

The Senate

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Standing Committee on  
Foreign Affairs, Defence and Trade

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Reforms to Australia's military justice system

Third progress report

September 2007

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# **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.<sup>1</sup> 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.<sup>2</sup>

## **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

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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;<sup>3</sup>
- 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;<sup>4</sup>
- 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 period<sup>5</sup>—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';<sup>6</sup>
- 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;<sup>7</sup> 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.<sup>8</sup>

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

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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.<sup>9</sup>

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.<sup>10</sup>

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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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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

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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.<sup>14</sup>

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:

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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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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

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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'.<sup>18</sup>

### ***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.<sup>19</sup>

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

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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..

## **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'.<sup>1</sup>

#### ***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.<sup>2</sup> 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'.<sup>3</sup>

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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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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

### ***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.<sup>8</sup>

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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 - \$81,748<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> It noted

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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.<sup>12</sup>

### ***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.<sup>13</sup>

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.<sup>14</sup>

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

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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'.<sup>15</sup>

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

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

# **Appendix 1**

**Department of Defence:  
progress of reforms to the military justice system**



**AUSTRALIAN DEFENCE FORCE**

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

**ON**

**PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM**

**APRIL 2007**

**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-IN-CONFIDENCE**

<b>Committee Recommendations</b>	<b>Government Response/Action Directed by Government</b>	<b>Planned Completion</b>	<b>Status</b>
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"> <li>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"> <li>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</li> <li>establishing a common database for tracking referrals.</li> </ul> </li> </ul>	<p>Oct 2007</p>	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>An ADF policy (based on the Government response to recommendations 1, 2, 3, 7, 8 and 9) is being finalised. The policy will be used as the basis for clarifying the referral and retention of offences with the civilian authorities.</li> <li>A major upgrade (Stage 2) to the Defence Policing and Security Management System (DPSMS) is currently underway, with user testing planned to commence in May 07 and roll out planned for Jul/Aug 07.</li> </ul>
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"> <li>Defence would ... as for Recommendations 1, 2 and 3 above.</li> </ul>	<p>As for Rec 1</p>	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Action as per Recommendation 1.</li> </ul>
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"> <li>encourage military personnel secondments and exchanges with civilian police authorities;</li> <li>undertake a reserve recruitment drive to attract civilian police into the Defence Forces;</li> </ul>	<p>Jun 2006</p> <p>Jun 2007</p> <p>Oct 2007</p>	<p><b>INCORPORATED IN RECOMMENDATION 6</b></p> <ul style="list-style-type: none"> <li>The outcomes of the Audit of ADF Investigative Capability and its implementation plan have overtaken Ernst and Young (Recommendation 6). As such, the planned completion dates have been revised to reflect the Audit report.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Secondments have been undertaken with the Victorian and NSW homicide squads, NSW Forensic Officers Branch and the QLD Police Criminal Investigations Branch. Now that the ADF Investigative Service has been established, stronger links between Service police and civilian police are being put in place to allow for a more comprehensive program of secondments and training.</li> <li>The workforce requirements for Service Police investigators have been updated to inform recruiting targets, and work is underway to inform the best recruiting methods for each of the Services.</li> </ul>

**COMMITTEE-IN-CONFIDENCE**



**COMMITTEE-IN-CONFIDENCE**

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
5 contd	<ul style="list-style-type: none"> <li>increase participation in civilian investigative training courses; and</li> <li>design clearer career paths and development goals for military police personnel</li> </ul>	<p>Jun 2007</p> <p>Oct 2007</p>	<ul style="list-style-type: none"> <li>Service police personnel attend a range of civilian investigative training courses in areas such as the management of serious crimes, sexual assault, forensic documents, DNA recovery, defensive tactics, and fingerprint and ballistics procedures.</li> <li>With the implementation of the ADF Investigative Service (some 140 personnel under the central oversight of the PM ADF), the career paths and development goals for Service police can now be clarified.</li> </ul>
6	<p>The Government agreed:</p> <ul style="list-style-type: none"> <li>To conduct a Tri-Service audit of Service police to establish the best means for developing investigative capability.</li> <li>That Defence would establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations.</li> <li>The [investigative] unit would be headed by a new ADF Provost Marshal outside single Service chains of command.</li> <li>The unit would deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Service police may be supplemented by civilian investigators.</li> </ul>	<p>Jun 2006</p> <p>Dec 2006</p> <p>Jun 2006</p> <p>Oct 2007</p>	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>The Audit Report into the ADF's Investigative Capability and the Defence action plan to implement the agreed recommendations were released by the CDF on 4 Dec 06.</li> <li>The initial joint ADF investigative capability was formed with the posting of six Service police investigators (including the PM ADF) to complement the Office of the PM ADF. The PM ADF has now assumed control (vide CDF Directive dated 21 Mar 07) of some 140 qualified investigators and direct support personnel, giving him central oversight and control of ADF investigations.</li> <li>The initial Provost Marshal ADF (Colonel Tim Grutzner, AM) was appointed on 14 May 06 and heads up the new ADF Investigative Service.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The ongoing requirement for secondment of an AFP officer has been informed by the outcome of the audit. Former Deputy Commissioner (AFP), Mr Adrien Whiddett is being re-engaged by Defence. The requirement to supplement service police with civilian investigative skills in particular circumstances, is being determined in consultation with the AFP.</li> </ul>
10	<p>The Government agreed to legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions (DMP).</p>	<p>Jun 2006</p>	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>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.</li> </ul>

**COMMITTEE-IN-CONFIDENCE**

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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
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><b>COMPLETED (NOV 06)</b></p> <ul style="list-style-type: none"> <li>Eleven additional positions, required to implement the enhancements to the military justice system, have been established, albeit not yet filled.</li> <li>Additional resources such as IT and accommodation have been reviewed and the DMP will relocate to permanent accommodation in Canberra in mid 2007.</li> <li>Resource requirements will be further reviewed as part of the review of the system at the end of the two year implementation period (as per Recommendation 35).</li> </ul>
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.	Jun 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Two new training positions have been established in the ODMP to facilitate the training of newly assigned officers.</li> <li>The Commonwealth DPP is also providing assistance in the training of newly assigned officers to the ODMP.</li> </ul>
13	The Government noted that the ODMP has been actively engaged in increasing its profile over the last 18 months, and agreed that action should continue to raise the awareness and profile of the Office.	Jun 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The DMP has commenced a range of briefs to the Services and various command and staff courses to raise the awareness of the ODMP.</li> <li>A web page has also been developed to further assist in raising the awareness and profile of the DMP.</li> </ul>
14	The Government agreed to the statutory appointment of DMP at one star rank	Dec 2005	<p><b>COMPLETED (MAR 06)</b></p> <ul style="list-style-type: none"> <li>DMP has been established at one star rank and the position has been filled.</li> </ul>
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	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>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 (RM)).</i></li> </ul>

**COMMITTEE-IN-CONFIDENCE**



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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
16	<p>The Government agreed in-principle that:</p> <ul style="list-style-type: none"> <li>• legal officers in the Office of the DMP would be required to hold Practising Certificates, and other permanent legal officers would be encouraged to take them out; and that</li> <li>• the matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).</li> </ul>	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• All legal officers in the Office of the DMP now hold Practising Certificates.</li> <li>• Permanent legal officers are being encouraged to take out practicing certificates.</li> <li>• An amendment to the Defence Act is being developed to address the matter of legal officer's independence and professional ethical stands. It is planned to include this amendment in legislation expected to be introduced into Parliament in 2007.</li> </ul>
17	<p>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.</p>	Jun 2006	<p><b>COMPLETED (APR 06)</b></p> <ul style="list-style-type: none"> <li>• The position of Director of Defence Counsel Services has been established and filled. ADF members requiring Defence Counsel Services have the right to select their legal representatives from the Defence Counsel Services panel. When they select an ADF legal officer (permanent or reserve), their services are provided at Commonwealth expense. Defence counsel discharge their duties at trial or during Inquiries in accordance with their professional duties to the service member who is their client, and their independence is legislated in the <i>Defence Force Discipline Act 1982</i> (section 193(2)) and regulation 61(2) of the <i>Defence (Inquiry) Regulations 1985</i>.</li> </ul>
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><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>• Legislation (the <i>Defence Legislation Amendment Act 2006</i>) to create the AMC was passed by Parliament on 5 Dec 06.</li> <li>• The Bill received Royal Assent on 11 Dec 06.</li> <li>• Procedural and administrative matters are now being progressed to allow the AMC to commence in Oct 07, under Recommendation 21.</li> </ul>
21	<p>The Government:</p> <ul style="list-style-type: none"> <li>• 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</li> </ul>	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• The establishment of a panel of military judges, within the Australian Military Court is being progressed. A Commonwealth Remuneration determination was made on 13 Feb 07.</li> </ul>

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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
21 contd	<ul style="list-style-type: none"> <li>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.</li> </ul>		<ul style="list-style-type: none"> <li>The selection process for the Chief Military Judge is underway. Applications for the positions of permanent military judges have been sought in advertisement.</li> </ul>
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><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The form of the right to elect trial from summary procedures to the Australian Military Court will be included in legislation to revise summary procedures. Drafting instructions have been received by the Office of Parliamentary Counsel and the Bill has category A status for the 2007 Winter sitting of Parliament.</li> </ul>
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><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>Amendment to the right of appeal to the DFDAT was included in the Bill to create the Australian Military Court.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The right of appeal from summary authorities to a military judge of the Australian Military Court will be included in legislation to revise summary procedures (as per Recommendation 22).</li> </ul>
24	<p>The Government:</p> <ul style="list-style-type: none"> <li>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.</li> <li>Supported annual reporting of the operation of the scheme against documented performance standards.</li> </ul>	Dec 2005  Jun 2006	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>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>)</li> </ul>
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><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>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>)</li> </ul>

**COMMITTEE-IN-CONFIDENCE**



**COMMITTEE-IN-CONFIDENCE**

<b>Committee Recommendations</b>	<b>Government Response/Action Directed by Government</b>	<b>Planned Completion</b>	<b>Status</b>
26	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.	Jun 2006	<b>COMPLETED (APR 06)</b> <ul style="list-style-type: none"> <li>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.</li> </ul>
27	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.	Jun 2006	<b>COMPLETED (APR 06)</b> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
28	<p>The Government agreed in part:</p> <ul style="list-style-type: none"> <li>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.</li> </ul> <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"> <li>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.</li> </ul>	Jun 2006  Jun 2006	<b>COMPLETED (APR 06)</b> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
29	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. The Government <b>proposed</b> 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.	Oct 2007	<b>UNDERWAY</b> <ul style="list-style-type: none"> <li>The Defence Fairness and Resolution Branch 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.</li> </ul>

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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
29 contd			<ul style="list-style-type: none"> <li>The final draft of Defence Instruction (G) Personnel 34-1 ROG Tri-Services Procedures is being prepared for endorsement within Defence.</li> <li>Amendments to the <i>Defence (Inquiry) Regulations 1985</i> are currently being prepared for drafting by the Office of Legislative Drafting.</li> <li>The IGADF has been established as a statutory position, remuneration has been determined, &amp; Mr Earley appointed to the position. IGADF provides CDF with internal audit &amp; review of the military justice system independent of the ordinary chain of command. This includes both Defence Force discipline and the Defence Inquiries system.</li> </ul>
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	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>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></li> </ul>
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	<p><b>COMPLETED (APR 06)</b></p> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
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	<p><b>COMPLETED (APR06)</b></p> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
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"> <li>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 &amp; would have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish.</li> </ul>	Dec 2006	<p><b>COMPLETED (MAR 06)</b></p> <ul style="list-style-type: none"> <li>Amendments to the Defence (Inquiry) Regulations 1985 (D(I)R) 33 were completed as at 31 Mar 06.</li> </ul>

**COMMITTEE-IN-CONFIDENCE**



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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
33 contd	<ul style="list-style-type: none"> <li>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.</li> <li>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.</li> </ul>	Dec 2006	
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"> <li>propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry.</li> <li>CDF should appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in Service.</li> <li>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.</li> <li>This form of inquiry would be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.</li> <li>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.</li> <li>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.</li> <li>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.</li> </ul>	<p>Dec 2006</p> <p>Oct 2007</p>	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>Legislation (the <i>Defence Legislation Amendment Bill 2006</i>) was passed by Parliament on 5 Dec 06 to facilitate the creation of a CDF Commission of Inquiry (CDF COI). The provisions for the CDF COI commenced on Royal Assent on 11 Dec 06.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Amendments to the <i>Defence (Inquiry) Regulations 1985</i> are currently being developed to support the conduct of a CDF COI, and are expected to be considered by the Federal Executive Council in April 07.</li> <li>In the interim, Boards of Inquiry were appointed under the amended (31 Mar 06) provisions of the <i>Defence (Inquiry) Regulations 1985</i>. The amended Regulations allow a civilian to preside at a Board of Inquiry, to overcome perceptions of bias in the administrative inquiry process.</li> <li>An initial panel of suitably qualified persons with judicial experience to preside over/sit on a CDF COI has been established. The panel consists of six persons, and is expected to increase this year.</li> <li>To date, three Boards of Inquiry have been run under interim arrangements, with a civilian president from this panel.</li> <li>A CDF COI coordination and support cell has been established within the Office of the CDF.</li> </ul>

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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
34 contd			<ul style="list-style-type: none"> <li>The ADF is also consulting with State and Territory Coroners to establish protocols regarding the review of outcomes of ADF inquires into deaths of personnel. Two State Coroners have already signed protocols, and one has agreed to establish liaison arrangements.</li> </ul>
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><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>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. This independent review will be conducted in an open and transparent manner, and include a more detailed review of the DFDA.</li> </ul> <p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>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 Learning Culture Inquiry report into ADF Schools and Training Establishments and Defence's action plan for implementing the agreed recommendations were released by the CDF on 6 Dec 06. Implementation is being reported separately.</li> </ul>
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><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>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 incorporated into a revised Defence Instruction (General) 35-6, which deals with Formal Warnings and Censures in the ADF.</li> <li>An internal review of offences and punishments has been conducted as part of the process for enhancing summary procedures, and is now being progressed under Recommendations 22 and 23.</li> <li>Offences and punishments will also be further reviewed as part of the review of the effectiveness of the overhauled military justice system to be conducted in accordance with Recommendation 35.</li> </ul>

**COMMITTEE-IN-CONFIDENCE**



**COMMITTEE-IN-CONFIDENCE**

<b>Committee Recommendations</b>	<b>Government Response/Action Directed by Government</b>	<b>Planned Completion</b>	<b>Status</b>
37	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. Defence would also amend the Defence (Inquiry) Regulations to provide for an annual report on the operation of the Defence (Inquiry) Regulations, 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.	Jun 2006  Jun 2006	<p><b>COMPLETED (JUN 06)</b></p> <ul style="list-style-type: none"> <li>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.</li> <li>The Defence (Inquiry) Regulations have been amended to provide for an annual report on the operation of the Regulations. <i>(Amendments were approved by the Federal Executive Council on 22 Jun 06.)</i></li> <li>Initial reports to the Senate FAD&amp;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.</li> </ul>
38	The Government agreed to commission an expert to examine whether the human rights of children are being respected.	Jun 2006	<p><b>COMPLETED (JUN 06)</b></p> <ul style="list-style-type: none"> <li>Jenni Whelan, a consultant &amp; 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.</li> </ul>
39	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.	Jun 2006	<p><b>COMPLETED (JUN 06)</b></p> <ul style="list-style-type: none"> <li>The ADF Cadet Forces Regulations 1977 have been amended. <i>(Amendments were approved by the Federal Executive Council on 22 Jun 06.)</i></li> </ul>
40	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.	Jun 2006	<p><b>COMPLETED (JUN 06)</b></p> <ul style="list-style-type: none"> <li>Further administrative positions across all three cadet organisations have been established and filled.</li> </ul>

**COMMITTEE-IN-CONFIDENCE**



## **Appendix 2**

**Department of Defence:  
Answers to questions taken on notice – 26 February 2007**





**Australian Government**  
**Department of Defence**

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24 May 2007

Dr Kathleen Dermody  
Secretary  
Senate Standing Committee on  
Foreign Affairs, Defence and Trade  
Parliament House  
CANBERRA ACT 2600

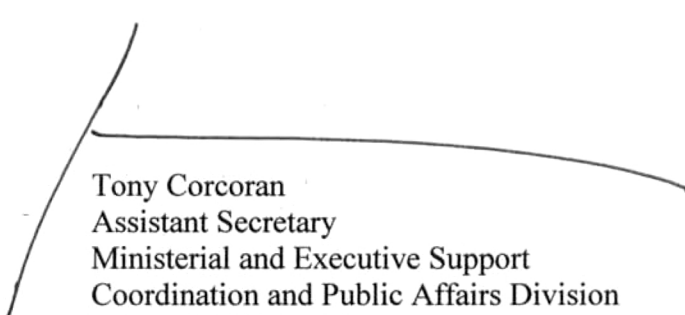
Dear Dr Dermody

I am pleased to enclose responses to questions on notice from the 26 February 2007 hearing into the Implementation of Reforms to Australia's Military Justice System. These responses have been cleared by the Minister Assisting the Minister for Defence.

Also enclosed is the internal Implementation Plan for the Defence Investigative Capability Audit which sets out how Defence will give effect to the 99 agreed recommendations in the Audit Report.

If you have any questions or concerns, please contact Mr Alex Tewes, Director Statutory Reporting and Accountability, on (02) 6265 6277.

Yours sincerely



Tony Corcoran  
Assistant Secretary  
Ministerial and Executive Support  
Coordination and Public Affairs Division  
Tel: (02) 6265 4414

# Senate Standing Committee on Foreign Affairs, Defence and Trade

## Review of Reforms to Australia's Military Justice System

### Hearing 26 February 2007 - Responses to Questions on Notice

#### Question 1

Senator Ferguson

Hansard 26 February, p. 14

#### Retention rates

The Podger report into the *Learning Culture at ADF Training Establishments* found that 3600 other ranked personnel were permanently enlisted in the ADF, with around 900 leaving during their training. Additionally, 650 officers are recruited each year, with around 200 leaving during their training.

- a) Are these figures accurate?
- b) Who is made aware of the reasons for personnel leaving?
- c) Is the loss rate of personnel leaving during training higher than previously?

#### RESPONSE

- a) Yes.
- b) A range of senior Defence staff in leadership positions. This includes senior commanders across the Services, commanders in training organisations, personnel managers and staff.
- c) The current separation rates are consistent with Defence's expectations..

## Question 2

### Senator Hutchins

Hansard 26 February, pp. 14-15, 17, 19

#### Assistance for trainees

The Podger report into the *Learning Culture at ADF Training Establishments* found that, while 85 per cent of trainees reported that assistance was available to trainees who fall behind, in one establishment only 48 per cent agreed that such assistance was available.

- a) Can you provide information on this training establishment?
- b) What factors contributed to such a significant difference across establishments?
- c) What are you doing to address these factors?

#### RESPONSE

- a) The training establishment is HMAS *Watson*, located at Sydney's South Head. HMAS *Watson* is Navy's establishment for surface warfare training.
- b) The Inquiry Team noted that factors such as a high staff-to-trainee ratio, more individual coaching and mentoring and good use of modern technologies such as simulators were generally appreciated greatly by trainees. However, the Team did not correlate these indicators with responses to the survey question, or identify other factors that may have contributed to, in this case, an above average negative response rate. There is no obvious correlation between the response in this case and the particular characteristics of the training establishment.

Factors that could have contributed to such a significant difference include the small sample size of just 29 participants, as well as the potential for survey respondents to make different interpretations of the questions, which could further skew the results.

- c) As noted at b), the survey result at HMAS *Watson* may have occurred due to the small sample size. The 29 surveyed participants represent less than 5 percent of the 628 personnel who received training at HMAS *Watson* during 2006. Accordingly, the result may not be representative.

The Defence response to the Inquiry Report commits to implementing a range of enhancements to the ADF learning culture which can be expected to improve the training environment. However, it would be premature to initiate widespread policy change in respect of this isolated survey response without more rigorous quantitative data gathering and analysis to better estimate the incidence rate of the issues of concern.

### Question 3

**Senator Payne**

**Hansard 26 February, p. 18**

#### **Provost Marshall investigators**

- a) Could you provide information regarding the qualifications of the six investigators already supporting the Provost Marshall, and the four investigators who are forward deployed on operations?
- b) Can you provide information on the specific aspects of their training that will raise them to the required standard?

#### **RESPONSE**

a) and b)

Currently six investigators (including the Provost Marshall ADF [PM ADF]) are assigned to the office of the PM ADF and six investigators are forward deployed overseas on operations – Iraq (2), Afghanistan (1), Timor Leste (2) and Solomon Islands (1).

All of these personnel have completed the Investigator Qualification Course (IQC), a 14-week course conducted at the Defence Police Training Centre.

The IQC prepares Service Police to investigate serious and complex criminal matters. The course is aligned with Federal, State and Territory Police investigator training courses and programs and successful completion is recognised with the award of the Advanced Diploma of Public Safety (Police Investigation), accredited under the National Quality Training Framework.

In addition to the formal IQC qualification, most of the investigators currently directly supporting the PM ADF or forward deployed on operations have undertaken additional policing training and education from the list of courses below:

- ADF Scenes of Crime Officer Course (forensic procedures);
- Master's of Public Policy and Administration – Australian Graduate School of Policing, Charles Sturt University;
- Bachelor of Policing - Australian Graduate School of Policing, Charles Sturt University;
- Victoria Police Detective Training School;
- AFP Management of Serious Crime Course;
- AFP and NSW Police Sexual Assault courses;
- AFP Forensic Document Examiners Course; and
- AFP DNA Recovery Workshop.

In accordance with the December 2006 Defence response to the Audit of ADF Investigative Capability, Defence will review the training and employment of Service Police investigators, to ensure they meet contemporary standards. Included in this review will be consideration of opportunities to enhance secondments and exchanges with civilian policing authorities in order to increase/enhance the capacity of Service Police to perform their investigative function as recommended by the 2005 Senate Committee report.



In the interim, some new courses have already commenced which will significantly enhance the professional standards of Service Police investigators. 12 more investigators will complete the Defence Forensic Procedures Course on 24 March 2007. This course is taught by the Australian Federal Police at the Defence Police Training Centre.

**Question 4**

**Senator Bishop**

**Hansard 26 February, p. 26**

**Trooper Lawrence – Question on Notice**

Who cleared the response to Question on Notice 2424?

**RESPONSE**

The Minister for Defence.

## **Question 5**

**Senator Bishop**

**Hansard 26 February, p. 26**

**Trooper Lawrence – inquiry reports**

Were any of the three inquiry reports subject to legal review internally by Army or the ADF prior to them being signed off?

### **RESPONSE**

Two of the three inquiry reports were subject to legal review prior to being released by the Appointing Authority.

The first inquiry report was legally reviewed in June 2005. The review was completed by Captain Richard Hawke, RAN - Director Administrative Law, Defence Legal.

Legal review of the second inquiry was undertaken retrospectively. At the conclusion of the second inquiry, preliminary legal opinion was obtained by the acting Training Command – Army Legal Officer, Major Cumines, but formal legal review did not occur.

Complete legal review was completed in March 2006, by the Training Command – Army Legal Officer, Lieutenant Colonel Worswick. A Decision and Implementation Directive has been issued.

The third inquiry was legally reviewed in February 2006 by Lieutenant Colonel Worswick.

## Question 6

**Senator Hutchins**

**Hansard 26 February, p. 29**

### **Processes following the death of ADF personnel (referencing Trooper Lawrence)**

- a) Could you explain by what authority the ADF can refuse an inquest into the death of ADF personnel?
- b) Could you advise about the circumstances under which a coroner is prevented from inquiring into the sudden, accidental or unexplained death of an ADF member?
- c) Are there circumstances under which the ADF can refuse to assist the coroner inquiring into the death of an ADF member?
- d) Could you provide an update on the progress between the states and territories in reaching an agreement on a memorandum of understanding governing the investigation of sudden deaths of ADF members? What, if any, are the main sticking points?

### **RESPONSE**

a) and b)

Under Regulation 27 of the Defence Force Regulations 1952, it is possible for a commissioned officer to issue a direction concerning the disposal of the body of an ADF member who dies while in service. Under Regulation 28 of these Regulations, such a direction has the effect of overturning the jurisdiction of the Coroner. The power to issue such a direction is subject to the direction of the Minister.

On 5 May 2004, the then-Minister Assisting the Minister for Defence, the Hon Mal Brough MP, signed a Ministerial Direction that limited the circumstances where a commissioned officer could consider issuing a direction to where there is armed conflict within Australia, or where the death occurs outside Australia, including on a ship outside Australian coastal waters. The direction is required to be made in writing and signed by the officer concerned. The direction may only be issued after the officer has considered whether it is possible or appropriate to comply with applicable State or Territory law relating to Coronial inquiries.

It is important to note that it is a discretionary action to issue a direction, and that extant Defence policy places a further restriction on the exercise of this discretion requiring that a commissioned officer, in considering the issue of a direction, must consult, and where appropriate seek approval from, higher authority, such as the Chief of Service or Chief Joint Operations Command (the Vice Chief of the Defence Force).

- c) The ADF has indicated to all coroners that it generally agrees to assist with their investigations, and comply with all reasonable requests for information and access to witnesses. In addition, the ADF has offered to provide assistance of a technical nature to assist in investigations conducted by a coroner. The provision of assistance by the ADF is subject to the need to protect national (including operational) security.

- d) At a meeting of the coroners held on 15 November 2005, the majority of coroners decided that a memorandum of understanding between them and Defence might be perceived as compromising their independence. It was resolved that coroners would separately write to Defence, setting out mutual procedures within a letter of protocol. Recently, a letter of protocol was signed between Defence and the Victorian State Coroner and the Chief Magistrate of Tasmania. In addition, the Queensland State Coroner has also provided Defence with a draft protocol which is anticipated to be signed in the near future. A meeting to discuss a protocol has been held with the Australian Capital Territory Coroner and it is expected that the ACT will provide Defence with a response in the near future.

On 12 November 2006, the Chief of the Defence Force wrote to the remaining State and Territory Coroners inviting them to provide similar protocols to those already received. The South Australian State Coroner has declined to provide a protocol to Defence. However, contact details for an ADF Liaison Officer have been provided to the South Australian Coroner. Defence anticipates that the remaining Coroners will provide protocols applicable to their jurisdictions.

## Question W1

### Service police – investigative skills

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. Paragraph 4 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.
- a) What is being done to recruit high calibre investigators into the Service Police?
- b) 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?
- c) Could you comment on workload on Service Police and what is being done to help ease the problem?
- d) Could you inform the Committee about Service Police and their information technology support system?

## RESPONSE

- a) The Audit of ADF Investigative Capability recommended that (Recommendation 6.2), *“...whilst also taking action to improve the recruitment and retention of investigators, the thrust of reform be on improving the effectiveness and efficiency of the existing workforce”*.

Defence is currently determining the [workforce] requirement for Service Police as an essential starting point in developing a recruiting strategy and a number of ‘retention’ issues are being addressed in implementing the Audit Report, including improved training and professional development, secondments and exchanges with civilian authorities and improved conditions of service.

As recommended by the Audit Report, the focus is on improving the effectiveness and efficiency of the existing workforce. Improvements in these areas will contribute positively attracting high calibre investigators and retaining them in the Service Police.

- b) There has been no increase in Service Police resources or support staff since the Audit Report was finalised. However:
- Under the new ADF investigative framework, Investigator Qualification Course qualified investigators and direct support personnel have been centralised in the ADF Investigative Service (ADFIS). This new arrangement will allow the Provost Marshal ADF to better apportion their resources in accordance with the Audit Report’s recommendation.

- The Services' requirements for additional resources has been examined and a new policy proposal to supplement the Services' investigative capability is being developed.
  - Additionally, the Services will shortly commence an internal review of their overall Service Police functions and roles and general duties policing requirements, and the ADFIS workforce will be reviewed after 12 months of operation in order to rebalance Service Police effort to effectively conduct policing across the ADF.
- c) With the establishment of the ADFIS, the investigative assets will be centrally managed to better address case loads across the Services, Australia and other areas of operation. The implementation of the Audit Report's recommendations, which involve improvements to investigator practices, training, equipment and technology, can also be expected to result in a productivity benefit and a balancing of investigator workloads.
- d) The existing Defence Policing and Security Management System (DPSMS) is undergoing a project upgrade and is to become a 'live' case management system which will provide for the management of all Defence Investigative Authority (DIA) (Service Police, Defence Security Agency, Inspector General Division) inquiries on a common system, facilitating enhanced information sharing and the rapid production of statistics, reports and trends. Importantly, the revised DPSMS will allow the Service Police to implement 'intelligence-led policing'. The response to Question W8 provides more detail on the implementation of the DPSMS.

## **Question W2**

### **Crime scene management**

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?

### **RESPONSE**

Yes. The progress and effectiveness of the enhancements to the ADF's investigative capability will be reviewed:

- as part of the broader independent review of the enhancements to the military justice system at the conclusion of the two year implementation period (as reflected in the Government response to Recommendation 35 of the 2005 Senate Committee report); and
- the establishment of the ADF Investigative Service will be reviewed after the first 12 months of operation.

Incident scene initial action and preservation training ('REACT') has been included as an element of all force preparation training for ADF personnel deploying on operations and will be included in relevant single-Service pre-command and career training courses.



### **Question W3**

#### **Service police**

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?

#### **RESPONSE**

It is the intention for Service Police to have specialist investigative skills.

Selected ADF investigators are currently trained as Scenes of Crime Officers, qualified to secure incident scenes, detect various types of evidence therein and collect and preserve that evidence for analysis. Defence currently does not have a capability for some specialist forensic skills, such as ballistic analysis, and in these situations, civilian police are requested to assist in the investigative process under longstanding arrangements. The development of such forensic capabilities was previously contraindicated given the relatively small size of the individual Services' investigative capabilities and the relative infrequency of the requirement for specialist forensic support.

With the establishment of the ADF Investigative Service as the single ADF investigative agency for complex and serious matters, it is appropriate to review the forensic capabilities required to support ADF investigations. In accordance with the Defence response to the Audit of ADF Investigative Capability and in order to increase/enhance the capacity of Service police to perform their investigative function as recommended by the 2005 Senate Committee report, Defence will:

- review the training and employment of Service Police investigators, including the requirement for specialist forensic training, and opportunities to enhance secondments and exchanges with civilian policing authorities; and
- build on the existing cooperation between the ADF and civilian policing authorities by entering into formal agreements, principally with the AFP, for the provision of forensic services, that remain beyond the capacity of the Service Police.

## **Question W4**

### **Cooperation and liaison with civilian police**

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.'

Could you provide a further update?

### **RESPONSE**

The Constitution (and the High Court opinion on these provisions) and also the *Defence Force Discipline Act 1982* itself require that certain alleged offences be referred to the relevant civilian authorities for prosecution and/or investigation rather than being dealt with by the ADF. Based on these legal requirements, the ADF has in place policy which expands on when this is to occur, and prescribes procedures for how this is to occur. In accordance with the Government response to Recommendation 4 of the 2005 Senate Committee report, Defence is working to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This includes the process/procedures for referring matters and the information technology tools that will provide better visibility of the progress and status of matters once referred. Initial discussions have been held with the AFP on this matter.

## **Question W5**

### **Defence Investigatory Authorities**

The recently-conducted audit of the ADF's investigative capability noted the lack of cooperation and coordination between the Service Police and their civil counterparts as a significant impediment to the Service Police carrying out their duties (eg obtaining search warrants). Paragraph 4.11 recommended Defence intensify its efforts to have Defence Investigatory Authorities recognised as Commonwealth Law Enforcement Agencies.

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?

### **RESPONSE**

Section 85ZL of the *Crimes Act 1914* defines a “law enforcement agency” as including: the Australian Federal Police; the police force of a State or Territory; the Australian Customs Service; and a number of other agencies and individuals.

The definition does not include ADF Service Police. The Act would require amendment to empower Defence Investigatory Authorities as Commonwealth Law Enforcement Agencies.

Whilst the Audit Report did note in the text that Defence intensify its efforts in this regard, it did not make a specific recommendation to that effect. Indeed, the Report noted that the ‘...situation is likely to be remedied, at least in part, by developing closer and more formal relationships with the necessary external organisations’.

This is the current priority for implementation effort and useful discussions have already been held with the AFP in this regard.

## Question W6

### Cooperation with civilian police

In response to recommendation 7.23 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'.

- a) Has the number of Service Police attending civilian investigative training courses increased? Have you any details?
- b) 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?
- c) 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?

### RESPONSE

- a) Currently ADF Service Police undertake a wide range of courses delivered by civilian Policing authorities, including:
  - AFP Management of Serious Crime Course
  - AFP and NSW Police Close Personal Protection Courses
  - AFP and NSW Police Sexual Assault Courses
  - AFP Forensic Document Examiners Course
  - AFP DNA Recovery Workshop
  - Victoria Police Detective Training Course
  - Victoria Police Defensive Tactics Course
  - NSW Police Scenes of Crime Operators Course
  - NSW Police Fingerprint Course
  - NSW Police Ballistic Officers Course
  - QLD Police Strategic Management and Leadership
  - QLD Police Economic Crime Course

In the past, attendance on these courses has been arranged by the individual Services. Now that it is established, the ADF Investigative Service will centrally coordinate the attendance of ADF investigators on relevant external training courses, and the numbers of personnel attending courses will increase. As an example, there have already been 12 investigators attend the 2007 AFP instructed forensic procedures course, a 100 percent increase from 2006.

- b) No. Formal arrangements are not in place yet. As noted in the response to Question W3 and in accordance with the Defence response to Recommendation 5.9 of the Audit Report, Defence is working to formalise arrangements with the AFP, principally, and also State and Territory police, on the attendance of Service Police on relevant training courses. This is the current priority for implementation effort and useful discussions have already been held with the AFP in this regard.

- c) No. As noted in the response to Question W3, Defence will build on the existing cooperation between the ADF and civilian policing authorities by entering into formal agreements, principally with the AFP, for the provision of forensic services. Under existing arrangements, civilian forensic services are provided on a case-by-case basis.

## **Question W7**

### **Cooperation with civilian police**

The Board of Inquiry into the Death of Private Jacob Kovco also noted the need to improve arrangements for cooperation between Service Police and their civilian counterparts.

Paragraph 287 (aa) (i) noted the assistance provided by the New South Wales Police and recommended:

- the establishment of formal protocols with Australian State Police to allow Service 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.
- a) 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?
- b) 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?

### **RESPONSE**

- a) There are no formal arrangements in place at this time. As noted in the response to Question W3 and in accordance with the Defence response to Recommendation 5.9 of the Audit of ADF Investigative Capability Report, Defence will seek to formalise arrangements with the AFP, principally, and also State and Territory police, on the attendance of Service Police on relevant training courses. This is the current priority for implementation effort and useful discussions have already been held with the AFP in this regard.
- b) No. The most appropriate means to provide support to counsel assisting during the scoping of offshore inquiries is currently being examined.

## **Question W8**

### **Defence Policing and Security Management System**

The 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.

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

Could you explain the intent and significance of this upgrade?

### **RESPONSE**

Between 1997 and 2000, DPSMS Stage 1 was developed and implemented in the Defence Investigative Authorities (DIA). It was built by the Information Systems Division and sponsored by the Inspector General. The main goals of the system were to improve:

- visibility of the extent of Service discipline, criminality and security matters;
- the operational effectiveness and efficiency of Defence security and policing operations;
- provide Defence investigators with access to an enhanced and modernised investigation case management system; and
- statutory and ad hoc reporting to Parliament, the Attorney General's Department, the Australian National Audit Office (ANAO), and internal reporting to Defence executives.

Stage 1 is currently used by the DIA. However it is built on obsolescent software (Paradox) that can only provide for a distributed hierarchy of local databases. In other words, it cannot deliver a centralised database capable of being accessed by a large number of geographically-dispersed users in "real time". Stage 1 was always intended to be replaced by a Stage 2 system that would provide this key capability and provide further enhancements.

A contract with Oracle Corporation Australia Pty Ltd (Oracle) was signed on 1 August 2006 for design, development and delivery of the first two releases of the new system. The Oracle project team is currently undertaking system tests the new application with implementation on the Defence Restricted Network planned to occur by the latter part of 2007.

Stage 2 will enable the DIA to collect, share and report on policing and security matters more efficiently and effectively than at present.

The new system is intended to provide Defence with a capability that addresses the requirements of the 2005 Senate Committee report – for a common referral tracking database (Recommendation 4) and addresses relevant recommendations of the December 2006 Defence response to the Audit of ADF Investigative Capability.

## Question W9

### *Defence Force Discipline Act 1982 (DFDA)*

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'. Paragraph 4.8 reported that some described the document as 'outdated and anachronistic' and suggested that it 'does not match modern disciplinary, legal and policing requirements'. In response to recommendation 4.13 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. This response appears to be tame when considering the weight of opinion on the Act.

What is 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?

### **RESPONSE**

The discipline system is continuously reviewed and reformed by Defence.

Changes recently implemented and those under consideration will, when completed, represent a comprehensive revision of the DFDA. Since the commencement of the DFDA, it has been substantially amended, including:

- the establishment of the Discipline Officer scheme for dealing with minor disciplinary infringements (DFDA, Part IXA Special Procedures Relating to Certain Minor Disciplinary Infringements);
- amendments to DFDA Part VI Investigation of Service Offences, including amendments to the requirement to caution persons and access to legal practitioners, tape recording of confessions and admissions and the requirements for medical examination or the taking of a specimen for the purpose of obtaining evidence; and
- the creation of new offences;
- the extension of the limitation period on certain charges from 3 to 5 years; and
- the application of the Criminal Code to the DFDA.

The Senate Foreign Affairs, Defence and Trade References Committee 2005 *Report on the Effectiveness of Australia's Military Justice System* provided a major impetus to Defence to further substantive changes to its wider military justice arrangements, including the discipline system. The changes to the discipline system agreed to by the Government are still being implemented, together with changes resulting from other inquiries or reviews relating to the military justice system that were conducted between 1997 and 2005.

Of note, the following significant changes to the discipline system have been recently implemented:

- the establishment of an impartial and judicially independent permanent military court, the Australian Military Court, to replace individually convened trials by way of Courts Martial and Defence Force magistrates;
- establishment and appointment of the statutory position of Director of Military Prosecutions;



- establishment and appointment of the statutory position of Registrar of Military Justice; and
- establishment of the Director Defence Counsel Services.

Defence is currently attending to the following significant amendments to the discipline system which will:

- extensively simplify the summary hearing process to enhance its expeditious yet fair application by commanders; and
- expand the Discipline Officer scheme to higher ranks.

In 2007, the Inspector-General ADF will conduct an own motion review of Part VI of the DFDA, which provides the statutory powers for the investigation of service offences by investigating officers. The results of the review and any recommendations for reform will be provided to the Chief of the Defence Force.

The results of the annual Defence Attitude Survey, the military justice audits and the focus groups conducted by the Inspector General ADF demonstrate that ADF members are interested in changes to the discipline system that balance the maintenance of effective discipline with the protection of individuals and their rights. Defence has demonstrated a commitment to radical change of the discipline system to better achieve this objective. A full review of the effectiveness of the new discipline system will be conducted at the conclusion of the Government's two-year implementation period as stated in the Government's Response to the 2005 *Report on the Effectiveness of Australia's Military Justice System*.

## Question W10

### DFDA – Defence Attitude Survey

The Defence Attitude Survey of ADF personnel on military justice produced the following responses to the given propositions (*Defence Annual Report 2005-06*, p. 258):

- the DFDA is an effective and efficient tool for the maintenance of discipline: 61 per cent agree, 20 per cent disagree and 19 per cent were uncertain;
- the DFDA is not easy to understand: 25 per cent agreed; 28 per cent disagreed and 47 per cent were uncertain; and
- minor breaches of discipline would be better dealt with by counselling and warning rather than charging under the DFDA: 76 per cent agree, 12 per cent disagree and 12 per cent are uncertain.

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

### RESPONSE

The survey results simply reflect the perceptions of members based upon their personal experience and knowledge of the military justice system. In many cases, a member's knowledge of the military justice system may be quite limited, if there has been little or no first hand experience of the system to draw upon. Therefore, the survey results may not necessarily reflect the facts of a given matter, but merely how it is perceived by an individual.

The survey found a majority of ADF members agreed that the Defence Force Discipline Act was an effective and efficient tool for the maintenance of discipline.. However, when asked whether they agreed with the proposition that the *Defence Force Discipline Act 1982* (DFDA) was not easy to understand, some 72 per cent of members surveyed either agreed with that proposition or else were uncertain as to whether they agreed or not. A conclusion that may be drawn is that while it might be thought to be an effective tool for the maintenance of discipline, the DFDA is generally not well understood and would benefit from being simplified. Accordingly, 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 the military justice system being implemented following the Committee's inquiry report.

The fact that a large majority of ADF members agree that minor breaches of discipline would better be dealt with by counselling and warning, in other words by recourse to less formal disciplinary procedures, is also useful feedback. This is being addressed by expansion of the Discipline Office Scheme, which is a much simplified and less formal method of dealing with minor disciplinary breaches. It appears to have a high level of acceptance across the ADF.

## Question W11

### Defence Attitude Survey

The Defence Attitude Survey of ADF personnel on military justice produced the following response to the given propositions (*Defence Annual Report 2005-06*, p. 258):

- both genders are treated equally under the military justice system: 39 per cent agree, 26 per cent disagree, 35 per cent uncertain; and
- not all ranks are treated equally under the military justice system: 53 per cent agree, 20 per cent disagree, 27 per cent uncertain.

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

### RESPONSE

Of those surveyed that had a definite opinion about whether genders were treated equally, more than 60 per cent thought that they were. Furthermore, feedback from focus groups interviewed during unit-level military justice audits, indicates that gender inequality in the military justice system is not a particular issue. Therefore, the overall results from surveys about equality of treatment as between genders do not indicate that a significant problem exists.

With regard to unequal treatment based on rank, it is not surprising that a majority of members surveyed thought that various ranks were treated differently under the military justice system. This is because, to some extent, different (not necessarily unequal) treatment is an intrinsic feature of the *Defence Force Discipline Act 1982*. For example, the Discipline Officer Scheme at present only applies to privates and their equivalents, and officer cadets. The punishments to which officers may be subjected are not necessarily the same as those that can be awarded to other ranks. It is more important to determine not whether ranks are treated equally, but whether they are treated fairly. There is no reason to believe that despite the inherent differences in treatment between ranks, that those differences result in unfairness.

## **Question W12**

### **Learning culture - benchmarks**

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?

### **RESPONSE**

Focus group discussions, which included members at all levels of the training continuum and staff, survey data and comparisons with relevant previous Defence Attitude Survey data, provided the baseline for the Inquiry Team's observations.

The Inquiry Report notes (paragraph 6) that “gaining an accurate appreciation of the culture of an organisation requires the use of a number of techniques, many of which are subjective” and (paragraph 7) that “literature suggests that qualitative information is at least as important as quantitative information”. The Report notes (paragraph 7) the elements of the layered approach to assessing the culture of schools and training establishments on which the Inquiry Team based their observations.

## Question W13

### Bullying and harassment

*The Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments 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'.(paragraph 54)

### RESPONSE

The Inquiry Team reported that it found no evidence of an inappropriate culture that supported bullying or harassment, but expressed a view that there was still some way to go before the underlying culture would firmly oppose harassment and bullying.

Furthermore, the Inquiry Team (Mr Andrew Podger, Ms Catherine Harris and Mr Roger Powell) who were consulted in preparing this response) advises,

*The Inquiry Team's findings are 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.*

## Question W14

### Bullying and harassment

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

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

### RESPONSE

The Inquiry Team was also consulted in preparing a response to this question. Accordingly, the Inquiry Team (Mr Andrew Podger, Ms Catherine Harris and Mr Roger Powell) advises,

*The Report refers in various places to the tendency to isolate those who are perceived to be performing poorly or not contributing sufficiently to the team. This can become a form of abuse, particularly if the trainee concerned perceives that his or her peers have collectively taken such a stance, particularly if derogatory terms are used towards the individuals concerned. This is the subject of the Inquiry Team's Recommendations 27 and 30.*

*The Inquiry Team also draws attention to the risks involved in promoting teamwork and close bonding, and its Recommendations 14 and 27 are relevant to managing the risks of both explicit and subtle forms of bullying.*

*These recommendations have been fully accepted by the ADF.*

*The Inquiry Team also 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.*

As indicated in the Defence response to the Learning Culture Inquiry Report, Defence will enhance the preparation of trainers for their roles, particularly in respect of dealing appropriately with trainees, and will include awareness training for new entry trainees that specifically addresses 'inter-personal relationships'.

## **Question W15**

### **Procedures during deployments**

The Board of Inquiry into the death of Private 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?

### **RESPONSE**

The investigation and review into the process by which critical ADF procedures are promulgated before and during ADF deployments is ongoing. Action to fully implement the relevant Board of Inquiry recommendation will be completed, as scheduled, by the end of April 2007.

## **Question W16**

### **Compliance with procedures**

#### **Senator Evans**

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?

#### **RESPONSE**

In response to the Inquiry into the death of Trooper Lawrence, the two following key compliance measures were implemented:

- the introduction of mandatory annual heat illness training for all Army personnel which is to be formally recorded when completed; and
- mandatory heat and humidity assessments to be undertaken prior to and during the conduct of all Army training.

In response to the inquiry into the death of Private Kovco, Army has been tasked to review the conduct of Self Loading Pistol training. This may result in the additional compliance requirements such as:

- amendments to existing qualification skills for use of the Self Loading Pistol; and
- 'buddy system' procedures will be introduced as an integral part of Self Loading Pistol handling drills.

Army has also been tasked to investigate the method and cost of introducing training on the Self Loading Pistol into ADF induction training, which would also potentially impose a significant compliance requirement upon the entire ADF.



**Question W17**  
**ADF mental health**

- a) 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?
- b) Have any concerns been drawn to your attention that question the procedural fairness of the current process?
- c) Are you confident that the current process resulting in the discharge from the Service on mental health grounds is fair and just?
- d) 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?
- e) With regard to privacy issues—who has access to a member's medical records?
- f) Are members entitled to have access to their medical records?
- g) 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?

**RESPONSE**

- a) Procedures for dealing with mental health issues are constantly being reviewed by the Directorate of Mental Health in the Defence Health Services Division. This is carried out as part of the ADF Mental Health Strategy which has the following initiatives:

**Integration and enhancement of ADF mental health services.** Activities under this initiative include:

- Establishment of 22 regional mental health teams within Australia, and two operational mental health teams.
- Liaison with key stakeholders and other organisations on matters of mutual interest, particularly with respect to the liaison with the Department of Veterans' Affairs to maintain continuation of mental health care for ADF members post discharge.
- Enhancement of service delivery through the development of a number of health directives on matters of clinical importance (e.g. PTSD, depression, anxiety disorders and other psychiatric disorders) and the release of Defence policies.
- Development of a coming home readjustment program to assist with sub-clinical problems associated with post-deployment readjustment.
- Sponsorship of research examining pathways to care (barriers and stigma associated with the delivery of mental health support).
- Establishment of an acute mental health on operations management course.

- Development and promulgation of a set of ADF mental health promotion fact sheets; a mental health support website and mental health articles regularly published in single Service newspapers and other Defence media.
- **ADF mental health research and surveillance.** ADF mental health research is focused on care of the member and enhancement of operational capability. A key feature of this initiative has been the establishment of the mental health research, surveillance and advisory group as a body to oversee mental health research projects and monitor mental health within the ADF.

A major project within the initiative is the ADF mental health and wellbeing study. The study aims to provide baseline data on the mental health of the ADF population, and to inform the ADF on the use of mental health services and potential barriers to care.

**Enhanced resilience and well being.** Through collaboration with the Australian Centre for Posttraumatic Mental Health, the strategy will be sponsoring the ADF resilience study designed to examine the course and predictors of psychological resilience (risk and protective factors) over the first three years of service in the ADF. Currently in the planning stage, the study will assist in the design of initiatives to enhance resilience.

The strategy has also facilitated the development of a Wellbeing Forum to promote better communication between key Defence agencies and enhance workforce wellbeing through informed policy.

**ADF critical incident mental health support.** The provision of Critical Incident Mental Health Support (CMS) is considered a fundamental part of the ADF's response to critical incidents and potentially traumatic events. Developed in conjunction with the Australian Centre for Posttraumatic Mental Health, CMS is considered best-practice and offers a framework to mitigate and alleviate possible psychological injuries following a critical incident.

**ADF suicide prevention program.** Reflective of the Australian population, suicide rates within the ADF have declined over recent years, however suicide related behaviour continues to be taken seriously by the ADF. While the data suggests that suicide risk factors among ADF members are the same as in the general community, it is recognised that there are many protective factors that can be influenced by command.

Ongoing suicide awareness briefs are provided to ADF personnel during annual and induction training activities, and more recently, the ADF commenced roll-out of suicide first aid training as a component of *The Keep Your Mates Safe* series (*Keep Your Mates Safe – Suicide*) and Clinical Upskilling for Mental Health Professionals working with clients/patients experiencing a suicidal episode.

**ADF alcohol, tobacco and other drugs service.** The ADF Alcohol, Tobacco and Other Drug Service (ATODS) provides for a major health promotion campaign that links to the National Alcohol Campaign. Awareness presentations are conducted during annual and training induction activities to promote safe drinking behaviour and *Keep Your Mates Safe – Alcohol* is delivered as a first aid-based program to encourage the responsible use of alcohol and provide referral information.

- b) No.
- c) Yes. Defence is committed to ensuring that the men and women of the ADF, and their families, are provided with an exemplary separation service to facilitate their transition to civilian life. Every effort is to be made to ensure that the separation service is as uncomplicated and stress free as possible.

Services such as education assistance and financial awareness can be regarded as through-service benefits for long-term career transition planning. In addition, Defence's transition services are sufficiently flexible to support those personnel who separate at short notice for medical or compassionate reasons. Those who must separate for medical reasons are supported by the ADF Rehabilitation Program.

Defence and DVA established the Transition Management Services in 2002. This incorporates provision of:

- Health Services, including Rehabilitation and Compensation
- Entitlement advice (covering matters such as housing, relocation, pay and leave)
- Administration coordination and assistance
- Education and Career Training and Skilling entitlements

ADF members separating due to medical reasons are provided with the same transition management services as for others, however, their pathway may differ because of a greater interaction with Defence Health Services, and in particular the ADF Rehabilitation Program.

The DVA provided 'Stepping Out Program' aims to increase awareness of exiting ADF members and their partners of appropriate psycho-social skills and behaviours that may assist them in their transition from military to civilian life. The program aims to achieve this through the provision of a comprehensive information and skills enhancement program and reinforces the case coordination principles, for those Members who are in the process of being medically discharged.

The concept of the 'Staying in Touch' program will allow for continued Departmental contact with former ADF personnel. The program will be comprised of an ADF Exit Survey, post separation surveys and seminars in order to improve communication post separation. These surveys will assist with longitudinal studies that both Departments need to undertake.

The aim of the follow-up surveys will be to gain a snapshot of the separated members' post-ADF life and how this has been influenced by support and services provided leading up to separation from the ADF. It could also be an opportunity to:

- gain feedback on the transition process;
- provide preventive health messages;
- promote early intervention strategies, such as free medical reviews at two and five year periods post separation; and
- provide information about changes to support services, new initiatives and benefits.

Issues concerning the health of veterans of past deployments have been difficult to resolve because insufficient data was collected at the time of those deployments. Defence, assisted by DVA, has established a program of post-deployment health surveillance. This program will conduct retrospective studies on East Timor, Bougainville and Solomon Islands veterans. It will also conduct studies on veterans from the current operations in the Middle East.

The Middle East Area of Operations health study, including Iraq and Afghanistan, will be significantly different from the other studies as it will be in part prospective, with participants being followed from time of deployment. Detailed real-time exposure data is critical to the success of this approach.

All the studies are expected to be conducted by the Centre for Military and Veterans' Health. This is a joint venture involving Defence and DVA and a consortium consisting of the University of Queensland, University of Adelaide and Charles Darwin University. The studies are similar to those being conducted by allies such as United States and United Kingdom.

It is anticipated that the studies will inform a continuing, comprehensive health surveillance program for the ADF, concentrating on the health effects of operational deployments.

- d) Extant Defence policy outlines that once a determination of medical employment classification (MEC) status has been made, there are three opportunities to appeal:
- A member may make a representation against a decision of a unit level MEC review.
  - A member may appeal a MEC Review Board (MECRB) determination. This is to be based on compelling new medical or occupational information. It is to be heard by a MECRB, with confirmation of recommendation being sought from the specific delegate.
  - If the member considers the outcome of the appeal unsatisfactory, the member may submit redress, in accordance with extant Defence policy.

A MECRB consists of a range of representative including a senior level officer (Director-General of the relevant Service personnel management agency) ultimately responsible for the determination of the MECRB; a representative from the member's Service career management area; a Joint Health Support Agency representative; a subject matter expert on entitlements; and other members as deemed relevant by the Chair.

The principles under which a MECRB operates are:

- Each case is to be considered individually.
- The final determination in each case rests with the Chair of the MECRB and is a personnel management decision, rather than a medical decision.

- MEC is to be assessed in terms of the member's ability to be employed in their primary occupation when deployed in an operational environment.
  - The MEC is determined according to each member's primary military occupation.
  - The MEC is to be determined from 'first principles', that is, from an assessment of the direct and quantifiable impact of the member's medical condition on deployability in that member's specific circumstances.
  - A member may provide a Member's health statement outlining their understanding and views of the effects of their medical condition on their ability to undertake their military duties and any comments they may wish to make on their medical and administrative management.
  - A workplace disability report outlining the functional effects of any disability in the workplace and on deployment is required. This includes whether the member is working full or part time, the type of duty currently performed and whether the member is capable of performing all aspects of their primary and deployed role.
- e) Health information is collected by a Defence health practitioner or health facility personnel to manage, diagnose and treat an individual's health on an ongoing basis and to provide documentary evidence of the preparedness of an individual. It is also collected for the purposes of health research subject to ethics approval from the Australian Defence Human Research Ethics Committee, and when de-identified, for operational surveillance and for clinical quality improvement activities. Access to a member's medical records is outlined in extant Defence policy
- f) Yes.
- g) Outside organisations can access a member's medical record only in the following circumstances:
- consent for disclosure has been given;
  - disclosure is reasonably believed necessary to lessen or prevent a serious and imminent threat to an individual's life, health or safety, or a serious threat to public health or public safety;
  - the disclosure is required or authorised by law;
  - where the Defence health practitioner has reason to suspect unlawful activities;
  - where the information concerns a patient incapable of giving consent and is disclosed to a person legally responsible for the patient;
  - where the use or disclosure is necessary for the compilation of statistics for public health or safety reasons or for research approved by the Australian Defence Human Research Ethics Committee;
  - to an investigating officer appointed pursuant to regulation 74A of the Defence Inquiry Regulations 1985; or
  - as authorised or required by law in response to a formal complaint to which the health information may reasonably be considered relevant.

**SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS,  
DEFENCE AND TRADE**

**REVIEW OF REFORMS TO AUSTRALIA'S MILITARY JUSTICE SYSTEM**

**REQUEST FOR SOME INDICATION OF THE ELEMENTS OF THE  
IMPLEMENTATION PLAN FOR THE AGREED RECOMMENDATIONS OF THE  
DEFENCE INVESTIGATIVE CAPABILITY AUDIT**

An internal Implementation Plan for the Defence Investigative Capability Audit sets out how Defence will give effect to the 99 agreed recommendations in the Audit Report. This working document identifies against each recommendation: indicative timelines for completion, methods to promote change, initial resources required, the Defence Groups/Services with implementation responsibilities, and measures of success (for implementation).

Where the Defence Investigative Capability Audit implementation action correlates with the overarching military justice implementation actions, the intention is to complete implementation within the two year period for the Government response to the 2005 Senate Report. These include establishing a joint ADF investigative capability, establishing a Provost Marshal ADF, providing the Office of the DMP with sufficient numbers of qualified and experienced staff, seconding a senior AFP officer to mentor the ADF Investigative Service (ADFIS), and developing common professional standards through improved and consistent training (including training and secondments with civilian police).

Other separate recommendations are planned to be at least commenced by mid 2008, noting that some of them will be ongoing over the five year period the Defence Investigative Capability Audit Report indicated will be required to achieve effective reforms.

Action is already completed or underway in respect of a number of the Report's recommendations, in particular, the ADFIS has been established, a senior former AFP officer has been seconded to mentor and oversight implementation, a number of foundation policy and procedural documents are under development, additional training has commenced with civilian police, and other training and operational support is being arranged in consultation with civilian police.

A range of measures have been incorporated in the implementation plan to monitor/measure progress. These include specific milestone activity such as the successful establishment of particular capabilities – including the ADFIS, promulgation of policy and procedures, promulgation of an ADF policing plan developed around service police functions and roles, and the formalisation of relationships with civilian authorities.

In addition, the seconded AFP officer will provide a more qualitative assessment of implementation progress; the establishment of the ADFIS will be reviewed after twelve months of operation; and relevant performance data on the operation of the ADF investigative capability will now be collated. This data will be used as the benchmark for measuring progress in achieving effective reform over the next five years.

The effectiveness of the enhancements to the ADF's investigative capability will also be addressed as part of the broader independent review of the enhancements to the military justice system at the conclusion of the two year implementation period (as reflected in the Government response to the 2005 Senate Committee report). Additionally, Defence will follow up the audit of ADF investigative capability with another similar comprehensive and independent review in three years time, using the recent audit as a benchmark, as recommended by the Committee in its second progress report, tabled on 29 March 2007.

## **Appendix 3**

### **Recommendations taken from the Commonwealth Ombudsman's report Australian Defence Force: Management of Complaints about Unacceptable Behaviour, June 2007**

#### **Recommendation 1**

Defence promote awareness of the Whistleblower scheme by including a cross reference to the scheme in the Instruction.

#### **Recommendation 2**

Defence review training for management of unacceptable behaviour complaints to maintain freshness and effectiveness. For example, Defence may consider changing and rotating case studies used for training courses, regularly developing and providing new case study exercises for distribution to units and equity advisers, and promoting awareness of different issues through articles in service newsletters and newspapers.

#### **Recommendation 3**

Defence consider strategies to ensure that all members have ready access to a skilled equity adviser, outside the chain of command if necessary. One strategy may be the use of external contractors.

#### **Recommendation 4**

Defence amend the Instruction to impose a time limit for ADF members dissatisfied with the outcome of the investigation to seek review.

#### **Recommendation 5**

Defence consider increasing the availability of, or the ease of access to, independent mediators.

#### **Recommendation 6**

Defence ensure that training delivered to commanders, managers and equity advisers provides sufficient guidance about how to manage respondents fairly.

#### **Recommendation 7**

Defence clarify the action to be taken where commanders and managers identify a possible false or malicious complaint. This could include amending the Instruction to

detail the action to be taken by commanders and managers and addressing this issue in training.

### **Recommendation 8**

Defence consider implementing quality assurance mechanisms for recordkeeping and reporting to ensure that standards are being met.

### **Recommendation 9**

Defence amend the Instruction by requiring the initial report be submitted to Fairness and Resolution Branch within one week of receipt of the complaint.

### **Recommendation 10**

Defence consider amending the Instruction by adding a checklist with information about the role and responsibilities of each party to the complaint to help facilitate timely resolution.

### **Recommendation 11**

Defence consider ways to ensure that posting decisions take account of any limitations that have arisen as a consequence of the investigation of a complaint of unacceptable behaviour.

### **Recommendation 12**

Defence ensure that the reporting and record-keeping system for complaints of unacceptable behaviour is able to identify systemic issues and is readily accessible by those with a need to know.

### **Recommendation 13**

Defence consider options for quality assurance of the complaint-handling process, including the Fairness and Resolution Branch performing a feedback and quality assurance role.

### **Recommendation 14**

Defence reinforce that complaint resolution is a day-to-day management responsibility by including assessment of complaint management in annual performance appraisals for all commanders and managers and integrating training about managing and resolving complaints into general management/supervision training.

### **Recommendation 15**

Defence consider training modules that focus on effective communication skills for preventing and resolving complaints about unacceptable behaviour.