

Additional comments by Labor Members of the Committee

1.1 Labor members of the committee concur with the findings of the committee's majority report. They take this opportunity, however, to draw attention to a number of matters of continuing concern that they intend to follow-up with Defence. Labor members note that the committee has not yet examined Defence on these matters.

Protracted and expensive legal proceedings

1.2 The Trooper Lawrence case, considered in the majority report, highlights a matter of concern that relates to the legal proceedings involving Defence. It would seem that in a number of cases, including the high profile cases cited below, Defence did not assist in expediting proceedings and unnecessarily prolonged the legal process.

Air Vice Marshal Peter Criss

1.3 In August 2005, Defence agreed to pay compensation to Air Vice Marshal (Retired) Peter Criss who brought a claim under the Commonwealth's Compensation for Detriment Caused by Defective Administration Scheme. Defence acknowledged shortcomings in its handling of this case and the Chief of ADF, ACM Angus Houston and the Secretary of the Department of Defence expressed their 'disappointment by the failings revealed in the handling of this matter and the protracted period of time it had taken to resolve'.¹

Lieutenant Commander Robyn Fahy

1.4 In July 2006, Defence agreed to compensate Lieutenant Commander Robyn Fahy and to facilitate her transition to civilian employment. She brought a claim under the *Human Rights and Equal Opportunity Commission Act 1986* alleging unlawful discrimination that occurred during her service at the Australian Defence Force Academy between 1986–87 and her removal as Executive Officer HMAS Stirling in October 2000.² Defence noted that in bringing the matter to a mutually agreed resolution, both the Chief of the Defence Force and the Chief of Navy regret the distress that this has caused Lieutenant Commander Fahy and her family, Captain Di Pietro and his family, as well as other members of the Australian Defence Force and their families'.³

1 Australian Government, Department of Defence, Defence Media Release, CPA 209/05, 'Payment of Compensation Claim to AVM Peter Criss', 22 August 2005.

2 Australian Government, Department of Defence, Defence Media Release, CPA 177/06 'Mediation Resolution with Lieutenant Commander Robyn Fahy Friday, 28 July 2006.

3 Australian Government, Department of Defence, Defence Media Release, CPA 177/06 'Mediation Resolution with Lieutenant Commander Robyn Fahy, 28 July 2006.

Albany Port Authority

1.5 After a long-running dispute, in June 2007, the Albany Port Authority and the Commonwealth of Australia reached agreement on terms to resolve a dispute arising from the discovery of ordnance in Port Albany in 2000.⁴ Defence admitted liability and agreed to pay \$5.25 million to the Authority for the cost of removing unexploded bombs, plus \$1 million towards the port authority's legal costs.⁵ It should be noted that in May 2006, Justice Templeman in the Supreme Court of Western Australia stated his concern about the Commonwealth's conduct. He said that it was clear that ordnance had been found on the seabed on the Port of Albany and that it had been necessary to remove the ordnance and that some cost was involved. He went on to say:

That cost must be met from public funds. I do not think the public would be concerned whether the cost was paid by the State or the Commonwealth. However, I think the public would be extremely concerned to know that instead of concentrating their efforts on resolving the practical problem of ordnance removal in the most cost effective and efficient way, the parties have locked horns in expensive and complex litigation which will undoubtedly result in very considerable further expenditure of public funds to the profit only of the parties' legal representatives.⁶

1.6 Justice Templeman stated that he thought it unacceptable that the Commonwealth 'should be profligate with public funds'.⁷

Eleanor Tibble

1.7 Cadet Sergeant Tibble took her own life at her home in Tasmania on 27 November 2000 at the age of 15. At the time of her death, she understood that she was to be discharged from the Air Cadets as a result of an allegation that she had fraternised with an adult cadet staff member. Eleanor Tibble's mother, Ms Susan Campbell, alleged discrimination against Eleanor and herself. She argued that her daughter's suicide 'arose out of her enforced resignation from the Tasmanian Squadron Air Training Corps. Ms Campbell's complaints were accepted by the Tasmanian Anti-Discrimination Tribunal. The Commonwealth, however, in the Federal Court of Australia sought to have the proceedings before the tribunal terminated. In February 2006, Justice Heerey recommended that it was appropriate for the Commission to accept this claim for investigation.⁸

4 Albany Port, Media Release, 22 June 2007.

5 Reports in the *Australian*, 25 June 2007, p. 7; *Sunday Times*, 24 June 2007, p. 29.

6 *Albany Port Authority v Commonwealth of Australia* [2006] WASC 101 (1 June 2006) paragraph 46.

7 *Albany Port Authority v Commonwealth of Australia* [2006] WASC 101 (1 June 2006) paragraph 47.

8 *Commonwealth of Australia v Wood* [2006] FCA 60 (9 February 2006), paragraph 16

1.8 The committee accepts that the Department of Defence has a right to defend its position if it believes that it has a sound defence. The committee believes, however, that Defence must exercise this right responsibly. Delays in legal proceedings cause unnecessary distress to people who have already, in some cases, suffered because of failings in the military justice system. They are also a significant drain on public money. For example, the Minister Assisting the Minister for Defence, the Hon. Bruce Billson MP, provided an indication of the costs involved in legal proceedings associated with Ms Susan Campbell's claim for compensation. In answer to a question on notice, associated with Ms Susan Campbell's claim for compensation, he informed the House of Representatives:

As at 5 September 2006, the legal costs and disbursements for defending the claim brought by Ms Campbell before the Anti-Discrimination Tribunal of Tasmania were as follows:

Professional costs - \$66,297
Disbursements - \$10,878
Plus GST - \$7,656
Total - \$84,831

As at 5 September 2006, the legal costs and disbursements for defending the proceedings before the Human Rights and Equal Opportunity Commission were as follows:

Professional Costs and disbursements - \$113,396
GST - \$11,340
TOTAL - \$124,736

As at 5 September 2006, in relation to Ms Campbell's application before the Supreme Court of Tasmania, the costs were as follows:

Professional Costs - \$33,201
Disbursements - \$89,515
GST - \$12,245
TOTAL - \$134,961

As at 5 September 2006, the legal costs and disbursements in respect of the application to the Federal Court of Australia were as follows:

Professional Costs - \$91,056
Disbursements - \$88,889
GST - \$17,777
TOTAL - \$197,722

As at 5 September 2006, the legal costs and disbursements in respect of the Commonwealth's appeal to the Full Court of the Federal Court were as follows:

Professional Costs - \$30,265
Disbursements - \$16,777
GST - \$4,583
TOTAL - \$51,625

As at 5 September 2006, the legal costs and disbursements in respect of the mediation with Ms Campbell and others were as follows:

Professional Costs - \$49,468
Disbursements - \$24,848
GST - \$7,432
TOTAL - \$81,748⁹

1.9 The Minister also provided the following information:

Phillips Fox represented the Commonwealth in each of the proceedings brought by Ms Campbell, and in the injunction application before the Federal Court. To date, the total amounts for professional costs and disbursements (which include counsel's fees) that have been invoiced by Phillips Fox are \$675,623.

The Australian Government Solicitor was consulted in relation to the constitutional issues that arose during the course of proceedings, in accordance with the requirements of the Legal Services Directions issued by the Attorney-General, and also represented the Commonwealth in respect of the mediation with Ms Campbell. To date, the total amounts for professional costs and disbursements (which include counsel's fees) referable to the mediation are \$93,066. The total amounts for professional costs and disbursements referable to the Federal Court proceedings are \$31,082, giving a total of \$124,148.

The lawyers within Defence Legal do not bill for their legal costs and disbursements.

Defence also paid \$80,000 by way of legal costs and disbursements in relation to Ms Campbell's participation in the Federal Court application concerning the jurisdiction of the Anti-Discrimination Tribunal of Tasmania. A further \$126,698 was paid by way of legal costs and disbursements in relation to Ms Campbell's other matters, giving a total of \$206,698.¹⁰

1.10 The majority report referred to the Defence Force Ombudsman's report on management of complaints about unacceptable behaviour.

1.11 Labor members have been concerned about complaint handling mechanisms in the ADF for some time. In its 2005 report on Australia's military justice system, the committee expressed concern about the instances of breakdowns in Defence's reporting system that allowed unsafe practices to go unheeded for some time. It found an embedded anti-reporting ethic in some areas of the ADF. The committee noted that the reticence to report improper conduct or to make a legitimate complaint means that responsible commanders are not well placed to detect and correct wrongdoing and hence unsafe practices or inappropriate conduct continue unchecked.¹¹ It noted

9 Answer to question No. 3960, House of Representatives *Hansard*, 6 February 2007, p. 87.

10 Answer to question No. 3960, House of Representatives *Hansard*, 6 February 2007, p. 87.

11 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 7.69 and 7.91

particularly that members will not make reports if they believe they will not be protected from reprisals. It concluded:

The administrative system must be sufficiently robust to instil confidence in members that if they do the right thing [by reporting wrong-doing] they will be protected; that allegations will be duly investigated; that they will not suffer reprisals on account of making a complaint; and that offenders will be brought to account. The committee accepts that removing the fear of reprisal is a most difficult challenge but one that should not be shirked.¹²

Ms Cassandra Lee

1.12 Although the Ombudsman suggested that the system is improving, he indicated clearly that more needs to be done if Defence is to have a robust complaint handling system that instils confidence in its effectiveness and fairness. A recent judgment in the Federal Magistrates Court of Australia underscores the importance of having such a system. The case, inter alia, dealt with alleged sexual harassment in the workplace during 2001. The applicant, Ms Cassandra Lee, was employed at the Patrol Boat Landing Class Logistics Office in Portsmith, Cairns. Members of the Navy and the Department of Defence worked in the office. Justice Connolly found the Commonwealth vicariously liable:

It is clear in this case that all reasonable steps were not taken by the Commonwealth and the fact that the Applicant was given no training in equity and diversity...was a failure by the Fourth Respondent [the Commonwealth] to adhere to its own training and equity and diversity regime. It may well have been the case, had the Applicant had the opportunity of attending such a course, she may well have been better equipped to deal with the earlier pornography in the workplace and by reporting those matters, it may have been that what occurred during and soon after the course could have been avoided and ultimately, the rape itself perhaps could have been avoided.¹³

1.13 In his judgment, Justice Connolly was also critical of the way Defence and some of its employees approached the investigation of the applicant's complaints. He found that the investigation:

Displays both an indifference and even disinclination on the part of all those involved, from Commanding Officer down to deal with the issues fairly and conscientiously. Indeed, the motivating factor appears to be to dispense with the matter with as little controversy as could be managed.¹⁴

1.14 The case also highlighted the problem of bullying and victimisation in the workplace toward the applicant after it became known that she had reported the

12 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 7.93.

13 Lee v Smith &Ors [2007] FMCA 59 (23 March 2007), paragraphs 199 and 209.

14 Lee v Smith &Ors [2007] FMCA 59 (23 March 2007), paragraph 158.

inappropriate conduct. The Commonwealth was found to be liable by way of commission of this discriminating conduct by two of its employees 'in accordance with the common law concepts of vicarious liability and agency'.¹⁵

1.15 Labor members recognise that the incidents took place over six years ago and that many changes have taken place to improve the military justice system. They nonetheless believe that these incidents serve as a powerful reminder to Defence to be vigilant in ensuring that the recent reforms to Australia's military justice system continue to have effect.

Conclusion

1.16 Although the majority report and these additional comments were intended to provide a brief overview of the progress made in implementing reforms to Australia's military justice system, they nonetheless highlight matters that are of continuing concern to Labor members. The committee first became aware of a number of serious failings in Australia's military justice system during its inquiry into Australia's military justice system in 2004–2005. It raised these matters in both its first and second progress reports on reforms to Australia's military justice system and again in this third report. They include the investigative capability of the ADF, a culture within the ADF that may counter the effectiveness of reforms intended to enhance Australia's military justice system, the potential for those in command to exert undue influence in disciplinary and administrative proceedings, a reluctance to report wrong-doing in the ADF and poor record keeping. In these additional comments, Labor members have also drawn attention to a number of cases that Defence have chosen to defend. In their view, Defence have demonstrated an unnecessarily litigious and combative approach to those seeking legal redress and compensation.

1.17 These facts underline the importance of continuing committee oversight of Australia's military justice system.

Senator Steve Hutchins
Deputy Chair

Senator Mark Bishop

Senator John Hogg

Senator Michael Forshaw

15 Lee v Smith &Ors [2007] FMCA 59 (23 March 2007), paragraphs 210 and 211.