles is a capable and experienced investigating officer. To ensure the independence and impartiality of the investigation, the committee argues strenuously that Colonel Charles should not have been asked to review his own investigations. Notwithstanding the fact that WO2 Wallace had not been interviewed previously, the further inquiries clearly relate to the initial investigation. The committee takes this opportunity to repeat the 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.¹⁴

5.18 In the committee's view, the ADF must address this problem of perceived bias undermining the integrity of the administrative inquiry process and do more to eliminate this perception.¹⁵

5.19 The committee's concern about the independence of an investigator, however, is not the only one in the case of inquiries into Trooper Lawrence's death. The committee has serious misgivings about a number of aspects of the investigations into this 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'.

5.20 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.

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

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

Chapter 6

The Defence Force Disciplinary Act

Call for a review of the Defence Force Disciplinary Act

6.1 *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'.¹ The audit noted that the DFDA had not undergone a fundamental review for over a quarter of a century.

6.2 The call for a review, however, is not new. The audit finding that the DFDA needs to be updated is consistent with those of previous reports dating back to the 1989 Report of the Defence Force Discipline Legislation Board Review. It was concerned about bringing the DFDA in line with comparable and more modern legislation in relation to 'the need to extend the proscription of evolving classes of illicit drugs which are now widely available and used in society and from which the ADF is unlikely to be immune'.²

6.3 The 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* (the Burchett Report) also noted the need to update the DFDA. It recommended, *inter alia*, that consideration be given to reviewing the nature of the punishments that may be imposed under the DFDA in the light of contemporary standards.³

6.4 The references committee's 2005 report on Australia's military justice system was particularly concerned about the grey areas that had developed between the disciplinary and administration systems. It concluded that:

...it appears that a review of the penalties imposed under the military justice system is long overdue. The time for review is also fortuitous in that a significant body of work has recently been done by the Australian Law Reform Commission on criminal, civil and administrative procedures and penalties.⁴

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

2 See Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 13.13.

3 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 32.

4 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 13.17.

6.5 In light of the findings of previous reports and evidence presented to it, the references committee recommended that:

Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.⁵

6.6 The committee further notes the findings of the Inspector General ADF based on the Defence Attitude Survey 2005 supplement. Survey responses showed that:

- 61% agreed, 20% disagreed and 19% were uncertain about whether the DFDA is an effective and efficient tool for the maintenance of discipline; and
- 25% agreed; 28% disagreed and 47% were uncertain about whether the act is not easy to understand.

6.7 The surveys also indicated that 76% agreed, 12% disagreed and 12% were uncertain that minor breaches of discipline would be better dealt with by counselling and warning rather than charging under the DFDA.⁶

6.8 In its response to the recommendation of the audit of the ADF's investigatory capability to review the DFDA, Defence stated that it would amend a number of offences as part of the Defence Legislation Amendment Bill 2007 and continue a more detailed review.

Committee view

6.9 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.

5 Foreign Affairs Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 13.19, p. 273.

6 Department of Defence, *Annual Report 2005–2006*, p. 258.

Chapter 7

ADF culture

7.1 In its first progress report, the committee commended the ADF on its efforts to improve Australia's military justice system. It was concerned, however, that reforms to processes would not of themselves tackle the deeper problems of an entrenched culture that 'may well undermine the success of current reforms'. This chapter looks at the steps being taken by the ADF to improve its culture.

7.2 The military justice system report found instances of breakdowns in the reporting system that allowed unsafe practices to go unheeded for some time. It expressed concern about the ineffectiveness of the reporting system as an early warning mechanism and as a means of stopping unsound practices.¹ The report identified a culture that encourages:

- an environment where there exists strong peer group pressure—where one is expected to be strong, stoic and uncomplaining in the face of pain or emotional stress, giving rise to an attitude that seeking help is an admission of weakness;² and
- an anti-reporting ethic of silence that leads to underreporting of inappropriate behaviour with some members fearing reprisals for reporting wrongdoing or for assisting an inquiry into wrongdoing.³

ADF culture—a demanding environment

7.3 Colonel Anthony Cotton, Director of Mental Health, Department of Defence, spoke authoritatively on this matter of self-help before the committee in its 2004–05 inquiry into Australia's military justice system. He stated:

The help-seeking culture in general—the idea that it is okay to go and get some help—is something that, in my opinion, is foreign to men of our culture. We have seen that in lots of places. I think the military environment exacerbates that because the military environment is all about being robust, being independent and those sorts of things and being able to look out for yourself.⁴

7.4 Indeed, more recently before the coroner inquiring into the death of Trooper Lawrence, Brigadier Mark Bornholt agreed with the proposition that the culture of soldiers was 'can do': that 'we do what we're told and it's dangerous we know, but

1 Paragraph 7.69.

2 Paragraph 7.24

3 Paragraph 12.109

4 *Committee Hansard*, 21 June 2004, p. 4.

we've got to endure it'.⁵ Dr Stefan Rudzki told the coroner that the buddy system appeared to have failed—that 'there appeared to be a culture that training took priority over all other issues...' The coroner quoted from the doctor's report:

There is clear evidence of troops and staff being desensitised to the risk and consequences of heat injury...Troops appeared to expect to fall victim to heat injury and be 'bagged'...In my view, a defeatist culture had evolved regarding heat injury. Everyone expected to fall victim to heat.⁶

7.5 The committee understands the place that this culture has in the ADF in a tough and demanding environment. Nevertheless, it does underscore the importance of supervision and of adherence to rules and guidelines.

7.6 At times, this culture, which values courage and encourages teamwork, can lead to inappropriate behaviour directed at those deemed to be 'weak'.

Learning culture in the ADF

7.7 In its 2005 report on Australia's military justice system, the committee did not have any recent statistics available to gauge the levels of bullying and harassment in the ADF, if any existed, nor to indicate the willingness or otherwise of persons to report such incidents. It did, however, have strong anecdotal evidence to suggest that there were pockets in the ADF where bullying and harassment had been tolerated and, furthermore, that there were substantial obstacles preventing members from reporting such inappropriate behaviour.

7.8 The committee recommended that the ADF commission a review of its disciplinary and administrative systems. The government agreed but went further. It suggested that any review of the military justice system would require a 'broader basis that allows examination of all aspects of the military justice system'.⁷ As part of this undertaking, the CDF announced in October 2005, an audit of the learning culture in ADF schools and training establishments.⁸

7.9 The audit team was to inquire into the culture of ADF schools and training establishments in order to 'determine whether the culture is inappropriate, in particular, whether a culture of harassment and bullying exists; and in general,

5 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, page 6 of 29, <http://www.nt.gov.au/justice/ntmc/documents/judgements/2005/ntmc069.html> (accessed 8 January 2007).

6 *Inquest into the death of Angus Lawrence [2005] NTMC 069*, paragraph 36.

7 Government's response to committee's 2005 recommendations. See appendix 2 – government response to recommendation 35.

8 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, entry under recommendation 35.

whether irregularities against established policies and processes of administration occur'.⁹

7.10 The audit 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'.¹⁰ The evidence indicated that:

...much has been done to create a more favourable learning culture, involving effective teamwork between the trainers and trainees, to enhance the learning outcomes. However, there is still much to be done to reach best practice; one in which those who succeed and those who do not are handled with firmness, fairness and empathy by all involved.¹¹

In all training establishments, trainees are assessed on the basis of both technical competencies (skills and knowledge) and attitudes (sometimes referred to as 'soldierly qualities', 'officer-like qualities', and 'personal development'). Trainees were frequently unhappy however, about the consistency of the latter assessments, being particularly disdainful of those who perform well only in front of the staff (at ADFA these are known as 'PDAS Hunters' who 'go jack' on their mates). Trainers frequently commented that they were not sufficiently confident in the framework for such assessments to ensure consistency and constructive feedback for trainees' personal development.¹²

7.11 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

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),

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

10 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.

11 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 61.

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 53

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.

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

7.12 Having identified a culture that 'seems to be so judgemental and disrespectful' as with those 'on the wrong bus', the audit team suggested the need 'for better leadership by divisional staff and other trainers to promote respect while still promoting comradeship'.¹⁵

7.13 These sentiments and the negative attitude toward those deemed to be failing is all too reminiscent of those described in the committee's 2005 report on Australia's military justice system. The committee quotes at length the following examples from the recent audit:

It was very apparent that many trainees in particular, but also some trainers, find it difficult to handle relations with those not seen to be contributing sufficiently to the team. The most common response in our focus group discussions was that they isolate those not contributing, excluding them (in varying degrees) from social interaction. One trainee said '...they get singled out and blamed when things go wrong or everyone stops liking them...' Another said '...they are isolated and treated basically like crap and it's sad and pathetic...' Whereas another trainee stated that it '...[depends] on the individual people, either [they are] picked on or left alone...' The perceptions of those isolated in this way, however, are frequently not so benign: some clearly consider themselves to be bullied by the rest of the group, with the implicit or explicit encouragement of the training staff. As defined in the Defence Instruction (endorsed by us), bullying is not just about physical abuse, but includes all forms of behaviour that belittles people and undermines their self-worth.¹⁶

7.14 A similar approach was observed in relation to those suffering injuries:

Many trainees and some trainers are very judgemental about the motives of injured and sick trainees. We constantly heard the terms 'chitters' (i.e. those with medical 'chits') and 'malingerers', always with the reassurance that those with genuine injuries are respected as that could happen to anyone. Those with injuries and in the relevant rehabilitation platoon often held a contrary view. At Kapooka, a healthy trainee mentioned (innocently) that his platoon performed an 'eyes right at Digger James Platoon'. He thought this was a sign of respect. Those from Digger James Platoon were very

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.

15 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 195.

16 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 138.

clear that far from showing respect, they felt this was a sign of denigration (we have since been advised that this is not a 'practice', but may have occurred, and may have been misunderstood). There is evidently some way to go for trainees, supported by their trainers, to show respect for those who are sick or injured (we were also made aware of occasional retribution by a rehabilitated trainee).¹⁷

7.15 This observation is of particular concern to the committee. In its report on Australia's military justice system, the committee devoted a chapter to problems identified at Army training establishments especially the School of Infantry, Singleton (SOI). It should be noted that a number of reports—one in 2000, another in 2001 and the inquiry into the death of Jeremy Williams in 2003—identified problems at the training establishment. The 2003 report, which remains a confidential document, found:

A culture of denigration and harassment existed towards R&D P1 [Recuperation and Discharge] at the time PTE Williams was present in the P1. As a result, members of the P1 were not treated with dignity, respect and sympathy.¹⁸

7.16 The 2003 report noted that 'while denigration of R&D was not universal among junior staff, there was no evidence of steps being taken to stop this culture'.¹⁹

7.17 Although this report found no evidence to support the view that a culture of brutality, bullying and stand-over tactics existed at SOI, it did note that the incidents reported, 'seem to be isolated incidents from differing individuals that highlight inappropriate behaviour by individuals rather than a culture'. It went on to state that there is evidence that a small number of staff members do use the threat of violence and some may have used physical violence on initial employment trainees (IETs). Furthermore, it found that 'cases of violence between IETs have been widely reported and are considered to exist'.²⁰

7.18 The 2003 report noted that, at the time of writing, 'a culture of denigration and harassment of recuperation and discharge (R&D) P1 was not apparent'.²¹ It should be

17 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 193.

18 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P. Williams, February 2003, pp. 35–6. This document was provided to the committee and is classified as Staff-in-Confidence. The committee has taken great care to ensure that the privacy of any persons referred to in the report has been respected.

19 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P. Williams, February 2003, p. 36.

20 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P. Williams, February 2003, p. 53.

21 Annex A, Appointing Officer's Decisions and Action Plan Investigation into the Death of 8299931 PTE J.P. Williams, February 2003, p. 37.

noted that the earlier 2001 report reached the same conclusions, yet two years later reports of abuse were occurring.

7.19 Indeed, the investigating officer's report of 2003 referred to the earlier 2001 investigation into the alleged mistreatment of a soldier at SOI in 2000. Importantly, it observed that the earlier report had identified a culture at SOI with distinct similarities to the one it described. Furthermore, the earlier report had accepted that as a result of changes in 2000/01, there was a far more professional and positive attitude at SOI. The 2003 report surmised:

Either the changes and remedial action identified in 2001 were not followed through by the chain of command in 2001, or they were lost in the space of a single posting cycle.²²

7.20 It should be noted that all three reports, 2001, 2003 and the recent audit report asserted that a culture of bullying and harassment did not exist in the respective training establishments. Even so, they could identify 'isolated incidents from differing individuals that highlight inappropriate behaviour by individuals'. The examples taken from the audit report and cited above describing a culture that 'seems to be so judgemental and disrespectful' toward those deemed to be 'on the wrong bus' is of continuing concern to the committee.

7.21 Over three years on from the 2003 report into the death of Jeremy Williams and after much publicity, worrying elements can still be detected in ADF training schools. Despite indications that incidents of disrespect toward, denigration and ostracism of, ADF members deemed to be failures still occur, the committee commends the CDF for commissioning the recent audit and for making public its findings.

7.22 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.²³

7.23 The findings of the inquiry into the learning culture in the ADF underscore the need for the ADF to continue, and strengthen, its endeavours to change the culture.

22 Executive Summary, Investigating officer's Report into the Death of 8299931 PTE Jeremy Paul Williams formerly RAINF Initial Employment Trainee School of Infantry, Singleton, on 2 February 2003, p. 7.

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

Assistance to trainees

7.24 The final report of the learning culture inquiry noted that overall, 85% of trainees reported that assistance was available to trainees who fall behind, but that this figure fell as low as 48% in one establishment.²⁴

7.25 The committee sought more information on the establishment where only 48% of trainees believed that assistance was available to trainees struggling to keep up. Neither the CDF nor the Chief of Army was able to answer the question. The committee is waiting for further information to be provided.²⁵ In the meantime, it expresses its concern that, although the report into the learning culture of the ADF identified a problem in at least one training establishment as indicated by the 48% negative response, the ADF could not name the establishment.

Retention rate in training schools

7.26 On a related matter, the committee sought information on the retention figures quoted in the report on the learning culture in the ADF. They indicated that around 3,600 other ranks permanently enlisted in the ADF, with about 900 leaving during their training. They also recorded that of the 650 officers recruited each year to undertake initial officer training around 200 leave during training.

7.27 The CDF was of the view that Defence was 'probably doing better now in terms of the number of people who get through the training process'. He noted that Defence was 'doing a lot to ensure that as many people as possible in the training process stay in the ADF' and gave the following example:

One of the places I would invite you all to go and visit is the Army training command rehabilitation unit, which is collocated with 1HSB at Holsworthy. What you will see there is a state of-the-art rehabilitation unit which essentially takes young people who are damaged in the training process and, through a very careful process of rehabilitation, returns them back into the training system. Most of them—in fact, in excess of 80 per cent of them—go back and essentially complete their training.

I found it a very uplifting place to visit. I saw young people who had major knee injuries and physical problems with limbs and so on working their way through a very compassionate program of training to restore their ability to do what they wanted with their lives in the ADF. So we are looking in a number of other areas to try to ensure that we save as many of these people as possible. They volunteered to join the Australian Defence Force in one of the three services and I think it is incumbent on us to ensure that all those who want to get through get through and if we have to help them overcome major injuries or some other problem, we will do so.²⁶

24 Department of Defence, *Final Report of the Learning Culture Inquiry*, July 2006, paragraph 69.

25 *Committee Hansard*, 26 February 2007, pp. 15–17.

26 *Committee Hansard*, 26 February 2007, p. 14.

7.28 Even so, the CDF undertook to provide the committee with further information on the retention rate of those undertaking initial training in the ADF.

Conclusion

7.29 The committee has taken a critical look at the findings of a number of recent reports inquiring into the investigative capability in the ADF and the ADF learning culture as well as inquiries into the sudden death of two ADF members. All inquiries exposed deficiencies in procedures and practices. The committee particularly noted the close connection between their findings and those of the committee's 2005 inquiry into Australia's military justice system.

7.30 Although the inquiries exposed failings in the ADF, the committee believes that they have proven to be a valuable incentive toward further moves to improve Australia's military justice system. 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 which includes information such as the Defence Attitude Survey. Again, the committee encourages Defence to continue this type of open reporting.

SENATOR MARISE PAYNE
CHAIR

Appendix 1

Public hearing and witnesses

Monday, 26 February 2007—Canberra

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

BROWNE, Mr Damien, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

HOUSTON, Air Chief Marshal Angus, Chief, Australian Defence Force, Department of Defence

LEAHY, Lieutenant General Peter Francis, Chief of Army, Department of Defence

McDADE, Brigadier Lynette Ann, Director, Military Prosecutions, Department of Defence

THOM, Dr Vivienne, Acting Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

WILLIAMS, Dr Ian Sidney, Inspector General, Department of Defence

Appendix 2

The Committee's 2005 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>

Committee's recommendations	Government response
	<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
<p>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.</p>	<p>civilian authorities.</p>
<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>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<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>

Committee's recommendations	Government response
<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</i> (2004). 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>

Committee's recommendations	Government response
<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>

Committee's recommendations	Government response
<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>

Committee's recommendations	Government response
	<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>

Committee's recommendations	Government response
	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>

Committee's recommendations	Government response
	<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.

Committee's recommendations	Government response
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>

Committee's recommendations	Government response
<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>

Committee's recommendations	Government response
<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 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.

Committee's recommendations	Government response
<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>

Committee's recommendations	Government response
<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>

Committee's recommendations	Government response
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 3

Department of Defence: Progress of enhancements to the military justice system, October 2006

AUSTRALIAN DEFENCE FORCE

REPORT TO THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

ON

PROGRESS OF ENHANCEMENTS TO THE MILITARY JUSTICE SYSTEM

OCTOBER 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
1, 2, 3, 7, 8 and 9	<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 finalised for consideration prior to discussion with civil jurisdictions. A major upgrade to the Defence Policing and Security Management System (DPSMS) currently underway and is expected to meet this requirement.
4	<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.
5	<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>Jun 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"> These actions have been informed by the outcomes of the audit of ADF investigative capability and implementation action is underway (Recommendation 6).

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>Jun 2006</p> <p>Dec 2006</p> <p>Jun 2006</p> <p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> • The audit was completed and a final report submitted to CDF on 3 Aug 06. • Initial positions, to staff the planned joint ADF Investigation Unit, have been established. The recommendations of the audit report with respect to the mature structure of the Unit are currently being considered within Defence. • The ongoing requirement for secondment of an AFP officer has been informed by the outcome of the audit and will be the subject of discussions with the AFP. • The initial Provost Marshal ADF (Colonel Tim Grutzner, AM) was appointed on 14 May 06.
10	The Government agreed to legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions (DMP).	Jun 2006	<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</i> which was assented on 12 Dec 05 and the position has been filled
11	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.	Dec 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Eleven additional positions, required to implement the enhancements to the military justice system, have been established and are being filled. • Additional resources such as IT and accommodation have been reviewed and identified and are being progressed.
12	The Government agreed to review the training requirements for permanent legal officers assigned to the Office of the DMP (ODMP). The review would be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.	Dec 2006	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Two new training positions have been established in the ODMP to facilitate the training of newly assigned officers. • The Commonwealth DPP is also providing assistance in the training of newly assigned officers to the ODMP.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
13	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.	Jun 2007	UNDERWAY <ul style="list-style-type: none"> The DMP has commenced a range of briefs to the Services and various command and staff courses to raise the awareness of the ODMP. A web page has also been developed to further assist in raising the awareness and profile of the DMP.
14	The Government agreed to the statutory appointment of DMP at one star rank	Dec 2005	COMPLETED (MAR 06) <ul style="list-style-type: none"> DMP has been established at one star rank and the position has been filled.
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	COMPLETED (DEC 05) <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	The Government agreed in-principle that: <ul style="list-style-type: none"> legal officers in the Office of the DMP would be required to hold Practicing 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	UNDERWAY <ul style="list-style-type: none"> All legal officers in the Office of the DMP now hold Practicing Certificates. The statutory appointment of the DMP has established the independence of the ODMP. The relevant professional ethical standards are under consideration.
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	COMPLETED (APR 06) <ul style="list-style-type: none"> The position of Director of Defence Counsel Services has been established and filled.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
18, 19 and 20	<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>	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> • The Bill to establish the Australian Military Court was introduced into Parliament on 14 Sep 06. • On 9 Oct 06, the Senate Standing Committee on Foreign Affairs, Defence and Trade held a hearing into the provisions of the Bill. The hearing raised some useful issues which will now be addressed in the further consideration of the Bill. • When the legislation is passed, administrative action will proceed to allow the AMC to commence operations by 01 Oct 07.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
21	<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. 	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> Action as per Recommendation 18.
22	<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>	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> The form of the right to elect trial from summary procedures to the AMC will be included in legislation to revise summary procedures. This legislation is expected to be introduced into Parliament in 2007.
23	<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>	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> Amendment to the right of appeal to the DFDAT has been included in the Bill to create the AMC. The right of appeal from summary authorities to a military judge of the AMC will be included in legislation to revise summary procedures (as per recommendation 22).

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. 	<p>Dec 2005</p> <p>Jun 2006</p>	<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>Wrong-doing 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>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> Amendments to the Administrative Inquiries Manual were completed and promulgated in Apr 06. In addition to covering these recommendations, the amendments incorporate agreed action 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>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> As for Recommendation 26.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
28	<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>Jun 2006</p>	<p>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> As for Recommendation 26.
29	<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>	Oct 2007	<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. First draft of DI (G) PERS 34-1 ROG Tri-Services Procedures has been completed for consideration within Defence. The IGADF has been established as a statutory position, remuneration has been determined, and Mr Earley appointed to the position. IGADF provides CDF with internal audit and review of the military justice system independent of the ordinary chain of command. This includes both Defence Force discipline and the Defence Inquiries system.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
30	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.	Dec 2005	COMPLETED (DEC 05) <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>.
31	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.	Jun 2006	COMPLETED (APR 06) <ul style="list-style-type: none"> As for Recommendation 26.
32	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.	Jun 2006	COMPLETED (APR06) <ul style="list-style-type: none"> As for Recommendation 26.
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>	COMPLETED (MAR 06) <ul style="list-style-type: none"> Amendments to the Defence (Inquiry) Regulations 1985 (D(IR) 33 were completed as at 31 Mar 06.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
34	<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>Dec 2006</p> <p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Amendments to the Defence (Inquiry) Regulations (D(I)R) 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. These arrangements have been supplemented by a CDF Directive [12/2006] promulgated on 30 May 06. An initial panel of suitably qualified persons with judicial experience to preside over/sit on a CDF COI has since been established. A CDF COI coordination and support cell has been established within the Office of the CDF. Amendments to section 124 of the <i>Defence Act 1903</i>, establishing a more permanent CDF COI framework, were introduced in Parliament on 14 Sep 06 with the legislation establishing the Australian Military Court, with subsequent amendments to the D(I)R to follow. Defence is pursuing the adoption of 'protocols' with all State and Territory Coroners. Two jurisdictions have signed letters to Defence, agreeing protocols.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
35	<p>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.</p>	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 in 2007. • In addition to the Government response, as announced by the CDF in Oct 2005, an independent audit of the learning culture in ADF schools and training establishments was undertaken. The 'Inquiry into the Learning Culture in ADF Schools' was completed in Jul 06 and a final report was submitted to CDF on 7 Jul 06. The Report is being considered within Defence.
36	<p>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.</p>	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Examination of the combination of criminal and administrative law was completed by obtaining independent external advice on double jeopardy from the Australian Government Solicitor. The advice has been taken into account in the development of a revised Defence Instruction (General), which deals with Formal Warnings and Censures in the ADF. • An internal review of offences and punishments is being conducted as part of the process for enhancing summary procedures.

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
37	<p>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.</p> <p>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.</p>	<p>Jun 2006</p> <p>Jun 2006</p>	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> A report on the state of health of the military justice system is included in the 2005-2006 Defence Annual Report, and will be an ongoing element of this report. The D(I)R have been amended to provide for an annual report on the operation of the <i>Regulations</i>. (<i>Amendments were approved by the Federal Executive Council on 22 Jun 06.</i>) Initial reports to the Senate FAD&T Committee on progress with enhancements to the military justice system were submitted in Apr and Oct 06. This reporting will continue until the end of the implementation period.
38	<p>The Government agreed to commission an expert to examine whether the human rights of children are being respected.</p>	Jun 2006	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> Jenni Whelan, a consultant and former solicitor at the Human Rights and Equal Opportunity Commission, has been engaged, under a standing offer for up to two years, to review specific policies and programs for compliance with the Convention on the Rights of the Child in order to determine whether the human rights of children are being respected.
39	<p>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.</p>	Jun 2006	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> The ADF Cadet Forces Regulations 1977 have been amended. (<i>Amendments were approved by the Federal Executive Council on 22 Jun 06.</i>)
40	<p>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.</p>	Jun 2006	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> Further administrative positions across all three cadet organisations have been established and filled.

Appendix 4

Written questions on notice to the Department of Defence

ADF investigative capabilities

Core investigative skills

1. The report of an Audit of the Australian Defence Force Investigative Capability 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 staff numbers allocated and their quality and experience; and

—many investigators have high workloads, poor administrative support and outdated and inadequate information technology support systems.¹

- What is being done to recruit high calibre investigators into the Service Police?
- Have resources and support staff been increased since the audit report was finalised? What are the plans for staffing and recourses for the Service Police?
- Could you comment on workload on SP and what is being done to help ease the problem?
- Could you inform the committee about SP and their information technology support system?

2. In keeping with 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 which would be reinforced periodically during career advancement. (Response to recommendation 5.8).

- Is it the intention of the ADF to conduct a follow-up audit to determine the progress and effectiveness of the undertakings contained in the ADF's response to the audit report?

3. The intention of the recommendations contained in the audit and Defence's response is to improve the investigative standard of Service Police.

- Is it the intention for Service Police to have specialist investigative skills for example in forensic science to examine the scene of an incident such as suspected suicide or to rely on specialist skills in the civilian police?

Co-operation and liaison with civilian police

4. The second progress report advised the committee that an ADF policy of referring matters to civilian authorities 'is being finalised for consideration prior to discussion with civil jurisdictions.'

1 Report of an Audit of the Australian Defence Force Investigative Capability, July 2006, paragraph 4.

- Could you provide a further up-date?

5. The recently conducted audit of the ADF's investigative 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 (eg obtaining search warrants). It recommended that Defence intensify its efforts to have Defence Investigatory Authorities recognised as Commonwealth Law Enforcement Agencies.²

- What needs to be done to have Defence Investigatory Authorities recognised by civilian authorities as law enforcement agencies and how close is the ADF toward this goal?

6. Following the recommendations of the audit of the ADF's investigative capability, the ADF undertook to 'establish and maintain formal lines of communication and liaison with Federal, State and Territory law enforcement bodies'.³

- Has the number of SP attending civilian investigative training courses increased? Have you any details?
- Are there now in place formal arrangements, principally with the AFP and also State and Territory police, for Service Police to attend relevant accredited training courses and for secondments between the agencies?
- Are formal arrangements now in place between the ADF and the civilian Police authorities, principally with the AFP, for forensic services in Australia and overseas especially for major incidents or crimes involving the non-combat related death of, or serious injury to, ADF personnel?

7. The Board of Inquiry into the Death of Private Jacob Kovoc also noted the need to improve arrangements for co-operation between SP and their civilian counterparts. It noted the assistance provided by the New South Wales Police and recommended:

—the establishment of formal protocols with Australian State Police to allow MP 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.⁴

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

3 ADF response to recommendation 7.23.

4 Paragraph 287 (aa) (i), Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovoc.

- Could you advise the committee whether formal protocols are in place with Australian State Police to allow Military Police secondments and to provide expertise, resources, and training where the ADF lacks this capacity?
- Has a pool of State Police investigators been established who are ADF 'force prepared' to accompany a Counsel Assisting team during the scoping of offshore Inquiries?

8. ADF's second progress report explained that a major upgrade to the Defence Policing and Security Management System was currently underway and was expected to meet this requirement.⁵

- Could you explain the intent and significance of this upgrade?

Defence Force Discipline Act (DFDA)

9. The Report of an Audit of the Australian Defence Force Investigative Capability found that a commonly held view expressed by ADF members was that the DFDA had 'simply had its day'. Some described the document as 'outdated and anachronistic' and suggested that it 'does not match modern disciplinary, legal and policing requirements'.⁶ In response to the recommendation that Defence review the DFDA, Defence stated that it would amend a number of offences as part of the Defence Legislation Amendment Bill 2007 and continue a more detailed review.⁷ This response appears to be tame when considering the weight of opinion on the Act.

- What does ADF's response to the recommendation mean in terms of the comprehensiveness of the review of the DFDA and the intention to consider the current legislation?

10. The Defence Attitude Survey of ADF personnel on military justice produced the following responses to the given propositions (Annual Report p. 258):

—the DFDA is an effective and efficient tool for the maintenance of discipline: 61% agree, 20% disagree and 19% were uncertain;

—the DFDA is not easy to understand: 25% agreed; 28% disagreed and 47% were uncertain

—minor breaches of discipline would be better dealt with by counselling and warning rather than charging under the DFDA: 76% agree, 12% disagree and 12% are uncertain.⁸

- Could you expand on the results of this survey and what they are telling Defence about the DFDA?

5 This update remains unchanged from the advice given in the first progress report.

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

7 Response to recommendation 4.13.

8 Department of Defence, *Annual Report 2005–2006*, p. 258.

11. The Defence Attitude Survey of ADF personnel on military justice produced the following response to the given propositions (Annual Report p. 258):

—both genders are treated equally under the military justice system: 39% agree, 26% disagree, 35% uncertain;

—not all ranks are treated equally under the military justice system: 53% agree, 20% disagree, 27% uncertain.

- Could you expand on the results of this survey and what they are telling Defence about the military justice system?

Learning culture

Benchmarking and assumptions

12. The report on learning culture stated that 'there is clear evidence of improvements in behavioural standards in all the training establishments we have visited and of universal knowledge of ADF policies of zero tolerance of bullying and harassment' (paragraph 106).

- What mechanism was used to measure this shift in behavioural standards – for example what was the benchmark?

Bullying and harassment

13. The report on learning culture summarised its findings 'the Inquiry Team found no evidence of an inappropriate culture that supports bullying or harassment. However, it is the Team's view that there is still some way to go before the underlying culture will firmly oppose harassment and bullying, and firmly support explicit policies on such issues of E&D' (paragraph 108).

- Could you reconcile this statement with some of the views expressed to the team carrying out the inquiry into the ADF culture such as:

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'.⁹

14. The report on learning culture stated 'Our strong impression is that the level of direct bullying of those perceived to be performing poorly by trainers or trainees is

9 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.

generally low now, given the rules on inappropriate behaviour, but other forms of more subtle abuse are not uncommon' (paragraph 196).

- Could the committee have some clarification on this statement? How is Defence responding to this problem of 'subtle abuse'?

Duty of Care

15. The Board of Inquiry into the death of Pte Kovco observed that a number of soldiers 'were unfamiliar with extant Standard Operating Procedures; in particular the provisions addressing Degrees of Weapons Readiness.' The ADF accepted the Board's recommendation that 'the Appointing Authority investigate and review the process by which critical ADF procedures are promulgated before and during ADF deployments.

- Could you provide the committee with progress on the review and the measures being taken to ensure that procedures are being promulgated and that all relevant members of the ADF are aware of them?

16. The reports on the deaths of Trooper Lawrence and Private Kovco seem to highlight the need for all ADF personnel to be not only aware of Defence rules, instructions, orders and guidelines but for Defence to ensure that all members comply with them.

- What steps are being taken to strengthen compliance?

Mental Health

17. The committee has received correspondence from a few former ADF members that go to the issue of discharge from the service on mental health/psychological grounds.

- When was the last time the ADF reviewed the procedures in place for dealing with mental health issues and the discharge of a member on such grounds?
- Have any concerns been drawn to your attention that question the procedural fairness of the current process?
- Are you confident that the current process resulting in the discharge from the Service on mental health grounds is fair and just?
- Could you outline for the committee, the safeguards built into the process that ensures procedural fairness to a member undergoing medically assessment and who is subsequently discharged on mental health grounds?
- With regard to privacy issues—who has access to a member's medical records?
- Are members entitled to have access to their medical records?
- Can outside organisations such as the Federal or State Police Forces, or security agencies obtain access to a member's medical record including psychological assessments?