

# Chapter 1

## Introduction

### Background

1.1 On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The committee tabled its report, which contained 40 recommendations, on 16 June 2005. It was highly critical of Australia's military justice system.

1.2 In October 2005, the government tabled its response to the committee's recommendations (see appendix 3). It accepted in whole, in part or in principle 30 of the committee's 40 recommendations and indicated that, where required, alternative solutions would be adopted 'to achieve the intent' of the committee's recommendations. The government asked the Department of Defence (Defence) to implement these initiatives within two years, and to report to the Senate committee twice a year throughout the implementation period.

1.3 Defence established a Military Justice Implementation Team (MJIT), under the direction of Rear Admiral Mark Bonser, to take responsibility for implementing the reforms contained in the government's response. It also had the task of implementing 'ongoing enhancements from a number of previous internal and external reviews of the military justice system'.<sup>1</sup>

### Progress reports

1.4 Since the beginning of the implementation phase, Defence has submitted to the committee five progress reports on reforms to the military justice system. The reports were dated:

- April 2006
- October 2006
- April 2007
- October 2007 and
- June 2008

1.5 The main part of each report consisted of a spread sheet that provided an overview of the progress made in Defence's reform program to that date. The October 2007 and June 2008 reports are at appendices 4 and 5.

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1 Department of Defence, *Report on the Progress of Enhancements to the Military Justice System*, 13 April 2006.

1.6 Following receipt of each of Defence's first three progress reports, the committee inquired into, and reported on, the reform program.<sup>2</sup> It should be noted that, unlike its predecessors, the committee's third review was not comprehensive. The committee decided that it would not hold a public hearing or produce a detailed report because it wanted to allow Defence sufficient time to respond to, and implement, recommendations coming out of more recent subsequent reviews including:

- *Report of an Audit of the Australian Defence Force investigative capability*, July 2006 (99 recommendations);
- *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006 (47 recommendations); 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 (28 recommendations).

1.7 The Defence Force Ombudsman's report, *Management of complaints about unacceptable behaviour*, published in June 2007, made a further 15 recommendations. Defence agreed to the bulk of the recommendations contained in these four reports.<sup>3</sup>

1.8 As noted earlier, the committee's main report contained 40 recommendations. The above reports add another 189. In addition, there have been findings of other inquiries or court judgments such as the coroner's report following the inquest into the death of Trooper Lawrence, Justice Connolly's findings in *Lee v Smith & Ors*, the Nias Island Sea King Board of Inquiry and Justice Crispin's findings in *Vance v Air Marshall McCormack*. All suggested that some of the problems identified in the committee's 2005 report were still to be remedied.<sup>4</sup>

1.9 Moreover, between 2006 and the beginning of 2008, the government introduced major reforms to Australia's military justice system through the passage of the Defence Legislation Amendment Bill 2006 and the Defence Legislation Amendment Bill 2007 and 2008. Although this legislation formed part of the government's undertakings to reform Australia's military justice system, it also led to further inquiries and reports by the committee about the nature and effectiveness of

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2 Foreign Affairs Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system, Second progress report*, March 2007, *Reforms to Australia's military justice system, Third progress report*, September 2007.

3 Commonwealth Ombudsman, *Australian Defence Force: Management of complaints about unacceptable behaviour*, Report 04/2007, June 2007.

4 Refer to Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system, Third progress report*, September 2007, including additional comments by Labor Members of the committee.

these reforms.<sup>5</sup> They provided the committee with the opportunity to highlight problems in the military justice system and in some cases to propose measures to address them.

## Final progress report

1.10 Defence's June 2008 progress report completed the government's undertaking to provide the committee with six-monthly reports on progress throughout the two-year implementation period. This development marks a significant stage in the progress made by Defence in reforming its military justice system. Enormous changes have taken place since 2005 when the committee tabled its major report into Australia's military justice system. The main changes are:

- the creation of a permanent military court (AMC) which commenced on 1 October 2007;
- the establishment of the Chief Military Judge (CMJ) as a statutory position;
- appointment of the first Registrar of the AMC;
- appointment on 12 December 2005 of a Director of Military Prosecutions (DMP) at the one star rank and as a statutory position;
- the establishment of a Director of Defence Counsel Services 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;
- all legal officers in the Office of the DMP now hold practicing certificates;
- the right of an accused to elect trial by the AMC from summary proceedings;
- the right of appeal from summary proceedings to a military judge of the AMC;
- the establishment of the Australian Defence Force Investigative Service (ADFIS) headed by a Provost Marshal who was appointed on 14 May 2006;
- establishment of the Defence Fairness and Resolution Branch as the central management body, outside of normal line-management, for managing all complaints and grievances lodged by members of the Australian Defence Force (ADF);
- clearing the backlog of outstanding redress of grievance (ROGs);
- the passage of enabling legislation to establish Chief of the Defence Force (CDF) commissions of inquiry presided over by a civilian with judicial experience;
- amendments to the administrative inquiries manual including—

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5 Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006 and *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007.

- clarifying and improving guidance on the use of quick assessments;
- improving guidance on the selection of inquiry officers;
- requiring inquiry officers to produce statements of independence;
- requiring the provision of evidence to an affected person who is not present at hearings;
- amendments to Defence (Inquiry) Regulations requiring the provision of a reasonable opportunity for familiarisation to be provided to those coming before a Board of Inquiry late in the proceedings; and
- the engagement of an expert to examine whether the human rights of children, with regard to ADF cadets, are being respected.<sup>6</sup>

### ***Public hearings***

1.11 Although the implementation phase has come to a close and the MJIT has been disbanded, ADF's final progress report noted that:

...while most of the new mechanisms and arrangements are now in place some of these will need time to bed down in practice before optimal effectiveness can be achieved.<sup>7</sup>

1.12 The committee recognises that over time refinements or adjustments may be required to the reforms implemented during the last two years. Even so, following receipt of the ADF's final progress report, the committee agreed to inquire into and report on the progress to, and implications for the future of, Australia's military justice system.

1.13 The committee held public hearings on 20 and 26 June 2008 in Canberra. The names of witnesses who appeared are at appendix 2. The Law Council of Australia made a submission and provided additional information to the inquiry.

1.14 While Defence's final report provided the basis for the committee's inquiry, the committee also benefited from information contained in the annual reports of the Chief Military Judge, the Judge Advocate General and the Director of Military Prosecutions. It also drew heavily on its previous reports to help gauge progress using its 2005 report as a starting point.

1.15 The committee presents this report in four sections. The first section examines the ADF's discipline system, the second considers the ADF's investigative capability,

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6 Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system, Second progress report*, March 2007, paragraph 3.14. See also *Committee Hansard*, 19 June 2006, p. 10.

7 Department of Defence, *Report on the progress of reforms to the military justice system*, 5 June 2008, p. 1 (see appendix 5).

the third covers the administrative system and the fourth looks at the post-implementation stage of the reforms and their durability.

## **Acknowledgments**

1.16 The committee thanks those who appeared before it at the public hearing including Captain Paul Willee from the Law Council who has maintained a keen interest in Australia's military justice system throughout the implementation period. It also takes this opportunity to acknowledge previous committee members and chairs who, over many years, have made valuable contributions to the work of the committee. Senator Steve Hutchins was chair of the committee during its 2004–2005 inquiry into Australia's military justice system. Senator the Hon David Johnston and Senator Marise Payne chaired the committee during the review phase. Lastly, the committee thanks the Chief of the Australian Defence Force, Air Chief Marshal Angus Houston, for the time he has given to the committee and to his staff for assisting the committee with its inquiries.