

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

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. The recommendations were all designed to improve Australia's military justice system.

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.

1.5 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

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.

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. It should also be noted that during the reporting period, Defence published a number of major reports that had direct relevance to Australia's military justice system. They were:

- *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 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 above as well as the coroner's report following an inquest into the death of Trooper Angus Lawrence.

1.9 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. The responses to these questions were not received before the committee tabled its report on 29 March 2007.

Defence's third progress report

1.10 In April 2007, the committee received Defence's third progress report and, on 24 May, it received the answers to questions taken on notice at the February hearing and to written questions submitted to Defence in March. The progress report is at Appendix 1 and Defence's answers are at Appendix 2.

1.11 The committee considered Defence's third progress report and the answers to questions put by the committee to Defence in February and March but decided that at this stage it would not hold a public hearing or produce a detailed report on the progress of reforms to Australia's military justice system. In its last report, tabled in

March 2007, the committee took a critical look at the findings of the three major reports released at the end of last year. It noted that all the inquiries exposed deficiencies in procedures and practices. Taking account of these three reports and Defence's undertakings to act on the large number of recommendations contained in them, the committee was of the view that Defence needed time to implement changes.

1.12 Although, the committee believes that it is too early to examine and report on progress toward implementing changes as a result of the new recommendations, it notes recent advice provide by Defence in its response to the committee's written questions on notice:

- the ADF Investigative Service is to be reviewed after the first 12 months of operation;³
- the Inspector-General ADF is to conduct an own motion review of Part VI of the Defence Force Disciplinary Act (DFDA), which provides the statutory powers for the investigation of service offences by investigating officers;⁴
- a full review of the effectiveness of the new discipline system is to be conducted at the conclusion of the Government's two-year implementation period⁵—Defence's progress report noted that this review is be an independent review and will be conducted in 'an open and transparent manner, and include a more detailed review of the DFDA';⁶
- a major overhaul of the summary trial system is underway with a view to a significant simplification of the summary justice process as part of a range of wider reforms to Australia's military justice system;⁷ and
- a large majority of ADF members agreed that minor breaches of discipline would be better dealt with by counselling and warning—by recourse to less formal disciplinary procedures.⁸

1.13 The committee requests a copy of the reviews mentioned above when they have been finalised.

3 Defence answer to question W2.

4 Defence answer to question W9

5 Defence answer to question W9.

6 Australian Defence Force, status on recommendation 35, *Report to the Senate Standing Committee on Foreign Affairs, Defence and Trade on Progress to the Military Justice System*, April 2007.,

7 Defence answer to question W10. Also refer to the committee's report on the Defence Legislation Amendment Bill 2007, tabled 10 September 2007.

8 Defence answer to question W10.

1.14 The committee also draws attention to two answers to the committee's written questions on notice to Defence. They both contain responses by the team who conducted the 2006 inquiry into the Learning Culture in ADF schools and training establishments.

Final Report of the Learning Culture Inquiry

1.15 In one of the questions, the committee sought an explanation on statements contained in the report that appeared to contradict the Inquiry Team's finding that there was no evidence of 'an inappropriate culture that supports bullying or harassment'.

1.16 Defence informed the committee that although the inquiry team 'reported that it found no evidence of an inappropriate culture that supported bullying or harassment', it did express 'a view that there was still some way to go before the underlying culture would firmly oppose harassment and bullying'. Defence noted further that the inquiry team had been consulted and advised that its findings were based:

...on its assessment of all the evidence it gathered from visits, focus groups, surveys and documentation. The majority of responses to survey questions and in focus group discussions were positive, but there were significant exceptions that demonstrated there is still some way to go to manage the risk of bullying and harassment by developing a culture that firmly opposes such behaviour and supports explicit policies on equity and diversity.⁹

1.17 The committee also sought further information on the Inquiry Team's 'strong impression' that 'the level of direct bullying of those perceived to be performing poorly by trainers or trainees is generally low now, given the rules on inappropriate behaviour, but other forms of more subtle abuse are not uncommon'. The Inquiry Team explained that in its report it had drawn attention to practices such as the tendency to isolate those who are perceived to be performing poorly or not contributing to the team. It noted that it had made recommendations to address these problems and they had been accepted by the ADF.

1.18 The Inquiry team also observed that it had reported that:

The ADF has some way to go to improve the treatment of women, where the emphasis to date has been on equality with men rather than recognising and appreciating the different styles and approaches of women and adjusting training practices and the learning culture to better suit their requirements. Failure to do so may be regarded by the Inquiry Team as a subtle form of inappropriate behaviour.¹⁰

9 Defence answer to questionW13.

10 Defence answer to questionW14.

1.19 In its report on Australia's military justice system and the two subsequent reports on Defence's progress in implementing reforms to Australia's military justice system, the committee highlighted its concerns about aspects of the culture in the ADF.¹¹ For example, in its second report, the committee stated that 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 the culture.

1.20 The committee will continue to monitor Defence's endeavours to change the aspects of its culture that have the capacity to undermine the success of its reforms to the military justice system.

1.21 A second matter that the committee places on notice and which it will pursue at a later date is the inquiry processes into the death of Trooper Angus Lawrence.

The independence and impartiality of an investigator—Trooper Angus Lawrence

1.22 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 Lawrence died from acute heat stroke while attending a Subject One Course for Corporal.

1.23 According to evidence taken at the committee's public hearing on 26 February, the Chief of Army asked Colonel Mike Charles, who was the initial investigating officer, to inquire into the circumstances of statements made by a warrant officer who was a key witness at the inquest into Trooper Lawrence's death. This request goes to the heart of a matter that has been of continuing concern to the committee—an investigator's independence. The committee took the opportunity to repeat its findings contained in its 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.¹²

1.24 At that time, the committee expressed its view, that the ADF must address this problem of perceived bias undermining the integrity of the administrative inquiry process and do more to eliminate this perception.¹³

1.25 The committee's concern about the independence of an investigator, however, was not the only concern in the case of inquiries into Trooper Lawrence's death. The

11 Defence's response to W14. See appendix 3.

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

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

committee had serious misgivings about a number of aspects of the investigations into this death. They related 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'.

1.26 In light of its concerns, the committee wrote to the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon. Bruce Billson MP, requesting copies of documents that it believed would assist it in its consideration of the investigative process. The committee is yet to receive a response from the Minister.

1.27 The committee also notes that Justice Madgwick, Federal Court of Australia, handed down his judgement on 4 May 2007 on the financial penalty to be imposed on the Commonwealth for admitted breaches of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* with regard to the death of Trooper Lawrence. At this stage, the committee records the statement by Justice Madgwick on the necessity of law reform:

I commend this case to the attention of the Parliament. I was informed that the relevant laws are under review. There are no doubt difficult issues as to how best to mandate compliance by public authorities and officers with occupational health and safety laws. There are also, no doubt, further complexities in thus dealing with the armed forces, even as to their peacetime and/or routine domestic operations. That said, the present state of the law is not such as to engender public confidence that proper legal standards of protection of Commonwealth employees, including our service people, is rigorously required of their superiors, on pain of consequences that will really bite.¹⁴

1.28 The committee reiterates its intention to pursue the matters raised by the inquiries into the death of Trooper Lawrence.

1.29 In concluding this brief report, the committee notes the recent report by the Defence Force Ombudsman on the management of complaints about unacceptable behaviour.

Defence Force Ombudsman's report on management of complaints about unacceptable behaviour

1.30 In June 2007, the Defence Force Ombudsman published a report on the management of complaints about unacceptable behaviour in the ADF. Overall, it found:

14 Federal Court of Australia, *Comcare v Commonwealth of Australia* [2007] FCA 662, Madgwick J, 4 May 2007, Sydney (Heard at Canberra), paragraph 134.

The information gathered in this investigation supports the view that Defence currently provides an effective complaint-management mechanism that ADF members can readily access. We observed that ADF members consider there have been improvements in the complaint-handling process in recent years and that members have a reasonable level of confidence in the complaints system.¹⁵

1.31 The committee welcomes these findings, which strengthen earlier ones, and commends Defence for its successful efforts to improve its complaints management systems. The Ombudsman, however, made 15 recommendations intended to enhance the current complaint-handling system. They were based on suggestions made by members of the ADF and related to record keeping, training, reporting, data collection, the role of inquiry officers and equity advisers, and quality assurance. In the view of the Ombudsman, further consideration of these recommendations would:

...improve support to, and accountability of, those involved in making, managing and responding to complaints of unacceptable behaviour. They will also further integrate Defence values of equity and diversity into cultures across the ADF.¹⁶

1.32 Defence agreed to all the recommendations which are reproduced at appendix 3. The committee will include consideration of the Ombudsman's report in its next review of Australia's military justice system. At this stage, it has identified a number of matters contained in the report that it believes needed to be underlined and which have been of concern to the committee since its major report on Australia's military justice system in June 2005. They are fear of reprisal and record keeping.

Fear of reprisal

1.33 The Ombudsman noted:

Almost two thirds of members responding to the survey advised that they would feel comfortable lodging a complaint of unacceptable behaviour. However, almost half did not consider that the complaint process was fair and transparent. Reservations expressed about using the system included possible repercussions such as adverse effects on promotion, peer pressure, being considered a 'dobber' or other adverse treatment.¹⁷

1.34 The Ombudsman suggested that Defence may 'wish to consider additional research into the reasons why a significant proportion of ADF members surveyed did

15 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007.

16 Executive Summary, Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, p. 1 of 43.

17 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, paragraph 2.47.

not feel confident to make a complaint about unacceptable behaviour, and identify whether there are particular barriers to making a complaint'.¹⁸

Record keeping

1.35 The Ombudsman also referred to deficiencies in record keeping:

It is possible that the deficiencies observed in record keeping may be indicative of record-keeping standards more generally in the ADF, rather than being limited to the management and investigation of complaints of unacceptable behaviour. The Ombudsman has raised concerns about the quality of records of conversation with the FRB on previous occasions during the investigation of complaints from members of the ADF. Inadequate record keeping not only has the potential to adversely affect decisions made by the commander/manager on resolution of the complaint but can hamper the resolution of complaints which are pursued through the review process in the Instruction, the ROG process, legal proceedings, or an Ombudsman or HREOC investigation.¹⁹

These are also matters that the committee will take up with Defence in due course.

Acknowledgments

1.36 The committee thanks officers from the ADF who prepared Defence's third progress report of reforms to the military justice system and the answers to the committee's written questions.

SENATOR MARISE PAYNE
CHAIR

18 Executive Summary, Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, p. 1 of 43.

19 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, paragraph 2.73..