

The Senate

Standing Committee on
Foreign Affairs, Defence and Trade

Reforms to Australia's military justice system

Fourth progress report

September 2008

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Overview

In June 2005, the Foreign Affairs, Defence and Trade References Committee tabled a comprehensive report on Australia's military justice system. It found that the system needed a radical overhaul. Since then, the Australian Defence Force (ADF) has embarked on an intensive reform program to improve the system including the establishment of the Australian Military Court (AMC) and the streamlining and restructuring of its complaints handling system.

The committee recognises the positive contribution that the reforms have made to the system. Its primary concern, however, is with ensuring that the reform program maintains its momentum and that the gains made to date are not lost. The committee is aware, however, of Defence's history of failed reforms: of its inability to make lasting change. Indeed, it was that history that forced the committee in 2005 to call a stop and to seek major reform at all levels.

To help break this cycle of failed reforms, the committee believes that there needs to be a set of inbuilt safeguards.

Four pillars: transparency, accountability, independence and scrutiny

It believes that transparency, accountability, proper independence and continuing scrutiny are the four pillars that will preserve and promote the integrity of Australia's military justice system. If any one falters, the effectiveness of the system once again comes under threat. With this in mind, the committee makes the following findings:

- The AMC needs to be more transparent and recommends that its disclosure regime be improved.
- The Chief Military Judge of the AMC has a vital role, and responsibility, to contribute to the parliament's understanding of the administration of military justice by agreeing, when invited, to give evidence before the committee.
- Without doubt the administrative system needs a strong independent and critical oversight authority responsible for identifying problems in the military justice system and for auditing and reporting on matters such as the progress of complaints and the implementation of recommendations arising from investigations. Although the Inspector General Australian Defence Force (IGADF) is a statutory appointment, the committee believes that his position needs to be, and perceived to be, more independent from command. A first step would be to change the reporting requirements of the IGADF.
- Commissions of inquiry (COIs) are presided over by a civilian with judicial experience, which has to some degree removed the perception of Defence inquiring into itself. They could, however, be more open and accountable for their proceedings and decisions by conducting their hearings in public.
- Defence's failure to consult with external and independent experts when considering reforms to Australia's military justice system is most concerning. This attitude indicates that Defence is not only reluctant to be open and

receptive to constructive criticism and new ideas but does not appreciate that wide consultation and open debate produces better legislation.

The ADF's inability to make lasting change is clearly demonstrated by the problems that persist with the ADF's police service and learning culture. The process of building the ADF's investigative capability and improving its learning culture must be regularly monitored and assessed. In this regard, the committee recommends independent reviews of the ADF's investigative capability and its learning culture within 5 years and more analysis and informative reporting on attitudes in the ADF.

The committee also accepts that over time refinements or adjustments may be required to the reforms implemented during the last two years. It cited for particular consideration, the conduct and protection of military jurors, an audit of ADF legal services, and the appeal process to service chiefs.

Monitoring and review

The need for regular monitoring, review, independent assessment and reporting applies to all aspects of Australia's military justice system including staffing and resources. In this regard, the committee notes:

- the delays establishing the facilities necessary for the efficient and effective operation of AMC;
- current problems staffing the ADF Investigative Service which need urgent attention—it is manned at only 58 to 60 per cent of strength;
- slowness in appointing officers to the Office of the Director of Military Prosecutions (DMP);
- COIs and the suggestion that Defence resources 'are very stretched';¹ and
- the need to ensure that the Fairness and Resolution Branch has the appropriate level of staffing to prevent a return to the pre-2005 administrative system which was plagued by lengthy delays in processing complaints and ROGs.

The committee welcomes the appointment of Sir Laurence Street and Air Marshal Les Fisher (Retd) to assess the effectiveness of the reform program. In the course of the report, the committee has identified matters that the team may wish to examine as part of their inquiry.

1 *Committee Hansard*, 20 June 2008, p. 42.

Executive Summary

Following the findings of the committee's 2005 report into Australia's military justice system, Defence has implemented significant reforms that, without doubt, have improved the system. The committee's primary concern, however, is with ensuring that the reform program maintains its momentum and the gains made to date are not lost. Defence's history of failed reforms heightens this concern.

This report marks the end of the committee's undertaking to report on the implementation of reforms to Australia's military justice system. It contains 13 recommendations and a number of suggestions. Some are of a more technical, legal nature indicating that changes to legislation may be required, particularly as the AMC and the new summary authority procedures become fully operational. The committee starts with the five major recommendations.

Transparency, accountability, independence and scrutiny

Any measures that strengthen disclosure, public accountability, transparency and the independence of the military justice system will enhance its effectiveness. The committee's key recommendations are intended to make Australia's military justice system more open, transparent, accountable and independent.

Recommendation 8

The committee recommends that the government amend the Defence Force Discipline Act to require the Australian Military Court (AMC) to publish material such as court lists, transcripts of proceedings and judgments in a readily and easily accessible form (paragraph 5.20).

The committee believes that the Chief Military Judge (CMJ) has a vital role, and responsibility, to contribute to the parliament's understanding of the administration of military justice by agreeing, when invited, to give evidence before the committee.

Recommendation 9

The committee recommends that the CMJ appear before the committee to give evidence on the operation of the AMC and matters raised in the CMJ's annual report when invited by the committee to do so (paragraph 5.30).

Without doubt the administrative system needs a strong independent and critical oversight authority responsible for identifying problems in the military justice system and for auditing and reporting on matters such as the progress of complaints and the implementation of recommendations arising from investigations. Although the Inspector General Australian Defence Force (IGADF) is a statutory appointment, the committee believes that his position needs to be, and perceived to be, more independent from command. A first step would be to change the reporting requirements of the IGADF.

Recommendation 10

The committee recommends that the *Defence Act 1903* be amended to include in section 110 the requirement for the IGADF to, as soon as practicable after each 31 December, prepare and give to the Minister, for presentation to the Parliament a report relating to the functions of his office as set out in section 110C(1) (paragraph 5.59).

This recommendation is a necessary first step in restoring credibility to the office of the IGADF when it comes to his independence and function as an effective oversight authority. Other measures should also be considered using the provisions that apply to the CMJ and DMP as a model.

Recommendation 11

The committee recommends that the government consider additional measures to strengthen the independence of the IGADF using the provisions governing the CMJ and the DMP as a template (paragraph 5.61).

The committee also believes that commissions of inquiry need greater transparency.

Recommendation 12

The committee recommends that the regulations governing the establishment of Commissions of Inquiry (COIs) be amended to require that COIs be conducted in public except in circumstances where the president deems there to be a compelling reason for privacy. In cases where the president makes such a decision, the regulations should require the president to issue a public statement containing the reasons for this decision (paragraph 5.63).

The committee is most concerned about Defence's failure to consult with external and independent experts when considering reforms on military justice. This attitude indicates that Defence is not only reluctant to be open and receptive to constructive criticism and new ideas, but does not appreciate that wider consultation produces better legislation and ultimately a more effective military justice system.

Recommendation 13

The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation, including subordinate legislation, that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia (paragraph 5.91).

Monitoring and reviewing

The ADF's inability to make lasting change is clearly demonstrated by the continuing problems with the ADF's police service and learning culture. The process of building the ADF's investigative capability and improving its learning culture must be regularly monitored and assessed.

The need for regular monitoring, review, independent assessment and reporting, however, applies to all aspects of Australia's military justice system. The committee recognises that over time refinements or adjustments may be required to the reforms implemented during the last two years. The remaining recommendations are concerned with the necessary reviews of the ADF's investigative capability and its learning culture and some other matters including the conduct and protection of military jurors, an audit of legal services in the ADF and appeals to service chiefs.

Recommendation 1

The committee recommends that the Defence Force Discipline Act be amended to include provisions governing the conduct and protection of military jurors (paragraph 2.31).

Recommendation 2

The committee recommends that Defence undertake an audit of all legal officers in the ADF with a view to ensuring that the legal skills, expertise and experiences available to the ADF are being used to full advantage and to identify deficiencies that may need addressing (paragraph 2.74).

Recommendation 3

The committee recommends that in 12 months, Defence report to the committee on its progress implementing reforms to improve the ADF's investigative capability (paragraph 3.34).

Recommendation 4

The committee recommends that the government commission an independent review of the ADF's investigative capability at the conclusion of the 5-year remediation period (paragraph 3.35).

Recommendation 5

The committee recommends that a specific time limit, for example 90 days, be imposed on referrals of redresses of grievance to the service chiefs (paragraph 4.14).

Recommendation 6

The committee recommends that the ADF commission an independent review of the learning culture in the ADF, along similar lines as the investigation conducted in 2006. The main purpose of the inquiry would be to assess whether the recommendations contained in the 2006 report have been effectively implemented and whether additional measures need to be taken to improve the learning culture in the ADF. This review should take place within five years and the report on its findings should be made public (paragraph 4.39).

Recommendation 7

The committee recommends that the findings of Defence's attitude survey contain a greater level of detail and analysis than that provided in the most recent publication (paragraph 4.42).

The committee also notes that Sir Laurence Street and Air Marshal Les Fisher (Retd) have been appointed to assess the effectiveness of the reform program. The committee welcomes the establishment of this review team and, in the course of the report, has identified matters that the team may wish to examine as part of their inquiry, including:

- the jurisdiction of the Australian Military Court (AMC) and the appropriateness of the AMC to hear civilian cases;
- the random and tri-service basis for the selection of military juries;
- code of conduct for military jurors;
- the rules of evidence for summary trials;
- the adequacy of the information made available on the work of the AMC including the proposal for the AMC to produce 'a military justice reporter' or similar publication;
- the accountability of the CMJ to parliament, including his or her appearance before parliamentary committees;
- the functions and future role of the Judge Advocate General (if any);
- the role of the Inspector General of the ADF (IGADF) and how the IGADF's independence could be strengthened to ensure the positive results of reforms to the military justice system, especially to the administrative system, do not dissipate with the passage of time;
- the relationship between the Australian Defence Force (ADF) and state and territory coroners;
- the potential for command influence in ADF investigations;
- the ADF's tracking system for handling complaints;
- the *Defence Force Discipline Act 1982* (DFDA) and whether it is in line with comparable and up-to-date legislation including provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment (paragraphs 2.34–2.36); and
- the role of the Law Council and adequacy of Defence's consultative process.

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'.¹

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.

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.² 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.³

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.⁴

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

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.⁵ 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—

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.⁶

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.⁷

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,

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.

Chapter 2

ADF discipline system

Australian military court

2.1 In 2005, the committee recommended that the government establish an independent permanent military court that would extend and protect a Service member's inherent rights and freedoms and produce impartial, rigorous and fair outcomes.¹ The court was to be staffed by independently appointed judges possessing extensive civilian and military experience.

2.2 The government supported the committee's main recommendation to create a permanent military court. It was aware of the criticism that the location of judge advocates and Defence Force Magistrates (DFMs) within the military chain of command had serious implications for their actual and perceived independence.²

2.3 On 14 September 2006, the then Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, introduced the Defence Legislation Amendment Bill 2006 into the House of Representatives. The bill proposed to replace the existing system of trials by Courts Martial and DFMs with an 'Australian Military Court' (AMC). In its consideration of the bill, the committee recognised that the intention of the legislation was to improve Service tribunals. It was disappointed, however, that the government did not go further in strengthening the independence of the proposed court and in guarding it against possible influence from the chain of command. The committee identified what it regarded as a number of serious failings in the legislation, in particular:

- the 5-year fixed terms for Military Judges;
- the requirement for them to retire from the ADF after serving their 5-year term;
- providing for the minister to terminate, under specified circumstances, a Military Judge's appointment; and
- the composition of military juries especially for serious offences.

2.4 In light of the committee's grave concerns, the government moved a number of amendments to the bill. They included:

- extending the term of appointment of the CMJ and MJs from a 5-year to a fixed ten-year period;

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

2 Defence Legislation Amendment Bill 2006, *Explanatory Memorandum*, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 2.

- the automatic promotion of the CMJ at the mid-point of his or her 10-year appointment;³
- the Governor-General, not the Minister, to appoint the CMJ and MJs;
- the Governor-General, not the Minister, to have the authority to terminate the appointment of the Chief Military Judge and Military Judges;⁴
- removing the requirement for the automatic retirement of a member from the ADF following his or her tenure as the CMJ or a MJ;⁵
- a jury of 12 members required for class 1 offences (the more serious offences);⁶
- a decision of a military jury to be unanimous or alternatively, by a five-sixths majority but only in the following circumstances:
 - where it had deliberated for at least 8 hours and unanimous agreement had not been reached but a five-sixths majority agreement had; and
 - the court was satisfied that the deliberation time was reasonable, having regard to the nature and complexity of the case; and
 - after examining one or more jurors (on oath or affirmation) it was unlikely that the jurors would reach unanimous agreement following further deliberation;⁷
- according the AMC the status of a court of record but with a provision that would limit the publication of proceedings in the interests of the security and defence of Australia, the proper administration of justice or public morals or any other matter the court considers relevant.⁸

3 *Supplementary Explanatory Memorandum and Corrigendum to the Original Explanatory Memorandum*, Amendments moved on behalf of the government, circulated by authority of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, paragraph 24.

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

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

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

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

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

2.5 Although the amendments did not go as far as the committee would have wished, the committee acknowledged that they were a positive step toward providing members of the AMC with security of tenure and judicial independence.⁹ The amended bill was passed by parliament and received assent on 11 December 2006.

2.6 Following the enactment of this amended bill, however, the former JAG, Justice Leonard Roberts-Smith, commented in detail on the legislation and the AMC. He wrote that as finally enacted the *Defence Legislation Amendment Act 2006* (DLAA 2006):

...does not fully address the concerns that I have raised in my Annual Report for 2005 and my submissions to the Senate Foreign Affairs, Defence and Trade Legislation Committee...In my view, the legislation does not achieve 'world's best practice' for the AMC, and in some instances, significantly adds to the risk involved in moving from the current arrangements to the new. The intention is that CMJ and the military judges will enjoy appropriate independence from the chain of command. I do not believe that this has been achieved.¹⁰

2.7 The JAG concluded his remarks on DLAA 2006 by recognising that while the legislation introduced desirable reform, it 'has proceeded on the basis of according the bare minimum so far as issues of fundamental importance are concerned such as the guarantees of independence'.¹¹

Committee view

2.8 The committee recognises that the DLAA 2006 went a long way to secure the independence of the AMC. Even though it shares the JAG's view that more could have been done to strengthen the court's independence, it accepts that the establishment of the AMC is a significant and positive initiative. The committee strongly supports the establishment of the AMC.

Jurisdiction of the AMC

2.9 Notwithstanding this support, the committee remains concerned about the jurisdiction of the AMC extending, under certain circumstances, to civilian criminal offences.

2.10 The now amended *Defence Force Discipline Act 1982* (DFDA) makes clear that the newly established AMC 'is not a court for the purposes of Chapter III of the Constitution'. It is 'a service tribunal'.¹² There is no requirement for the Chief Military

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

10 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006*, paragraph 29.

11 Judge Advocate General *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006*, paragraph 104.

12 Section 114, *Defence Force Discipline Act 1982*.

Judge or Military Judges to have civilian judicial experience. Yet, in some cases the court will hear cases of a civilian criminal nature.

2.11 Numerous witnesses and submitters to the committee's 2005 inquiry recognised the important role of Service tribunals in maintaining Service discipline. They emphasised the need for the ADF to have the ability to maintain Service discipline as a means to enhance the operational effectiveness of the military. Former CDF, General Peter Cosgrove; Mr Neil James of the Australian Defence Association; and the former JAG, Justice Roberts-Smith, endorsed the principle of ADF control over the discipline system.¹³ Referring to the discipline system, the then JAG stated:

The first and fundamental point is that we are not talking about an exercise of the ordinary criminal law—although in some areas...they overlap. It is a military discipline system. The object is to maintain military discipline within the ADF by a system which is, and is seen to be, fair and just and which serves the purpose of military discipline, which is, ultimately, success in battle. The historical need for a discipline system internal to the military force has been recognised by the High Court of Australia in a number of cases... So that need, as I would see it, is beyond debate in terms of principle.¹⁴

2.12 Even so, some witnesses raised concerns about the jurisdiction of military tribunals extending to civilian criminal offences committed by ADF personnel overseas. After considering the evidence, the committee formed the view in 2005 that all criminal offences committed by ADF personnel, including those overseas, should come under the jurisdiction of the civilian criminal justice system. It recommended *inter alia*, that 'all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities'.¹⁵

2.13 The government did not accept this or related recommendations.

2.14 The jurisdiction of the AMC was again considered during the committee's inquiry into DLAB 2006. At that time, the JAG questioned the conduct of criminal trials by service tribunals. He noted a view that such tribunals were 'not established under Chapter III of the Constitution, and might not be thought to afford the protections provided by those courts'.¹⁶ He mentioned the possibility of the most serious charges being laid against ADF members and the doubts about the proposed AMC having jurisdiction over crimes such as rape and murder.¹⁷ The Law Council of

13 General Peter Cosgrove, Chief of Defence Force, *Submission P16F*, Foreign Affairs, Defence and Trade Reference Committee, *Committee Hansard*, 9 June 2004, p. 20.

14 Foreign Affairs Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005, p. 100.

15 See also recommendations 1–4 and 8–9 in Foreign Affairs Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005.

16 *Submission 3* to committee's inquiry into DLAB 2006 [provisions], p. 1.

17 *Submission 3* to committee's inquiry into DLAB 2006 [provisions], paragraphs 10 and 11.

Australia also noted the potential for the AMC to be involved in 'very serious matters'.¹⁸

2.15 In response to the JAG's concerns about the possibility of charges of the most serious offences against members of the ADF being dealt with by the AMC, Defence stated that should one occur:

...it would not be unusual for a serious offence committed outside Australian jurisdiction to be dealt with by a Service tribunal. This has been the case ever since the Australian Naval and Military Forces were established following Federation. There are many types of tribunal established under Commonwealth legislation. Service tribunals are established under the DFDA for a specific purpose, that is, to control the forces and thereby maintain discipline.¹⁹

Committee view

2.16 The committee recognises that discipline within the Australian Defence Force (ADF) is essential to command and operational effectiveness. It supports the requirement that any offence which can reasonably be regarded as 'substantially serving the purpose of maintaining or enforcing Service discipline' should come under the jurisdiction of the AMC. The committee understands, however, that ADF personnel serving overseas may be accused of serious criminal offences such as rape or murder and may come under the jurisdiction of the AMC. The committee is not convinced that the AMC is the appropriate body to deal with serious criminal charges and still has misgivings, as it did in 2005 and 2006, about the extent of the court's jurisdiction.

2.17 The committee notes the establishment of a review team of Former Chief Justice of New South Wales, Sir Laurence Street, and a former Chief of the Air Force, Air Marshal Leslie Fisher (Retd). They were appointed to assess the effectiveness of the current reform program and are to report to the CDF by 10 February 2009.²⁰ The committee believes that the team would be ideally placed to consider the circumstances under which it would be appropriate for the AMC to deal with criminal civilian matters including the competency of the AMC as now constituted to hear such matters.

18 *Submission 5* to committee's inquiry into DLAB 2006 [provisions], p. 4.

19 Department of Defence, answers to written questions on notice during the committee's inquiry into the Defence Legislation Amendment Bill 2006 [provisions], contained in Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill [provisions]*, October 2006, appendix 5, paragraph 5.

20 *Committee Hansard*, 20 June 2008, p. 22.

AMC—further refinements

2.18 In his 2007 Annual Report, the Chief Military Judge drew attention to a number of problems encountered with the operation of the AMC including matters associated with handling multiple charges, the commencement and enforcement of punishments and orders and the custody of a prisoner before sentence.²¹ The DMP also mentioned in evidence a number of concerns including class three offences and inconsistent elections. A number of these matters have since been resolved including:

- the commencement of the punishment of dismissal from the Defence Force which can now be ordered to take effect 30 days post the imposition of that punishment;²²
- charges involving more than one co-accused and different classes of offences;²³ and
- class three offences.

2.19 The DMP noted, however, that schedule 7, which lists class 1, 2 and 3 offences, still needs consideration:

...which is just a change in relation to certain matters. As you would appreciate, prejudicial conduct has not really been classified as a class of offence. Predominantly, of course, prejudicial behaviour is dealt with at the summary level, but that is not to say it is not dealt with before the AMC on a number of occasions.²⁴

2.20 Other matters still requiring legislative consideration include:

- providing military judges with the authority to have a prisoner detained in custody prior to his sentence; and
- enforcement of reconnaissance release orders.²⁵

2.21 The committee draws these observations to the government's attention for its consideration. More important matters dealing with the constitution, conduct and protection of military juries and rules of evidence for summary proceedings are dealt with below.

21 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007*, paragraphs 49–55.

22 *Committee Hansard*, 20 June 2008, p. 3.

23 *Committee Hansard*, 26 June 2008, p. 10.

24 *Committee Hansard*, 26 June 2008, p. 10.

25 *Committee Hansard*, 20 June 2008, p. 3.

Military juries

Selection process

2.22 Defence's June 2008 progress report on reforms to Australia's military justice system noted that an issue had arisen with regard to the validity of the constitution of military juries. A trial was adjourned after the Military Judge upheld the Defending Officer's objection that the military jury had not been arrayed according to law. This matter has now been resolved by amending the AMC rules so that the panelling of military juries is on a fully random and tri-service basis.²⁶

2.23 The Chief Military Judge, however, would prefer the requirement for a tri-service random selection be set out in legislation.²⁷ Even so, the CMJ agreed that legislative intervention should be delayed until after Sir Laurence Street's review.²⁸

Committee view

2.24 To avoid doubt, the committee supports the Chief Military Judge's view that the DFDA specify that military juries are to be selected on a fully random and tri-service basis. It also agrees that this is a matter that should be referred to Sir Laurence Street.

Code of conduct for jurors

2.25 Under existing arrangements, the AMC operates without the equivalent of a civilian jury code.

2.26 In 2006, the former JAG noted that the existing legislation did not provide any safeguards to protect military jurors from command influence concerning the performance of their military duties nor protection from reporting on their performance as a military juror.²⁹ For the government's consideration, he noted the desirability of incorporating provisions similar to those in the *New South Wales Jury Act 1977*—sections 68, 68A, 68B, 68C and 69.³⁰

2.27 In his annual report, the Chief Military Judge also stated his belief that:

26 *Committee Hansard*, 20 June 2008, p. 3.

27 *Committee Hansard*, 20 June 2008, p. 9.

28 *Committee Hansard*, 20 June 2008, p. 3.

29 Judge Advocate General, *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006*, paragraph 75.

30 Judge Advocate General. *Defence Force Discipline Act 1982, Report for the period 1 January to 31 December 2006*, paragraph 75.

...it would be highly desirable for the legislation to address issues of juror protection and to create offences concerning interference with jurors or misconduct by military jurors in the discharge of their duties.³¹

2.28 Captain Paul Willee from the Law Council of Australia reinforced this view:

It would...be much better if these sorts of protection were in place in the same way as they are in the civilian arena. They are probably particularly needed to protect people from their colleagues, who, in the mess, will say: 'Tell us what happened. How on earth could you have come to that conclusion? You idiot! You've got the work boat, and your leave's cancelled for three months for that decision.' I do not think it is as prevalent as it used to be, but it is better that nobody sees it as a situation that is not properly covered.³²

2.29 According to the Registrar of the AMC, such a code would cover issues such as offences that may be committed by jurors in terms of disclosure of information and offences committed on jurors—for example trying to extract information from them.³³ Mr Mark Cunliffe, Head Defence Legal, informed the committee about existing legislation that may afford protection to military jurors. He explained that the ADF operates 'within a command and control environment where there is a Defence Force discipline set of rules in place already and where there are protections which potentially can be pointed to in that body of law'.³⁴ He then indicated, however, that:

We are at this stage, I think, positing that there would be amendment in the first part of 2009 that would encompass provisions that would deal with this in more detail. I think that gives us two things: first, it is a real date that is attainable and, second, it gives us the time to actually study the issue and to see whether some of these concerns are actually real manifestations. It also gives us the time to decide how they might be dealt with in a resourcing sense, in a numbers sense and in terms of protections and other mechanisms that the jury legislation might cover.³⁵

Committee view

2.30 Even though there is a Defence Force discipline set of rules that could apply to the conduct and protection of military jurors, the committee is of the view that provisions governing the conduct and protection of jurors should be contained in the DFDA. The provisions would cover matters such as soliciting information from or harassing jurors or former jurors, disclosure of information by jurors, inquiries by

31 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007*, paragraph 46.

32 *Committee Hansard*, 20 June 2008, pp. 45–6.

33 *Committee Hansard*, 20 June 2008, pp. 5 and 9.

34 *Committee Hansard*, 20 June 2008, pp. 33–34.

35 *Committee Hansard*, 20 June 2008, p. 34.

juror about trial matters and prejudice to ADF personnel summoned for jury service. As suggested by the JAG, the *New South Wales Jury Act 1977* provides a model.

Recommendation 1

2.31 The committee recommends that the DFDA be amended to include provisions governing the conduct and protection of military jurors.

Summary proceedings

2.32 The vast majority of disciplinary matters in the ADF are dealt with on a daily basis at the summary level. The CDF told the committee that a summary system must 'operate quickly, be as simple as possible and it must be capable of proper, fair and correct application by commanding officers while providing an appropriate level of protection for individual members'.³⁶ In 2005, the committee found that reform was needed to impart greater independence and impartiality into summary proceedings. It found that the current system for prosecuting summary offences suffered from 'a greater lack of independence than courts martial and Defence Force Magistrate processes'.³⁷

2.33 The committee recommended an expansion of the right to elect trial by court martial before its proposed permanent military court, and the introduction of the right to appeal summary decisions before this court.³⁸

2.34 In August 2007, the government introduced legislation to amend the Defence Act and DFDA in order to streamline and restructure summary discipline procedures. The new system was to operate under simplified rules of evidence, provide a right of appeal from a summary authority to the new AMC and a right to elect trial by the new AMC instead of a summary authority.

2.35 The CDF informed the committee of his confidence that the new summary arrangements would 'not only update and simplify the current system for the benefit of commanders and those who administer military justice, but will also substantially enhance the rights of those who find themselves subject to the disciplinary system'.³⁹

2.36 In 2007, Defence indicated that two important matters would be dealt with in legislation proposed for 2008—the detention and release of people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment and the extension of the Discipline Officer scheme to non-commissioned officers.

36 *Committee Hansard*, 20 June 2008, p. 21.

37 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, pp. 102–3.

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

39 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 2.

2.37 The committee noted, and was assured by, Defence's stated intention to rectify in the near future some of these omissions in the legislation. The committee, however, remains unsure about the consideration that has been given to the provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment. In an answer to a question on notice, Defence informed the committee in September 2007 that:

The currency of the existing provisions for dealing with mental impairment became apparent during drafting of the Bill [DLAB 2007]. As a result, Defence looked to bringing the provisions up to contemporary standards in this legislation, if it was feasible. However, it became evident during the course of drafting that there were a number of significant practical and policy matters to be resolved to avoid disadvantaging ADF members. A particular matter requiring further detailed consideration is whether a person would be able to appeal to the Defence Force Discipline Appeal Tribunal against a finding that he or she was unfit to stand trial. This right of appeal, and a number of other complex matters requiring further policy consideration, precluded drafting being completed for inclusion in this Bill.⁴⁰

2.38 In the committee's view, Sir Laurence Street's review team would be ideally placed to examine, in light of contemporary developments, the provisions in DFDA governing people on trial before the AMC who are deemed to suffering from mental impairment.

Rules of evidence

2.39 In its report on DLAB 2007, the committee also expressed reservations about the provisions governing the evidence in proceedings before a summary authority. It recommended that, before passing the bill, the legislation provide clear statutory guidance that summary authority rules were not to depart from the fundamental principles of the rules of evidence.

2.40 The bill lapsed with the prorogation of parliament and was re-introduced in February 2008.

2.41 Although amended along the lines suggested by the committee, the provisions in DLAA 2008 governing the rules of evidence continued to cause some concern. In April and June 2008, the Law Council of Australia wrote to the committee raising doubts about 'the workability and effectiveness' of the provisions in the legislation, notably the rules of evidence. It stated:

In order to ensure the ADF's summary discipline procedure is perceived as fair, independent and not subject to interference by the Defence chain-of-command, the fundamental principles referred...should be listed within

40 Department of Defence, Response to written question no. 6, Appendix 4, in Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007.

provisions of the legislation, not simply referred to in notes or in subordinate regulations or guidelines because notes of this sort in legislation have no binding effect in the way that legislative words do.⁴¹

2.42 Until 20 September 2008, summary trials were conducted in accordance with the full requirements of the Evidence Act. Under the new system introduced by DLAA 2008, 'the full panoply of the rules of evidence will not apply'.⁴² This change means that the summary authorities will no longer be subject to the same formal rules of evidence that apply to the AMC.⁴³ The CDF informed the committee:

The simplification of the rules of evidence before summary tribunals will address a long standing criticism of the current system that the requirement to apply the full law of evidence in summary proceedings was an unnecessary complexity. The simplified rules will however preserve members' rights by requiring summary authorities to have regard to basic evidentiary principles including relevance, reliability, weight, probative value and procedural fairness.⁴⁴

2.43 The JAG acknowledged that the new rules would water down the civil standards of evidence, but explained:

...it was never realistic to impose the full rules of evidence on service officers who had no legal training. They are going to get a set of rules which are, as I understand it, a work in progress so I have not seen them and, indeed, there is no requirement that I be consulted in relation to them. They will get a set of rules that will bind them to procedural fairness on core issues but not the periphery of the rules of evidence. Until I see those rules, I really cannot venture a comment as to the extent to which it will involve a departure from what, until now, has applied.⁴⁵

2.44 The Law Council was of the view that the provision in the act stipulating that the Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence was 'very nebulous'. Captain Willee argued:

The system ought to be able to identify which fundamental principles need to be addressed and what they are so that at least those who are framing the rules have some indication of where they are going, what the rules are going to address. At least, we submit, the fundamental principles that need to be addressed ought to be set out in the legislation.⁴⁶

41 Law Council of Australia to Committee, *submission*, 17 June 2008, p. 3.

42 *Committee Hansard*, 20 June 2008, p. 18.

43 *Committee Hansard*, 20 June 2008, p. 22.

44 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 2.

45 *Committee Hansard*, 20 June 2008, p. 16.

46 *Committee Hansard*, 20 June 2008, p. 41.

2.45 The JAG explained:

One way of determining what distillation of those rules should obtain at summary level would be for them to be set out in the rules that are promulgated under the act. They would have the force of law that would bind the military commanders exercising those powers, but they could also be put in the statute, in the Defence Force Discipline Act, if that were thought appropriate. I do not have a preference for one over the other, save that if something needs to be changed quickly there is more flexibility if they are in the rules than if they are in the act.⁴⁷

2.46 During the public hearing on 20 June 2008, Captain Willee agreed with the JAG that 'it does not matter where it [specifying the rules of evidence] is done, as long as it has proper parliamentary scrutiny and it has proper scrutiny before it is put into place'.⁴⁸ Section 149 of the DLAA 2008 provides for the Chief Military Judge, by legislative instrument, to make rules governing the practice and procedures to be followed by summary authorities.⁴⁹ At this time, the rules were still being developed in readiness to take effect in September 2008. In the JAG's view the rules must have 'sufficient detail and clarity that can be understood by those who have to implement them'.⁵⁰

2.47 The rules have now been promulgated and were registered as a Federal instrument on 18 September 2008.

Promulgation of rules of evidence

2.48 In June 2008, the Law Council expressed concern that the Summary Authority Rules were currently being drafted but that no draft copies had been issued or, if they had been issued, supplied to the Law Council.⁵¹ The CDF stated that much work was still to be done in the lead-up to summary trials. He noted tasks such as 'rewriting relevant manuals, instructions and guidance, revising military justice training course content, providing appropriate conversion training to practitioners and administrators, as well as general familiarity training to ADF members'. He was satisfied that summary hearings would 'in future be fair, efficient and timely as a result of these changes'.⁵² Group Captain Paul Cronan, Defence Legal Services, informed the committee in June that there was an early draft of those rules but that they still required significant work. He explained further:

47 *Committee Hansard*, 20 June 2008, p. 18. See also p. 19 where the JAG stated 'Between the two possibilities, the one virtue of having them in the rules is that if some problem emerges it can be fixed up much quicker than if they were in the act.'

48 *Committee Hansard*, 20 June 2008, p. 41.

49 Because this provision is yet to come into force, it is currently appended in notes to the DFDA.

50 *Committee Hansard*, 20 June 2008, p. 19.

51 *Submission*, 17 June 2008, p. 3.

52 *Committee Hansard*, 20 June 2008, p. 22.

The writing of the training process...is dependent on the production of those rules and the way in which they are constructed... The training packages are quite large. There is a lot of new material to cover. We are making large changes to the summary disciplinary system. In terms of the training packages, we are covering those issues upfront that we have clear guidance on and that there is not too much doubt about. The summary rules process will come, I guess, at the end of the development stages for those training packages.⁵³

2.49 Captain Paul Willee noted that there must be at least 30 or 40 fundamental principles of rules of evidence—'they fill volumes of books of evidence'.⁵⁴ He was concerned that when deadlines are so tight, 'they almost invite error' and that it 'is time to move towards more acceptable deadlines...'.⁵⁵ In this regard, he stressed the importance of allowing ample time for ADF personnel to familiarise themselves with the new rules. He argued strongly that 'people's courses of action in relation to summary proceedings depend on their understanding of the process'. He added:

If there is to be a simplified procedure, then one would hope that they would be able to understand the process and be better informed as to whether they ought to plead guilty or not in relation to the evidence against them. Certainly those advising them would be in a better position to do so. That might result in a much fuller exploitation of the summary proceeding systems. It might not. But it needs to be done properly if it is going to be done at all.⁵⁶

2.50 The DMP explained that the CMJ has an ad hoc rules committee meeting and that a meeting had been held with regard to the summary rules. She is a member of the committee. The DMP did observe, however, that 'we do not seem to lift our eyes to the future and start the planning process in a timely way. We always seem to be behind the eight ball'.⁵⁷ The JAG expressed a willingness to look at, and comment on, the new rules currently being drafted.⁵⁸

2.51 Since taking evidence at its public hearings in June 2008, the committee received further advice from the Law Council of Australia on the need to have certain fundamental evidentiary matters addressed in the simplified rules. On 29 August 2008, the Council informed the committee that their representatives had met the CMJ and officers at Defence Legal to discuss a preliminary draft of the simplified rules. The Council provided comprehensive comments on this draft indicating clearly areas

53 *Committee Hansard*, 20 June 2008, p. 29.

54 *Committee Hansard*, 20 June 2008, p. 42.

55 *Committee Hansard*, 20 June 2008, p. 44.

56 *Committee Hansard*, 20 June 2008, p. 41.

57 *Committee Hansard*, 26 June 2008, p. 11.

58 *Committee Hansard*, 20 June 2008, p. 17.

of concern including a number of matters that 'do not appear to be addressed' in the rules.⁵⁹

Committee view

2.52 The committee is firmly of the view that formulating the simplified rules of evidence was no easy task especially given the limited time available to have them ready. It takes particular note of Captain Willee's concern that when deadlines are so tight, 'they almost invite error'.⁶⁰ The committee believes that an expeditious promulgation of the modified rules of evidence was desirable but not at the expense of sound and considered deliberation. At this late stage in the committee's consideration of the evidence, it has not been able to examine in detail these rules of evidence or to be satisfied that the concerns raised by the Law Council in August have been adequately addressed. As noted previously, the rules were registered on 18 September to come into operation on 20 September. In chapter 5, the committee considers the importance of consultation in drafting legislation, including subordinate legislation.

2.53 The committee endorses the JAG's view that these rules must provide sufficient detail and 'clarity that can be understood by those who have to implement them'. The difficulty distilling such a large and comprehensive body of legislation into clear and concise rules in a short timeframe underlines the need for them to undergo scrutiny. Sir Laurence Street's review team could examine these rules to determine whether they are appropriate and 'provide sufficient detail and clarity'.

Rules of evidence on appeal from summary proceedings to AMC

2.54 The Law Council of Australia was of the view that the legislation fails to make clear that 'the application of the ordinary rules of evidence should be restored upon appeal to the AMC from the decision of the summary authority'. Mr Willee sought clarification on:

What rules are going to apply when the appellate jurisdiction of the Military Court is invoked? Are they going to be the summary rules or are they going to be the rules that apply in that court, which are the full rules of evidence, and how is that going to affect the proceedings? Nobody has decided that situation yet.⁶¹

2.55 He stated further:

The point of principle is that the cut-down, streamlined rules...are just that...They are going to be second best. If you have to resort to an appeal, why aren't you entitled to the best venue in which to conduct it? The best

59 Secretary-General, Law Council of Australia to Senator Mark Bishop, Committee Chair, 29 August 2008, Attachment A.

60 *Committee Hansard*, 20 June 2008, p. 44.

61 *Committee Hansard*, 20 June 2008, pp. 41–2.

venue is the one that has all the rules of evidence applied at the level of a court that understands those rules...⁶²

2.56 He was unsure whether legislation was required to specify that those are the rules that are to be applied in appeal. He explained:

...they are clearly the ones that apply in first instance trials in the Military Court. That would simply regularise what is already happening. It may be that my analysis of the legislation is not sufficient to enable that to be concluded. If I am wrong about that, perhaps the Chief Military Judge simply needs to promulgate that that is what the court is doing, but there is always the risk, of course, that somebody will challenge it.⁶³

2.57 Recently the Law Council repeated its argument that the ordinary rules of evidence should be restored on appeal to the AMC from a decision by a summary authority. It was concerned about the possibility for injustice to be done by the application of the simplified rules of evidence. It advised the committee, however, that following discussions with the CMJ and Defence Legal, it is now 'reasonably satisfied with the application of the simplified rules on appeal from decisions of a summary authority'.⁶⁴

Committee view

2.58 The committee is of the view that the legislation should make clear that the ordinary rules of evidence are to be restored upon appeal to the AMC. It notes that the Law Council is now satisfied with the arrangements governing the application of the ordinary rules of evidence for appeals to the AMC from decisions of a summary authority.

Appeals on interlocutory points

2.59 During the committee's inquiry into the provisions of DLAB 2007, Mr Willee raised the Law Council's concern about the omission of the right of the DMP to appeal to the Defence Force Discipline Appeals Tribunal against an interlocutory judgment or order given or made in proceedings in an Australian Military Court. He referred to the Council's proposal that s.5F provisions of the NSW *Criminal Appeal Act*, which he indicated had 'stood the test of time', should be included in the bill. He advised the committee:

When a ruling is made which in itself will be so fundamental to the way in which the proceedings will or will not go on, there ought to be a provision similar to the provision that we have extracted from the New South Wales act. That provision ought to enable those issues to be dealt with in appropriate cases to prevent unfairness, a miscarriage of justice and,

62 *Committee Hansard*, 20 June 2008, p. 45.

63 *Committee Hansard*, 20 June 2008, p. 45.

64 Secretary-General, Law Council of Australia to Chair of Committee, 29 August 2008.

perhaps equally important, a colossal waste of time by people trying to go through the same process using the prerogative writs.⁶⁵

2.60 Mr Willee was of the view that there was 'nothing complex about this proposal': that it was 'a simple thing'.⁶⁶ At that time, Defence did not discount for future consideration the Law Council's proposal. Rear Admiral Bonser advised the committee that the appeal of matters raised in interlocutory points by the prosecution was a complex issue subject to two differing points of view. Defence believed that such a proposal required 'considerable deliberation and policy development before being considered for inclusion' in the DFDA in the context of an amendment to the bill.⁶⁷ Rear Admiral Bonser told the committee that 'Defence is clearly keen to consider it as a possible provision in legislation to be brought forward in future years'.⁶⁸

2.61 The DMP also commented on the Law Council's proposal. She indicated that members of her unit and those involved with Defence legal, have 'struggled long and hard for some time in relation to how the DMP should have an appeal to resolve matters, whether they should be done on interlocutory basis or indeed after the event'.⁶⁹ She outlined some of the matters that needed to be considered including the Defence Force Tribunal being ad hoc, whether a duty judge would be available, and how quickly matters could be heard. She supported Rear Admiral Bonser's observation that: 'there is more debate...and more consultation to be had as to whether or not it would ultimately be beneficial to our proceedings to have the capacity to take matters at an interlocutory stage'.⁷⁰ She added:

...we were content at this point in time, given that our court is yet to stand up and given also that we do not have a standing appeals tribunal that still remains ad hoc. The concern was about delays and the fragmentation...It is just a question of time. Ultimately, down the track, it may well be that those amendments will be sought.⁷¹

2.62 Although Defence suggested that it was considering the right of the DMP to appeal against an interlocutory decision, it has not yet produced any concrete proposals. At the committee's most recent hearing, Mr Willee again argued for the

65 *Committee Hansard*, 5 September 2007, p. 2.

66 *Committee Hansard*, 5 September 2007, pp. 2 and 7.

67 *Committee Hansard*, 5 September 2007, p. 19.

68 *Committee Hansard*, 5 September 2007, p. 19.

69 *Committee Hansard*, 5 September 2007, p. 14.

70 *Committee Hansard*, 5 September 2007, p. 14.

71 *Committee Hansard*, 5 September 2007, p. 15.

right of the DMP to appeal interlocutory points.⁷² He provided one example to illustrate the importance of allowing the DMP to make such an appeal:

The classic case is always a confessional statement by an accused person that is ruled to be inadmissible. That is a complex area—admissibility. If the prosecution loses that confession, in whatever form it may be, then very often it loses the whole basis of its prosecution and it simply has to discontinue. If it is questionable or arguable that the court, in ruling on that issue, in some interlocutory proceedings went wrong, then, in fairness, the prosecution ought to be able to test that sort of thing in the appropriate case so that the issue can be decided. That is only one example.⁷³

Committee view

2.63 In September 2007, the committee urged the government and Defence to give serious consideration to the Law Council's proposal regarding the right of the DMP to appeal interlocutory points. It again suggests that the government and Defence consider the proposal. This matter may well be one that Sir Laurence Street's review team could consider.

Director of Military Prosecutions

ODMP—staffing and resources

2.64 In 2005, the committee was of the view that:

...a well-resourced, statutorily independent Director of Military Prosecutions is a vital element of an impartial, rigorous and fair military justice system.⁷⁴

2.65 The government agreed with this view and on 12 June 2006, the DMP was created as a statutory office. The DMP is to hold the rank of Brigadier and the appointment is for a term of five years.⁷⁵ Section 196B of the DFDA clearly states that the DMP must as soon as practicable after each 31 December, prepare and give to the Minister, for presentation to the Parliament, a report relating to the operations of the DMP during the year ending on that 31 December.

72 *Committee Hansard*, 20 June 2008, p. 42. He indicated that the Director of Military Prosecutions had informed him that morning that she was in complete agreement with the Law Council's proposals, 'except for the last paragraph, which she thought it would be imprudent for her to go into—that is, the quality of the judges!'

73 *Committee Hansard*, 20 June 2008, p. 43.

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

75 The Hon. Bruce Billson, MP, Minister Assisting the Minister for Defence, Media Release, MINASSIST 024/06, 5 July 2006. See also *Committee Hansard*, 19 June 2006, p. 13.

Independence of the DMP

2.66 In her first annual report, the DMP referred to the perception of the independence of her office. She cited the involvement of the Acting Secretary of Defence in the case of *DMP V Registrar of Military Justice*:

I am of the view that the interruption of the litigation by the Acting Secretary of the Department of Defence has the potential to affect perceptions of my independence.

and

Significantly, the Acting Secretary also directed that 'no further expenditure on legal expenses is to be incurred before commencing or maintaining litigation involving other Commonwealth officeholders without my prior approval'. This could be perceived as affecting my and the Registrar's independence.⁷⁶

2.67 The CDF informed the committee that a 'practical and sensible way' to deal with disagreements such as the one that occurred between the Registrar and the DMP, was under consideration. He indicated that they would be resolved through a mechanism or procedure that would be retained within the bureaucracy within government'.⁷⁷ He assured the committee that:

...we have taken the circumstances of the case and we have come up with a way of dealing with it so that it will never happen again and a way which will not require a resort to the Federal Court.⁷⁸

2.68 In response to the matter of curtailing funding for litigation by the DMP, the CDF explained:

...at the end of the day, all of us are constrained by money. I am constrained in what I might want to do operationally, and of course her activities are also constrained. I think that obtaining sufficient funding to do something does not necessarily interfere with her independence to do the job as the DMP.⁷⁹

76 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, paragraphs 50 and 63.

77 *Committee Hansard*, 20 June 2008, p. 37.

78 *Committee Hansard*, 20 June 2008, p. 38.

79 *Committee Hansard*, 20 June 2008, p. 37. See also comments by Dr Lloyd, who said, 'Two obligations are of particular importance under those directions—they certainly informed us. The first is the obligation, as a model litigant, not to resort to litigation where there are other means for resolving a dispute. The second element of the legal services directions is that it says that, where there is a dispute between two Commonwealth agencies—and this is not precisely two Commonwealth agencies, but it is a reasonable equivalent—it suggests that the appropriate mechanism is referral to the Solicitor-General to get an opinion, essentially because it is not a particularly seemly or efficient use of resources to be airing a dispute between two elements of the Commonwealth in the courts when there is the opportunity to seek a view from the Solicitor-General'. *Committee Hansard*, 20 June 2008, p. 38.

2.69 The DMP took the view that the direction issued to her by the Deputy Secretary regarding the need for his approval to fund litigation involving other Commonwealth office holders is extant. She argued that while it retains its currency, the directive has the potential to affect perceptions of the DMP's independence. She explained further:

To a large extent, I am over it, and things have moved on. I do have a right of appeal in relation to matters that I did not have at the time of the Nicholas matter. There are other ways that I can resolve it without necessarily having to take on statutory appointees to get a resolution, but, notwithstanding all those changes and given that time has moved on, I do not see any reason why it should be extant.⁸⁰

2.70 The committee only became aware of the DMP's concerns about this incident and how the Acting Secretary's involvement may affect her perceived independence through her annual report.

Committee view

2.71 The committee notes that both the CDF and the DMP believe that other ways now exist to resolve disputes between statutory appointments. This case, however, demonstrates the value of the DMP's annual report which provided an opportunity for the DMP to speak frankly and openly about her concerns regarding her perceived independence. Without commenting on the rights or wrongs of the dispute between the Registrar of the AMC and the DMP or the involvement of the Acting Secretary, the DMP was clearly able, in a public forum, to voice her concerns about what she believed was inappropriate interference in the work of her office. The committee strongly supports this reporting regime.

Audit of legal officers in the ADF

2.72 The DMP informed the committee that she had long advocated an audit of all the legal officer positions in all the services. The intention would be to:

...see how we are utilising and deploying them because I think there are some areas where we do not need as many as we have, and they should be redeployed to areas such as my office, the inspector-general and the MLC.⁸¹

Committee view

2.73 The committee supports the DMP's suggestion for an audit of all legal officers in the ADF.

80 *Committee Hansard*, 26 June 2008, p. 14.

81 *Committee Hansard*, 26 June 2008, p. 15.

Recommendation 2

2.74 The committee recommends that Defence undertake an audit of all legal officers in the ADF with a view to ensuring that the legal skills, expertise and experiences available to the ADF are being used to full advantage and to identify deficiencies that may need addressing.

Resources

2.75 The AMC commenced operations on 1 October 2007. The ADF's June 2008 progress report suggested that the number of trials referred to the AMC 'is considerably greater than might have been expected...' As at 17 June 2008, 92 matters had been referred by the DMP to the court for trial: 36 matters had been finalised; 13 were currently listed for trial; four matters had been withdrawn; and six were not being actioned for reasons such as deployment of members.⁸² Thirty-three matters were undergoing preliminary action, including case management, prior to any listing action before the court.⁸³

2.76 The number of matters proceeding to trial by the AMC represents a significant increase from those under the old regime. The Registrar of the AMC, Colonel Geoff Cameron, explained that 'there were about 40 to 50 matters in each of the preceding years. He stated further:

The key issue that arises from those sorts of figures is the volume of work that is currently before the court, and that excludes the new summary appeals regime which will commence later this year on 20 September and the new election regime as well. That volume of work is considerably greater than might have been anticipated based on those historical figures. How many other matters are going to come before the court after that new regime commences is still unknown.⁸⁴

2.77 In addition, according to Colonel Cameron, a much larger proportion of matters are proceeding to trial by military judge and jury than had been dealt with by court martial under the previous trial system. The AMC had 17 matters intended to proceed to trial by judge and jury in contrast to seven courts martial in 2007, one in 2006, six in 2005 and two in 2004.⁸⁵

2.78 The Registrar noted further that, 'the administrative and financial burden in assembling military jurors at various trial locations throughout Australia and conceivably in overseas locations is very significant'. For example, he indicated that about 30 to 40 persons are required in order to screen for a straight six-person jury

82 *Committee Hansard*, 20 June 2008, p. 2. See also Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 6 at appendix 5.

83 *Committee Hansard*, 20 June 2008, p. 2.

84 *Committee Hansard*, 20 June 2008, p. 2.

85 *Committee Hansard*, 20 June 2008, p. 2.

which would 'expand quite significantly' for a 12-person jury.⁸⁶ The trial of a class one offence requires 12 members.⁸⁷

2.79 The Military Judge's Annual Report also records that the number of jury trials is 'likely to considerably exceed the number of matters proceeding to a court martial in recent years'.⁸⁸ It similarly noted that 'jury trials are considerably more resource intensive both in terms of the administrative effort required to run the trial and in terms of the personnel taken from other duties for the trial itself'. The JAG explained why juries are resource intensive:

...in civilian courts there are rules that govern matters such as who jurors may interact with during the period of the trial, and, in particular, after they have been charged and have gone out to consider their verdict. They are kept apart from everyone until they have come back and reported their verdict. They are looked after by a jury keeper, who is an officer of the court experienced in assisting jurors without getting involved in the merits of the case that they are debating with a view to providing a verdict, and so on.⁸⁹

2.80 He noted that significant difficulties emerge when that civilian model is transferred into the military. Although a purpose built court is to be built in Canberra, he observed:

...the moment the court sits with a jury on a military base that has no facilities for a jury trial, then there is a considerable risk, in my view, that things could miscarry quite inadvertently. The jury will have to resort to the mess to eat their meals, and it is not easy to keep them separate from everybody else in a large mess. The risk is that they will be seen talking to somebody by defence counsel, there will be a complaint and the trial could miscarry. To me, there seems to be a need for some dedicated facilities, and I am conscious that this is going to take time.⁹⁰

2.81 A number of witnesses put forward practical suggestions that, in their view, would help to alleviate the demand on resources. The DMP proposed that:

...given that we brought all the assets to Canberra—all the prosecutors and judges are here, a significant portion of the officers of the Defence Force are in Canberra, we are building an AMC here in Canberra and we do not

86 *Committee Hansard*, 20 June 2008, pp. 3 and 5.

87 Section 122, *Defence Force Discipline Act 1982*. For class 1 offences see Schedule 7 and, for example, sections 15, 16, 20, 21 and 59. There are three classes of offence, class 1 offences are the most serious offences dealing with, for example, abandoning a post, aiding the enemy, mutiny, desertion or selling or dealing in narcotic goods.

88 Chief Military Judge, *Australian Military Court: Report for the period 1 October to 31 December 2007*, paragraph 24 and footnote 16.

89 *Committee Hansard*, 20 June 2008, p. 19.

90 *Committee Hansard*, 20 June 2008, p. 19.

have facilities in the regions that currently exist—we should have all the trials here, particularly the contested matters, the trials by jury.⁹¹

2.82 She stated further:

I think that we are stretching ourselves far too much by attempting to do them in the regions. There is the logistical difficulty of having a 12-man jury, for instance, in Perth. Flying officers to Perth, where they could be for a week and a half, keeping them separate and accommodating them, and the burden on the unit of the accused—which currently has to bear that administrative burden of providing the clerk and all the orderlies, getting the room together and the like—starts to add up. If we had a structure in Canberra with a court staff, we could have that running on a regular basis—a weekly basis or even a daily basis. I think we would get through matters much more effectively than we are now. Equally, I would not lose prosecutors for two weeks. They have other matters to attend to, yet they are taken to Perth, to Melbourne, to Adelaide or to Townsville. It is a lot of flying; it is quite tiring.⁹²

2.83 She suggested further that if trials are to be held outside Canberra then existing facilities could be used—let us not worry about trying to convert tearooms into courtrooms'.⁹³ The JAG also acknowledged that arrangements could be made between the Commonwealth and states to allow the AMC to use the courthouses that exist throughout Australia.⁹⁴

Committee view

2.84 The committee notes the significant increase in matters being referred to the AMC, as opposed to the old regime, and the demands that this increase is placing on ADF resources. The committee is firmly of the view that such considerations have no bearing on decisions regarding the establishment of the AMC or of allowing an accused to elect trial by the AMC. Cost and resource considerations should in no way compromise or erode the principles underpinning the operation of the AMC as now enshrined in legislation. They should not diminish support for the AMC.

2.85 Even so, the committee is of the view that the AMC should seek to adopt efficient and cost effective ways to conduct its business. The DMP and the JAG have proposed what appear to be practical and sensible ways to address some of these resource issues.

2.86 The committee is concerned, however, about the slowness in developing the infrastructure and finalising other organisational matters necessary for the effective

91 *Committee Hansard*, 26 June 2008, p. 17.

92 *Committee Hansard*, 26 June 2008, p. 17.

93 *Committee Hansard*, 26 June 2008, p. 17.

94 *Committee Hansard*, 20 June 2008, p. 20.

operation of the court. It believes that the speedy establishment of the AMC as a working organisation is critical to an effective military justice system. The committee is of the view that the CMJ must take urgent steps to ensure that the appropriate organisational structures are in place and fully functional so that the business of the court can proceed without delay or impediment. The committee requests that the CMJ keeps the committee fully informed about progress on the establishment of the AMC.

Staffing for the ODMP

2.87 On the matter of resources, the July 2006 audit of the ADF investigative capability noted that the ODMP was understaffed.⁹⁵ In her 2006–2007 annual report, the DMP recorded that a number of officers in her office were transferred out, including two officers deployed overseas which resulted in the office carrying their 'extended absence'. With regard to Navy, she indicated that it was unable to meet its obligations to provide two prosecutors of lieutenant commander rank throughout 2007.⁹⁶

2.88 In evidence before the committee, she stated that for the first time all the service positions would be filled as of January 2009.⁹⁷ She noted that, while to date she had not been able to have all the positions filled, the operations of the office had not been adversely affected due in large part to the high calibre of the officers assigned to the ODMP.⁹⁸

Committee view

2.89 The committee notes that the DMP is a statutorily independent appointment and requires adequate resources to carry out her functions effectively. Her annual report, which clearly raised concerns about staffing matters, is a clear indication of the value that the current reporting regime has in supporting the independence of the office of the DMP.

95 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2-006, paragraph 2.28 (1).

96 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, paragraphs 19–21.

97 *Committee Hansard*, 26 June 2008, p. 15.

98 *Committee Hansard*, 26 June 2008, p. 16.

Chapter 3

ADF's investigative service

3.1 In its 2005 report, the committee expressed grave concerns about the ADF's capacity to conduct rigorous and fair disciplinary investigations. Indeed, it was of the view that the ADF had 'proven itself manifestly incapable of adequately performing its investigatory function'.¹ Responding to the committee's finding, the government agreed that the then military police investigation capability had significant shortcomings and was inadequate for dealing with more serious offences not referred to civilian authorities. It accepted the committee's recommendation to conduct a tri-service audit of the service police to establish the best means for developing investigative capabilities.² In February 2006, the CDF commissioned an audit into the ADF's investigative capability.

3.2 On 31 July 2006, the *Report of the 2006 Audit of the ADF Investigative Capability* was presented to the CDF and made public in December 2006. This audit was not the first review of the ADF's investigative capability. Inquiries into such matters date back to 1998 with the Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*.³ This report and numerous subsequent ones have been consistent in identifying similar problems including:

- lack of experience and inappropriate training of those undertaking the investigation;⁴
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users;⁵
- inadequate questioning techniques, recording of interviews and statement taking, for example, pursuit of irrelevant issues in witness

1 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 52.

2 Government response to recommendation 6 contained in Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005. See appendix 3 of this report.

3 See also the 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report *Military Justice Procedures in the Australian Defence Force*; the 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*; the 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC.

4 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

5 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15.

interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response;⁶

- lack of guidance about evidence gathering and analysis;⁷
- absence of a structured process for supervising or monitoring the progress of investigations;⁸
- inadequate record keeping;⁹
- failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations under the auspices of the DFDA;¹⁰
- secrecy in the investigation process, poor management practices, inadequate resourcing, and excessively long investigation and offence clearance times;¹¹
- delayed investigations;¹²
- unreasonable exertion of influence from commanding officer during investigative processes;¹³ and
- procedural fairness and competence issues in investigation conduct.¹⁴

3.3 Importantly, the more recent 2006 audit found that the ADF's investigative capability was in serious decline. It contended that despite being reviewed, re-organised, restructured and downsized over the last fifteen years, the service police still lacked 'clear purpose and direction, a senior "champion" or advocate to advance

6 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 3.12–13.

7 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

8 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12. The Ombudsman noted at paragraph 6.34, that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.

9 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.13.

10 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15.

11 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.19.

12 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

13 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

14 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

their interests, adequate leadership, and modern policy, doctrine, training and tradecraft'. According to the audit, a higher tempo of operations, integrated military and civilian workforces, and new investigative challenges were deemed to exacerbate the 'plight of the investigative capability'.¹⁵ It argued that from senior commanders down, and even among service police themselves, there was 'no shared view as to the *place, purpose and standing* of investigators in fulfilling the mission of the contemporary ADF'.¹⁶ The audit report concluded that the service police investigative capability had:

...reached the point where fundamental questions could be asked whether the service it provides justifies the significant resources expended on it. However, given the Government's decision that the ADF will retain its investigative capability, remediation must not be further delayed. It is very likely that unless action is taken as a matter of priority, the capability's depleted condition will eventually be evidenced either by its collapse or by the inability of the ADF to respond appropriately to a serious, sensitive event.¹⁷

3.4 In the government's response to the committee's 2005 findings on investigative capability in the ADF, Defence decided to establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF Investigative Service (ADFIS) has since been established under the command of a Provost Marshal ADF (PMADF) who is also responsible for implementing the recommendations of the tri-service audit of the ADF Service Police Investigative capability. In June 2008, the CDF observed that steady progress was being made with 45 of the audit's 99 recommendations completed, 27 close to completion and 4 that would be continuing activities.¹⁸

3.5 Even so, the committee understands that building up the investigative section will take time. It was informed that the reform process and building the appropriate capacity in the ADFIS would take 'at least five years'.¹⁹

Committee view

3.6 The committee notes the anticipated 5-year timeframe for building up the capability of the ADFIS to a satisfactory standard.

15 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraphs 4 and 5.

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

17 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 8.

18 Department of Defence, *Report on the progress of reforms to the military justice system*, 5 June 2008. See Appendix 5.

19 *Committee Hansard*, 20 June 2008, p. 22.

Recruitment to the ADFIS

3.7 In 2005, the committee reported that service police members were of the view that their organisation was in crisis. They complained of poor morale, being overworked and under-resourced, loss of confidence, lack of direction and a sense of confusion about their role and purpose.²⁰ The 2006 audit report described a military police service where 'investigator motivation and morale were suffering and capable people were considering leaving the ADF'.²¹ It found that the viability of the investigative elements of the three services was seriously threatened on several fronts noting:

- all are experiencing problems related to allocated staff numbers and their quality and experience; and
- many investigators have high workloads, poor administrative support and outdated and inadequate information technology support systems.²²

3.8 In June 2008, the CDF informed the committee that recruitment and retention of suitable personnel remained a principal concern and that it was likely to be some time before ADFIS would 'be able to achieve its full complement'. He acknowledged that this under resourcing was 'probably a major factor in our ability to deal with the workload'.²³ He explained progress to date:

The ADF Investigative Service has been in existence for just over a year now, and I am most encouraged by the measures being implemented to achieve best practice policing within the ADF. It will, however, take time to establish and develop the investigative capability to its optimum potential... Recruitment campaigns and improvements to pay and conditions are being examined to rectify this shortfall.²⁴

3.9 The committee had before it correspondence from a person who stated that he had been identified as a suitable candidate for direct entry recruitment into the Army Reserve component of the ADFIS.²⁵ He informed the committee:

Within a two year period, despite a sustained and concerted effort by the Provost Marshal and his staff, a deadline for my appointment is still outstanding.²⁶

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

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

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

23 *Committee Hansard*, 20 June 2008, pp. 22 and 33.

24 *Committee Hansard*, 20 June 2008, p. 22.

25 Confidential correspondence dated 16 June 2008.

26 Confidential correspondence dated 16 June 2008 and *Committee Hansard*, 20 June 2008, p. 32.

3.10 When asked about this case, the Provost Marshal, Colonel Tim Grutzner, explained that currently the ADFIS was manned at 58 to 60 per cent strength.²⁷ He advised the committee:

There are outstanding policy issues, in terms of bringing qualified personnel, such as civilian police—serving or exofficers—into the Army, Navy or Air Force Reserves as direct entry officers. In this case, the individual wishes to join the Army, and the policy now does not provide for a direct entry officer to join the military police. So there are a number of policy issues that we need to overcome for that.²⁸

3.11 The CDF reminded the committee of the five-year implementation time, but indicated that in this case, recruitment processes would be accelerated. He said:

I think it is absolutely imperative that we expedite this process and I will take that on board. We will come back to it next time we speak and let you know how it is going.²⁹

Committee view

3.12 The committee notes the CDF's undertaking to expedite recruitment processes to the ADFIS and urges the ADF to do its utmost to ensure that any shortfall in staffing for the ADFIS is remedied promptly.

Improvements in capability

3.13 According to the Provost Marshal, there are positive signs of improvement in the investigative capability of the ADFIS. For example, he was of the view that the briefs of evidence were improving.³⁰ The DMP also noted that there had been a slight improvement in the standard and quality of briefs of evidence. She was of the view, however, that there was 'room for improvement.'³¹ She expressed concern that her office was still receiving a brief of evidence that shows that the investigation had taken between six to twelve months to complete. The DMP also indicated that many briefs 'clearly disclose that no service offence could be successfully prosecuted.'³² In evidence before the committee, she stated:

But over the last 12 months or so, particularly the last six months—and I think us being in Canberra has enhanced this, as well as ADFIS finally having got home and settled down some of their procedures—we have been able to form an extremely good liaison with them and a number of the other

27 *Committee Hansard*, 20 June 2008, p. 33.

28 *Committee Hansard*, 20 June 2008, p. 32.

29 *Committee Hansard*, 20 June 2008, p. 32.

30 *Committee Hansard*, 20 June 2008, p. 33.

31 *Committee Hansard*, 26 June 2008, p. 12.

32 Directory of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, paragraph 91.

service policemen throughout Australia. For instance, I have instructed my prosecutors that, irrespective of whether the trial will proceed by a not guilty or a guilty plea, they encourage the service policemen who investigated it to attend. I think that exposes them to the problems that you have with evidence; they see it and they can learn vicariously in relation to how they should go about investigating. We have very good liaison with the headquarters at ADFIS, and their operations officer. I admit to still having some difficulties...³³

...

Having said that, I think it has improved—certainly the quality. We still have a number of matters whereby we repechage and seek guidance. That has been better received than it was initially. In the early stages when I asked for things to be redone or for evidence to be got in relation to certain matters, people were taking umbrage that I was being highly critical of their work. I think slowly but surely there is now a realisation that I am not being critical. They are making the same errors less often. Overall, I think their main problem is that they simply do not have enough. I do not know how you overcome that problem.³⁴

3.14 The IGADF took the opportunity to inform the committee about the average time taken in the summary system. To bring matters to trial at the summary level in 2007–08 took 11 days for Navy, 15 days for Army and 28 days for Air Force. In the case of Air Force, about 60 per cent of those were actually handled in less than 21 days.³⁵

Committee view

3.15 The committee notes the comments by the DMP and the IGADF indicating that the quality of investigations undertaken by ADFIS is improving. Nonetheless, as demonstrated by the committee's 2005 report and the more recent audit of the Report of an Audit of the Australian Defence Force investigative capability, the capability of the Service Police is starting from a low base. In particular, the committee notes the findings of the audit report that ADF investigative capability is in 'serious decline' and that, even if approached with 'unremitting resolve and commitment', remediation is likely to take no less than five years'.³⁶ The committee also notes that Defence has made a commitment 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. According to Defence, this audit will form part of the broader independent review of the enhancements to the military justice system.

33 *Committee Hansard*, 26 June 2008, pp. 12–13.

34 *Committee Hansard*, 26 June 2008, p. 13.

35 *Committee Hansard*, 20 June 2008, p. 39.

36 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 3.

3.16 Although there have been many reviews of the ADF's investigative capability, the need for continuing monitoring and review is of the utmost importance. The committee supports Defence's intention to conduct a follow-up audit and also recommends a comprehensive and independent review after the 5-year remediation period (see recommendations 4 and 5 at paragraphs 3.34 and 3.35).

3.17 The committee would also like to see the IGADF assess progress and report in detail on the implementation of the recommendations contained in the audit report. The committee would also encourage the DMP to continue to draw on the experiences of her office to comment in her annual report on the quality of briefs produced for her office by the ADFIS.

Scene of incident

3.18 The criticism directed at the poor standard of investigations applies with equal force to administrative inquiries into serious accidents or sudden deaths. Based on evidence presented to the 2005 inquiry, the committee found that the immediate stage involving activities such as securing and examining the scene of an incident was one area of concern. At that time, a number of relatives of members of the ADF who had committed suicide were highly critical of the initial examination. Many believed that the investigation was flawed, for example, because the respective investigation was incomplete, that evidence was overlooked or important questions not asked.³⁷

3.19 The audit into the ADF investigative capability supported the committee's findings. It recognised the need for all service police to have 'good crime scene skills in order to preserve and protect the scene and any evidence'. One of its many recommendations went to the basic skills required of service police:

SP and investigator training needs be reviewed to emphasise and reinforce the basic core skills and competencies of policing. These include the taking of statements from witnesses, interviewing suspects and offenders, and the rules governing the admissibility of evidence, including the value and use of exculpatory as well as inculpatory evidence.³⁸

3.20 Despite repeated calls over many years for the appropriate care and management of incident scenes, the audit also found the urgent need for improvement in this area and recommended:

The proper care and management of incident and crime scenes, at least in terms of basic protection and preservation techniques, ought to be an

37 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 9.23–9.26. The report cited for example, Mrs Palmer, *Committee Hansard*, 1 March 2004, p. 75, who felt that there was 'not much of a military investigation with evidence discarded'. Mrs McNess, *Committee Hansard*, 28 April 2004, pp. 62–4.

38 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.1, paragraph 5.3, p. 49.

element of all pre-command training courses in the ADF and be reinforced periodically during career advancement.³⁹

3.21 In response to the recommendations of the audit report, the ADF stated that it would include the proper care and management of incident and crime scenes as an element of all pre-command training courses in the ADF.⁴⁰

3.22 The findings of the *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, presented to the CDF on 27 October 2006, further underlined the concerns about the competence of investigating authorities in the ADF. It emphasised the need for immediate and decisive action by the ADF to rectify the many problems besetting its military police service. In particular, the report highlighted inadequate education and training of those undertaking the investigation, poor questioning techniques, recording of interviews and statement taking, and lack of process, monitoring or quality control.

3.23 To be more specific, the Report of the Board of Inquiry found shortcomings in ADF processes concerning the handling and preservation of serious incident sites and physical evidence and of the passage of information about the details of serious incidents.⁴¹ For example, the inquiry found that the room in which Private Kovco died was not properly secured for the preservation of all evidence in the room. The Board stated, 'Put simply, there were too many ADF personnel entering Room 8 after the shooting'.⁴²

3.24 In its second progress report tabled in March 2007, the committee was cautious in accepting that the ADF's undertakings to improve its investigative capability would be successful. Despite obvious progress, the committee's confidence was tempered by the repeated failures of the ADF to implement effective reforms following previous reports and reviews of the investigative capability of the military police service. It should be noted that recommendations to improve the investigative capability of the service police were made in 1998 by the Commonwealth Ombudsman; by the Joint Standing Committee on Foreign Affairs, Defence and Trade in 1999, again by the Joint Standing Committee in 2001; by Mr J. C. S. Burchett Q.C. in his 2001 report into military justice in the ADF; the IGADF's commissioned report into the East Timor SAS investigation (confidential document); the 2004 Ernst & Young Report; and by this committee in June 2005.

39 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.8, paragraph 5.31, p. 49.

40 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 5.8.

41 Paragraph 285, Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco.

42 Paragraph 282(h), Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco.

3.25 Following each report, the ADF indicated that reforms were under way that would address the many problems plaguing the military police services. For example in January 1998, the Commonwealth Ombudsman stated:

Looking ahead, during 1998 the ADF is intending to commence a review into the tri-service investigation and policing capability for the ADF, which I understand will also address training issues. I am satisfied that every effort is being made to ensure that Service police will be adequately trained in the future, and that accreditation processes will promote adequate guidance and documentation for their investigative functions.⁴³

3.26 The same inadequacies, however, remain. The committee notes the repeated failed attempts to improve the capability of service police and is looking for certainty that on this occasion definite and lasting improvements will be made.

3.27 Problems with the proper management of the scene of an incident, however, go beyond the capability of the service police and involve the activities ADF members before the investigators arrive. In May 2007, Defence informed the committee that:

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.⁴⁴

3.28 In December 2007, well after deficiencies with regard to management of evidence were brought to light following the death of Private Kovco, the inquiry into the death of Private Luke Worsley in Afghanistan also identified failures. The report found that Private Worsley's clothes and equipment had been destroyed prior to inspection by the Investigating Officer (IO). The inquiry stated:

Whilst not an issue in this case, care should be exercised for future matters where retention of evidence may be important. The IO was unable to identify a current policy detailing the management of personal equipment and clothing in the circumstances of this incident.⁴⁵

3.29 While acknowledging that ADF members are acting with the best of intentions, it appears, from an investigation perspective, that the scenes of serious incidents are still being compromised.

3.30 The 2008 inquiry into the death of Sergeant Matthew Locke in Afghanistan also found breaches in post-mortem procedures that indicated 'a weakness in the

43 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, January 1998, paragraph 5.10.

44 Department of Defence, written answers to question on notice, W2, following hearing, 26 February 2007, May 2007.

45 *Inquiry Officer's Report into the Death of 8265028 PTE LJ Worsley in Afghanistan on 23 Nov 07*, paragraph 43.

knowledge levels of deployed personnel and possibly others preparing to deploy'. It stated:

It is conceivable that such a knowledge weakness could lead to a catastrophic loss of evidence in the event a criminal act is apparent. It remains a matter that warrants clarification to ensure force preparation and ongoing deployed force awareness of post-mortem procedures is sufficiently adequate.⁴⁶

Committee view

3.31 The committee notes the high priority that the ADF has placed on improving the capability of its investigative services. The recent investigator's reports cited above highlight two important factors:

- much work remains to be done in training ADF personnel on the correct management of the scene of an incident, particularly the initial stage of an investigation including before the investigating officer arrives on the scene; and
- the value in making the investigating officer's report into a sudden death or serious incident public—although this reporting may expose deficiencies in the handling of an incident, it is an important accountability and learning tool.

Conclusion

3.32 The standard of the ADF's investigative capability has come under serious, sustained and justified criticism for many years dating back at least to 1998. Over that time little progress has been made toward rectifying identified failings. If the reforms recently initiated and those still to be implemented are to take effect the ADF needs to refocus, develop a plan with clearly stated objectives for improving the ADF's investigative capability and make a concerted effort to achieve these objectives. Recruitment and training is a priority. The process of building the ADF's investigative capability should be monitored and assessed regularly.

3.33 The committee suggests that a senior officer or team similar to the MJIT have responsibility for reinvigorating the reform process by assessing progress in implementing change, reviewing the remediation plan and reporting to the CDF as soon as possible on the findings.

Recommendation 4

3.34 The committee recommends that in 12 months, Defence report to the committee on its progress implementing reforms to improve the ADF's investigative capability.

46 *Inquiry Officer's Report into the Death of 8229246 SGT MR Locke in Afghanistan on 25 Oct 07*, paragraph 44.

Recommendation 5

3.35 The committee recommends that the government commission an independent review of the ADF's investigative capability at the conclusion of the 5-year remediation period.

3.36 In addition, the committee draws its concerns about problems with the ADF's investigative capability to the attention of Sir Laurence Street. It would welcome his advice on the approach being taken by the ADF to rectify these deficiencies and any suggestions his team might have on how the ADF's investigative capability could be improved.

Chapter 4

Administrative system

4.1 The administrative system is the second component of the military justice system. It is concerned with non-DFDA matters, such as boards of inquiry (BOI), CDF commissions of inquiry, administrative investigations, redress of grievance (ROG) and complaint handling, adverse administrative action and review of command decisions.

4.2 The disciplinary and administrative components of the military justice system are 'essential to maintaining a disciplined and operationally effective military force'.¹ The systems, however, are quite distinct and separate. The administrative system has a different legislative source and serves a different purpose from the disciplinary system.² Whereas the discipline system is largely informed and controlled by the rules and principles of the criminal law, the administrative system is 'subject to administrative law principles, especially the fundamental principles comprising natural justice, also called procedural fairness.'³

Delays in the redress of grievance system

4.3 In its 2005 report, the committee identified delays and other organisational failures that frustrated the timely completion of an investigation in resolving grievances as a major problem. To tackle these problems, the references committee recommended that all complaints lodged with a commanding officer and being investigated within the chain of command be referred to the proposed Australian Defence Force Administrative Review Board (ADFARB) if the matter was not resolved 60 days from lodgement.⁴

4.4 The government did not accept the committee's recommendation. It proposed instead to reform and streamline the complaints and redress of grievance management system. The Fairness and Resolution Branch was established on 30 January 2006 as the central management body outside the normal line management. This initiative combined a number of former separate units within the department. In effect, it re-structured, renamed and brought together the Complaint Resolution Agency, the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution

1 Air Commodore Harvey, *Committee Hansard*, Inquiry into the effectiveness of Australia's military justice system, 1 March 2004, p. 54.

2 Department of Defence, *Submission P16* to the Inquiry into the effectiveness of Australia's military justice system, p. 22 and *Submission P16F*, p. 3.

3 *Submission P16* to the Inquiry into the effectiveness of Australia's military justice system, paragraph. 2.58.

4 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2006, paragraph 8.114.

and Conflict Management.⁵ The new system allows Defence 'to streamline the complaints and redress of grievance system in line with the recommendations of the 2004 joint Defence Force Ombudsman and CDF redress of grievance system review'.⁶ The Fairness and Resolution Branch now has responsibility for addressing the problem of delays and other operational failings in the administrative system.

4.5 Early in the implementation period, the committee was encouraged by the results from the restructuring. In June 2006, the Defence Force Ombudsman informed the committee that there had been a substantial improvement in the processing of complaints, notably a reduction in the time for handling ROGs and in the number of complaints about delay that flow through to his office.⁷ He explained:

Our experience a year ago was that it was common for matters to have been within the Complaint Resolution Agency, or within the redress of grievance process, for six or nine months and sometimes longer before it came to our office.⁸

4.6 Professor McMillan attributed the better and faster handling of grievances to sounder structural coordination by the merger of the different branches.⁹ He was of the view that the reduction in processing time was a positive improvement in the way that matters were handled within Defence and that it represented a more professional approach to handling complaints.¹⁰

4.7 He also noted that in the past his office sometimes experienced difficulty in having its requests to Defence receive priority but that the process in investigations was 'proceeding much more efficiently in discussion with the Defence department'.¹¹ Overall, he observed 'a general improvement in responsiveness of the Defence portfolio to our requests'.¹² The positive results have enabled the Office of the Defence Force Ombudsman to reduce their number of open cases and brought about a 'much more efficient dispatch of complaints about the defence portfolio'.¹³

5 *Committee Hansard*, 19 June 2006, pp. 2 and 11.

6 *Committee Hansard*, 19 June 2006, p. 11.

7 *Committee Hansard*, 19 June 2006, pp. 2 and 6.

8 *Committee Hansard*, 19 June 2006, p. 7.

9 *Committee Hansard*, 19 June 2006, pp. 2 and 9.

10 *Committee Hansard*, 19 June 2006, p. 9.

11 *Committee Hansard*, 19 June 2006, p. 7.

12 *Committee Hansard*, 19 June 2006, p. 9.

13 *Committee Hansard*, 19 June 2006, p. 2. At this hearing in 2006, the Deputy Defence Force Ombudsman, Mr Ronald Brent, predicted a reduction of approximately 10 per cent in the number of complaints in the current financial year as against the previous one. *Committee Hansard*, 19 June 2006, p. 9. See also Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, pp. 22.–23.

4.8 At that time, he suggested that to avoid any slippage in quality it was 'necessary to implement quality assurance processes and regular monitoring and auditing of the way complaints handling and investigation are undertaken'.¹⁴

4.9 The complaints handling system has continued to undergo further reforms. The ADF's June 2008 progress report noted that substantial work had been completed in reforming and streamlining the complaints and redress of grievance system. The CDF explained:

...The Defence Force regulations took effect last month and now provide an updated process for members of the ADF to submit complaints regarding certain matters relating to their service. The amendments introduce time frames relating to the process for submission on, inquiry into, and referral to a higher authority of redresses of grievance. I believe the revised arrangements will substantially improve ADF complaint handling processes.¹⁵

4.10 As an indication of this improvement, the Defence Force Ombudsman received 252 approaches and complaints from serving and former members of the ADF in 2006–2007 compared to 303 in the previous year. It drew attention to:

- greater timeliness in the way Defence handles complaints from serving members;
- the positive effect that recent quality assurance mechanisms have had on the ADF's redress of grievance process; and
- Defence's willingness to involve the Ombudsman's office in ADF training courses and seminars.¹⁶

Referral to service chief—delays

4.11 The committee notes the success that the 90-day time limit for addressing a redress of grievance at the unit level is having in minimising delays. While recognising the improvement that this measure has had in expediting the handling of complaints, the Defence Force Ombudsman did note, however, that there was no 90-day time limit imposed for referrals to the Service Chiefs. Information available to the Ombudsman's office indicated that such referrals were taking about 6 months before the matter is then allocated to a case officer within complaints resolution. He explained:

Then, of course, it can take several weeks more for the complaint officer to investigate and prepare a report for the service chief and then for the service

14 *Committee Hansard*, 19 June 2006, p. 5 and Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, pp. 22–3 and 26.

15 *Committee Hansard*, 20 June 2008, p. 22.

16 Commonwealth Ombudsman, *Annual Report 2006–2007*, Section on Defence in Chapter 7 http://www.ombudsman.gov.au/publications_information/annual_reports/ar2006-07/index.html.

chief to address it. Admittedly, it is more important in many ways to have the resources and effort focused at the primary stage and to ensure that the time lines are met at the primary stage. But the fact that there are such strict time limits being met there and then, if there is an appeal to a service chief that it is taking so long...¹⁷

4.12 He stated further:

Given that an important principle in the design of the system is that there should be a 90-day turnaround at the primary stage, one would like a similar time limit at the appeal stage. In many ways, that could be a shorter period because the basic investigation has already been done and so the issues have been clarified.¹⁸

Committee view

4.13 The committee recognises the efforts of the ADF to improve its ROG process. It especially notes the success achieved in reducing the time taken to process these grievances. It draws attention, however, to the potential for delay where a grievance is referred to a service chief. The committee believes that a timeframe imposed on this stage of a ROG would be desirable.

Recommendation 5

4.14 The committee recommends that a specific time limit, for example 90 days, be imposed on referrals of ROGs to the service chiefs.

Reporting of complaints

4.15 The importance of having a mechanism that allows ADF members to make a complaint with confidence in the integrity and fairness of the process is central to an effective and fair administrative system. The Defence Force Ombudsman noted that from an institutional viewpoint, individual complaints are 'a valuable resource for highlighting problems and improving and reforming administrative systems'.¹⁹ He stated:

Regular high-volume complaint handling provides a constant message to everybody in the system that dealing with problems is core business—that it is not a sign of malfunction or that people have issues. The underlying principle of the redress of grievance system is that the absolute devotion and loyalty expected of defence members has to be matched by a system that formally allows them to lodge a grievance and have it redressed. In many ways, the redress of grievance system is more integral to defence culture than is often thought to be the case. The idea that people can lodge a

17 *Committee Hansard*, 26 June 2008, pp. 4–5.

18 *Committee Hansard*, 26 June 2008, p. 5.

19 *Committee Hansard*, 26 June 2008, p. 6.

complaint by a formal process is a necessary feature of a system that otherwise demands complete loyalty in all other circumstances.²⁰

4.16 In 2005, the committee highlighted its concern about the tendency of ADF members to baulk at reporting improper conduct or to lodge a legitimate complaint. The committee's 2005 report devoted a chapter to impediments to reporting wrongdoing or making a complaint in the ADF.

4.17 In its view, there was an anti-reporting ethic in some areas of the ADF. It argued that 'a fundamental change in the ADF mindset must be achieved to overcome the stigma attached to lodging a complaint'. Indeed, the committee recognised that this reluctance to complain was part of an entrenched culture within the ADF that, if allowed to continue, had the potential to frustrate the efforts of the ADF to reform its military justice system. It contended that the failure to report wrongdoing meant that responsible commanders were not well placed to detect and correct wrongdoing and hence unsafe practices or inappropriate conduct continued unchecked. The committee was particularly concerned about the reporting of wrongdoing in ADF's training establishments. It found:

The very fact that two young soldiers at Singleton were not prepared to pursue their right to make a complaint about cruel and abusive treatment, and that the wrongdoing came to light only through the determined efforts of their parents, speaks volumes about the inadequacies of the administrative system. They were not alone in their experiences. This failure to expose such abuse means the system stumbles at its most elementary stage—the reporting of wrongdoing.²¹

4.18 In his recent 2007 report on the management of unacceptable behaviour, the Ombudsman referred to ADF personnel and their disinclination to make a complaint. According to his findings:

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.²²

4.19 He explained further:

...there is probably a popular view that, in a disciplined, uniform force, having to complain is a sign of failure or weakness. And yet, as I say, the redress of grievance system historically was regarded as an essential and

20 *Committee Hansard*, 26 June 2008, p. 3.

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

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

critical part of Defence values and Defence principles. If people are being told to follow orders and directions that can lead to their death or injury, then an essential corollary is that they should be able to formally lodge a grievance and have it investigated. My impression is that that philosophy is probably not known as widely as it should be in relation to the Defence redress of grievance system, so there is work to be done both in and outside Defence in promoting that philosophy about complaint handling.²³

4.20 The committee notes the Ombudsman's suggestion that Defence may wish to consider additional research into the reasons for a significant proportion of ADF members surveyed not feeling confident 'to make a complaint about unacceptable behaviour, and identify whether there are particular barriers to making a complaint'.²⁴

4.21 The ADF's June 2008 progress report recognised that fear of reprisal by respondents is 'common to many complainants'. It stated that Defence has introduced a training course for commanders, supervisors and managers which includes information on providing support to all parties to a complaint.²⁵

Committee view

4.22 The committee notes the Ombudsman's suggestion that Defence could benefit from inquiring into why a significant proportion of ADF members surveyed do not feel confident making a complaint about unacceptable behaviour, and whether there are barriers to lodging a complaint. The committee believes that this proposal is very sensible and would provide the ADF with a better understanding of the reasons for the reluctance to report unacceptable behaviour. The training programs mentioned by the CDF may then be better targeted to address the causes.

4.23 Compelling evidence is already available, however, indicating that one of the primary factors discouraging ADF members from reporting wrongdoing stems from elements within the ADF culture that tolerate bullying and harassment and other forms of victimisation of those who are perceived to be weak or who report wrongdoing.

Learning culture in the ADF

4.24 In November 2005, the CDF appointed a team of three to investigate the culture of ADF schools and training establishments. They were to determine whether the culture was 'inappropriate, in particular, whether a culture of harassment and bullying exists; and in general, whether irregularities against established policies and

23 *Committee Hansard*, 26 June 2008, p. 6.

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

25 Department of Defence, *Report on the Progress of Reforms to the military justice system*, 5 June 2008, p. 6.

processes of administration occur'.²⁶ The inquiry team reported in July 2006. In recording its findings, the team 'did not find evidence of a culture that supports bullying or harassment'. Even so, it went on to state 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 as Equity and Diversity'.²⁷

4.25 The committee was struck by the similarity in language and use of phrases in the recent audit report and in the investigators' reports into the suicide deaths of Private Jeremy Williams and Gunner John Satatas, cited in its 2005 report. For example, the report into the death of Private Williams found no evidence to support the view that a culture of brutality, bullying and standover tactics existed at the School of Infantry. It noted that there seemed to be 'isolated incidents from differing individuals that highlighted inappropriate behaviour by individuals rather than a culture'. It wrote of 'negative reinforcement' and 'disparaging and negative comments' but found that 'a culture of denigration is not proved'.²⁸

4.26 Concerned that some of the recent findings were reminiscent of those from earlier investigations into the suicides of young soldiers such as Private Williams and Gunner Satatas, the committee sought additional information from Defence. For instance, the committee was concerned about statements recorded by the team 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'.²⁹

4.27 To assist the committee understand the context and significance of these views, Defence explained that the inquiry team in the ADF's learning culture had 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

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

27 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, Executive summary, p. v.

28 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, pp. 116–120.

29 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 54. See also paragraph 108.

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.³⁰

4.28 Specifically, the committee also sought information from Defence 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 committee sought clarification on the meaning of the term 'subtle abuse'. The inquiry team, through Defence, 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 sufficiently to the team'. It noted:

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.³¹

4.29 This report coupled with the committee's findings in 2005 underline the need for the ADF to take a firm stand against 'isolated incidents' and to be mindful that they may signify a deeper problem. It is crucial that incidents of inappropriate behaviour are reported without fear of reprisal, investigated thoroughly and remedied quickly: otherwise, the potential for such practices to take root in ADF culture is great.

4.30 In 2005, to address a number of problems such as fear of reprisal for reporting wrongdoing, the committee recommended that the government establish an independent Australian Defence Force Administrative Review Board (ADFARB). Under certain circumstances, it would, *inter alia*, receive reports and complaints directly from ADF members, for example, if the person making the submission felt he or she would be victimised in some way for making the report.

4.31 As noted earlier in this chapter, the government rejected the committee's recommendation and decided to restructure the system with the Fairness and Resolution Branch assuming responsibility for address organisational failures in the administrative system. Under this revised system, all complaints must be registered with the agency, which has the authority to take over the management of all cases unresolved by commanders 90 days after lodgement. The government also indicated that improved training of commanding officers and investigating officers would resolve some of the problems identified with the management of complaints. It noted further:

30 Defence answer to written question on notice W13 following committee hearing 26 February 2007.

31 Defence answer to written question on notice W14 following committee hearing 26 February 2007.

For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—IGADF and the Defence Force Ombudsman.³²

4.32 It should be noted that the CDF has given his commitment to ensure that Australia's military justice system is underpinned by values that promote 'productive and constructive' behaviour. Soon after becoming CDF in 2005, Air Chief Marshal Angus Houston informed the committee:

During my tenure as CDF I will invest a great deal of personal effort to ensure that our values are at the heart of the way we do our business in Defence and, most importantly, that we are emphasising values based leadership at all levels. There have been some instances where our people have not been treated very well. I have made it very clear that I expect everybody in Defence to be treated with respect and to get a fair go. That is the Australian way and that is the Australian Defence Force way. I expect to see that right across the three services and right across the whole defence organisation.³³

4.33 In 2008, the CDF informed the committee that implementation of 46 of the 47 agreed recommendations from the Inquiry into the learning culture in ADF schools and training establishments 'was progressing satisfactorily'. He noted the following milestones:

- defining the optimal learning culture (now pending incorporation into Australian Defence Doctrine);
- defining the difference between tough training from bullying and providing principles for the conduct of tough training;
- rules for the development of codes of conduct across ADF training;
- aligning the ADF fraternisation policy, within ADF training, with contemporary standards; and
- the development of principles for the conduct of focus groups that promote open and honest communication while preserving command authority and discipline and ensuring accountability.³⁴

4.34 He noted:

The implementation plan builds on several initiatives already underway. As part of the process of continuous improvement it is expected to influence

32 Government response to the Senate Foreign Affairs, Defence and Trade References Committee, *Report on the effectiveness of Australia's Military Justice System*, October 2005. See appendix 3 in Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006 or appendix 3 in this report.

33 *Committee Hansard*, 2 November 2005, p. 8

34 Department of Defence, *Report on the Progress to the Military Justice System*, June 2008, p. 5. See appendix 3.

changes to ADF training well after achievement of the last of its endorsed milestones. Good progress has been made to date and this progress is being reported to me quarterly, with achievements contained in a specific section of the Defence annual report.³⁵

4.35 The committee notes the measures taken to improve the Defence's learning culture such as developing policies, codes of conduct and training programs. The committee commends such measures but believes that their success in promoting a fair and effective system needs to be assessed regularly. Indeed, on a number of occasions the committee has expressed its concern that to achieve lasting change in the military justice system, a 'major shift' is required in the attitudes of ADF personnel. The committee understands that reform will take time and persistence and that the ADF faces a significant challenge.

Measuring changes in attitude

4.36 The committee sought information on the 'performance indicators' used to monitor changes in attitudes and behaviour. The CDF cited the Defence attitude survey as a way of benchmarking the attitudes of Defence personnel. He said:

Through that we can pick up how people are travelling and how their morale is. There are other mechanisms also available to us, but most of those are what I would call qualitative assessments by commanders...whether we have specific benchmarks against cultural change as a consequence of this report, no we do not. But I do think we have got a number of other mechanisms out there whereby we can measure how things are going.

I think it is more a question of using the learning culture report to change the way we do our training—the way we do the basic training and the training of NCOs and commanders—to emphasise the importance of establishing the right culture through the organisation. All three services have done that very effectively. Obviously, it is something that takes time and we are proceeding pretty well at this stage.³⁶

4.37 In its 2005 report and subsequent reports on the implementation of reforms to the military justice system, the committee voiced strong concerns that if the culture within the ADF is not addressed, it may well undermine any reforms.

Committee view

4.38 The committee believes that the effective monitoring of attitudes in the ADF is critical to the success of the implementation of reforms to Australia's military justice system. The recent inquiry into the learning culture of the ADF underlines the need for another independent and comprehensive review at some time in the near future. Such a review is particularly important to ensure that the recommendations

35 *Committee Hansard*, 20 June 2008, p. 22.

36 *Committee Hansard*, 20 June 2008, p. 36.

made in the 2006 review of the learning culture in the ADF have been implemented and to determine whether additional measures need to be taken.

Recommendation 6

4.39 The committee recommends that the ADF commission an independent review of the learning culture in the ADF, along similar lines as the investigation conducted in 2006. The main purpose of the inquiry would be to assess whether the recommendations contained in the 2006 report have been effectively implemented and whether additional measures need to be taken to improve the learning culture in the ADF. This review should take place within five years and the report on its findings should be made public.

4.40 In the mean time, Defence's Attitude Survey is one way that the ADF, the government and the parliament can keep track of developments in the attitudes of ADF members. The committee suggests, however, that if the ADF and the parliament are to rely on such surveys to benchmark developments in the military justice system, the surveys would need to provide a greater level of detail and critical analysis than that provided in the recent publication *2006 Defence Attitude Survey, Summary of Results*.

4.41 The committee suggests that the published findings of Defence's attitude survey not merely report on the statistics collated but provide robust analysis and commentary on these indicators and what they mean for the effectiveness of Australia's military justice system.

Recommendation 7

4.42 The committee recommends that the findings of Defence's attitude survey contain a greater level of detail and analysis than that provided in the most recent publication

Investigating complaints

4.43 Encouraging ADF members to report unacceptable behaviour is an important first step but ADF members must also have confidence in the competence of those investigating complaints and the fairness of the process. It should be noted that administrative investigations tend to be routine inquiries conducted at the unit level and not by members of the ADFIS.

4.44 In its inquiry in 2005, the committee underlined the central importance of the inquiry process to the overall effectiveness of the administrative system. It recognised that any shortcomings or failings during the early stage of an inquiry have the potential to set an administrative proceeding on a long and troubled course that could drag through the system for years. The integrity of the inquiry process and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and its effectiveness. The Burchett Report observed that:

...if an investigation is conducted carelessly or incompetently, so as to miss the real point, or if it is conducted in such a manner that, although its actual conclusions are realistic, the persons most concerned are left with a feeling that they have not been treated fairly, no decision dependent upon the investigation is likely to be received with general satisfaction...the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.³⁷

4.45 During the 2005 inquiry, the Defence Force Ombudsman also underlined the importance of getting the investigation right from the beginning. He made the observation that 'if the initial handling, investigation or whatever of a complaint is defective then it establishes a bad platform which is reflected at every subsequent stage of the process...'³⁸ Mr Neil James, Executive Director, Australian Defence Association, strongly endorsed this view. In his words, 'an ounce of prevention is worth a pound of cure'.³⁹

4.46 In 2005 the committee found, however, that there were serious flaws in the investigation stage of an administrative inquiry. It described a system where:

There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.⁴⁰

4.47 One of the most corrosive influences undermining the principles of natural justice and one of the most commonly cited concerns stemmed from conflicts of interest and the lack of independence of the investigator and the decision-maker. Many witnesses to the 2005 inquiry called for an independent adjudicator so that a

37 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 116.

38 *Committee Hansard*, 9 June 2004, p. 10.

39 *Committee Hansard*, 9 June 2004, p. 32.

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

neutral and unbiased investigation could take place free from contamination by self-interest or third party influence.⁴¹

4.48 As noted earlier, the Fairness and Resolution Branch is now the central management body responsible for overseeing the management of complaints in the ADF. The Acting Director of the branch, Ms Diane Harris, told the committee in June 2006 that the branch had the capacity to look at a complaint when it is submitted and to determine whether the best process is being used to resolve the matter. She explained:

For example, if that complaint is around what might be a very difficult workplace relationship, it may well be that an alternative dispute resolution process is better suited to it. So we are in a position as a branch to go back to a CO right in the early stages and say, 'Well, yes, this is a formal complaint but have you considered this as an alternative approach,' and so they can use that instead. If it does not succeed, of course the individual still has the formal complaint on the books and it can then be proceeded with as a formal complaint, but sometimes that is not the best way to get the outcome that the individual wants.⁴²

We also have an enhanced advisory role. As of 1 July it will be mandated that all COs, on receiving a complaint, have five days to do their quick assessment to determine what their course of action is going to be and then to submit all of that to the Fairness and Resolution Branch where it will be reviewed. We will have our legal officer look at it, we will have an experienced case officer look at it and we will then provide advice to the CO in terms of the approach that has been proposed.⁴³

We would expect that in most cases that approach will be fairly sound, but in some cases it will not be. We might go back, for example, and say: 'You have nominated Lieutenant Smith to be the inquiry officer. In this case we believe the issues are too complex for a junior officer. We recommend that you appoint a more senior officer to do it.' We might also, for example, say: 'This is a very complex issue. It will be quite involved.' So we might recommend a different inquiry officer altogether and we may put forward to the CO the name of somebody else from outside the unit who might be able to be the inquiry officer for the purposes of that complaint.⁴⁴

4.49 As early as June 2006, the Defence Force Ombudsman, Professor John McMillan, noticed an improvement in the operation of the system. He welcomed the requirement for the central unit to be notified when a complaint or redress of grievance is first lodged. According to the Ombudsman, the unit then takes a quick look at the complaint and can give 'guidance and direction to the unit level

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

42 *Committee Hansard*, 19 June 2006, p. 16.

43 *Committee Hansard*, 19 June 2006, p. 17.

44 *Committee Hansard*, 19 June 2006, p. 17.

commander who will be investigating it'. In his view this early management of complaints is 'important and is improving the result'.⁴⁵

4.50 In June 2007, an Ombudsman's report confirmed the earlier positive impressions about the operation of the system:

...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.⁴⁶

Committee view

4.51 The committee recognises that the restructuring of the ROG process under the direction of the Fairness and Resolution Branch was a definite improvement. While early indications are promising, the system will require continuing surveillance and adequate staffing.

Managing complaints of unacceptable behaviour

4.52 Although in his 2007 report, the Ombudsman acknowledged a much improved complaint-handling system, he nonetheless made 15 recommendations intended to enhance ADF's administrative system. They were based on suggestions made by members of the ADF and related to recordkeeping, 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.⁴⁷

4.53 Defence agreed to all the recommendations. A number of matters contained in the report, however, have been of continuing concern to the committee since its major report on Australia's military justice system in June 2005 including fear of reprisal and recordkeeping. The committee has already discussed fear of reprisal.

45 *Committee Hansard*, 26 June 2008, p. 5.

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

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

Recordkeeping

4.54 On a number of occasions the committee has expressed concern about poor recordkeeping in the ADF and its implications for the military justice system. In its 2005 report, the committee found that:

Missing or misplaced documentation, poor record keeping, recourse to the Freedom of Information legislation, conflicts of interest, lack of support in processing a complaint, investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry all contribute to unnecessary delays.⁴⁸

4.55 The Ombudsman in his June 2007 report on the management of unacceptable behaviour also referred to deficiencies in ADF recordkeeping. He noted the possibility that deficient recordkeeping 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'.⁴⁹

4.56 He noted that he had raised concerns about the quality of records of conversation with the FRB (Fairness and Resolution Branch) on previous occasions during the investigation of complaints from members of the ADF. In his view:

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 [Human Rights and Equal Opportunity Commission] investigation.⁵⁰

4.57 In response to the Ombudsman's recommendations relating to recordkeeping, the CDF explained that the IGADF undertakes monthly audits of selected units to assess the quality of quick assessments, inquiries and recordkeeping in incidents of complaints of unacceptable behaviour.

4.58 The committee notes, however, that the Ombudsman's concern goes beyond recordkeeping relating to the handling of a complaint to recordkeeping more generally in the ADF. In this regard, the committee has received complaints, for example, from former ADF members about medical documents that the ADF could not locate, or would find too difficult to discover among metres of documentation. According to some members, ADF's inability to produce documentation hampers the initial claim process but more particularly any appeal process that the member pursues, for

48 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 8.113.

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

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

example, in the Administrative Appeals Tribunal. In this way, poor recordkeeping may adversely affect the ability of complainants to press their claims thus denying them natural justice. The committee notes a recent finding by Justice Crispin in *Vance v Air Marshall McCormack*:

It is inescapable that the defendants have already had almost five and a half years to find the documents relevant to the retirement of a single officer. An earlier generation of military officers waged the First World War in substantially less time. No plaintiff should be forced to endure such an extraordinary delay in the litigation of his or her claim due to the sustained default of a defendant...⁵¹

Committee view

4.59 The committee is of the view that, as part of the IGADF's monthly auditing, the IGADF also take account of any difficulties experienced by a complainant because of missing or incomplete documentation. Furthermore, the committee suggests that in analysing and reporting on the matters referred to the Office of the IGADF, the IGADF note whether poor recordkeeping has been cited by the complainant as an impediment or frustration in pursuing redress.

4.60 Along similar lines, the committee suggests that the Defence Force Ombudsman also take particular note of, and report on, the complaints he receives from members of the ADF that relate to difficulties complainants may have experienced in pursuing their claims because of poor recordkeeping. These matters would include unnecessary delays or costs because the ADF could not locate documents.

CDF commissions of inquiry (COIs)

4.61 In its 2005 report on Australia's military justice system, the committee raised concerns about administrative inquiries into grave and complex matters such as sudden death or serious accidents. At that time, it could not stress strongly enough the importance of having investigating authorities 'above any suspicion of partiality'. It recommended that all notifiable incidents including suicide, accidental death or serious injury be referred to its proposed Australian Defence Force Administrative Review Board (ADFARB) for investigation or inquiry. Although the government agreed that there was a need to demonstrate that ADF inquiries into serious incidents were independent and impartial, it rejected the recommendation to establish such a review board. Instead, it undertook to establish Chief of Defence Force Commissions of Inquiry (COIs) to meet the objectives of independence and impartiality.⁵²

51 Supreme Court of the ACT, *Russell Vance V Air Marshall Errol John McCormack* in his capacity of Air Force and Commonwealth of Australia, 28 September 2007, p. 10 of 15.

52 Government response to committee's recommendation 34 in Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005.

4.62 The Defence Legislation Amendment Act 2006 allows the Governor-General to make regulations in relation to the appointment, procedures and powers of CDF commissions of inquiry. Regulations enabling the appointment of COIs were passed by the Federal Executive on 21 June 2007 and commenced on 26 June 2007.

Role of COIs

4.63 The CDF made clear that COIs are intended to inform internal military decisions. They:

...determine the facts and circumstances surrounding an incident so an informed decision can be made regarding how and, if possible, why an incident occurred, to help avoid a similar occurrence in the future. This is vital for the safety and reputation of our people and the maintenance of our capability. So far, these new arrangements have worked very well.⁵³

4.64 He explained further:

COIs are not carried out with the intention of meeting the requirements of any other organisation or person outside of Defence. Defence is nevertheless committed to supporting the families of deceased ADF members throughout the COI process and beyond.⁵⁴

4.65 Captain Willee, who has been appointed to the CDF's panel of presidential members for the conduct of CIOs, also explained the importance of Defence inquiring into serious incidents:

...one has to go back to the fundamental reason for inquiries—that is, that defence and most disciplined forces, such as fire brigades and police services, need to get to the answer to the problem as quickly as they possibly can, whether it be a blown gasket on an engine in an engine room or a rifle that consistently misfires, to establish a cure so that it does not happen again. In that sense it is sometimes seen that that need brings about a lack of impartiality.⁵⁵

4.66 He acknowledged, however, that these inquiries:

...will never deal with the fundamental difficulty...that is, the grief which afflicts those whose loved ones have been taken from them in whatever way and the constant theme that runs through all those sorts of inquiries that something more can be done or that something has not been done properly. We can only address that in the best possible way and as sympathetically as possible, but it will never resolve or assuage the initial grief, the bitterness

53 *Committee Hansard*, 20 June 2008, p. 23.

54 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 6 and *Committee Hansard*, 20 June 2008, p. 23.

55 *Committee Hansard*, 20 June 2008, pp. 43–44.

and the concern that often arises from that that not everything has been discovered.⁵⁶

4.67 The committee recognises the importance of Defence inquiring into mishaps or accidents in the ADF causing serious or fatal injuries. It is also aware of the importance of such inquiries being removed from undue influence, especially from command, and being conducted by competent investigators.

4.68 To address this problem of perceived partiality, the Defence (Inquiry) Regulations stipulate that the president of a COI must be a civilian with judicial experience and he or she must not be a permanent or reserve member of the ADF. Captain Willee stated:

I would hope that those inquiries that have been conducted to date, which have been studied by those who are concerned, would have already helped to dispel any notions of lack of impartiality. As we go forward, we will continue to improve the transparency and openness of the proceedings so that people can be assured.

It is certainly not a case of the Defence Force investigating itself. The act requires that those who are appointed as presidential members to conduct those inquiries not be members of the ADF. Some ill-informed people might think that, because we have been members, that would have imbued in us a love of the service to such an extent that we would continue to want to curry favour with the force.⁵⁷

4.69 It should be noted that a CDF commission of inquiry has the power to make recommendations arising from its findings. The CDF must also, at the end of the financial year, prepare a report to be included in the Department's annual report on the operation of the regulations governing the commissions.⁵⁸ This requirement provides an opportunity for the parliament to examine the ADF on the conduct and effectiveness of CDF commissions of inquiry.

4.70 Under the regulations, a commission of inquiry must not conduct an inquiry in public.⁵⁹ The CDF, however, may direct that a commission of inquiry conduct all or

56 *Committee Hansard*, 20 June 2008, p. 42.

57 *Committee Hansard*, 20 June 2008, p. 44.

58 Regulations 110 and 125, *Defence (Inquiry) Regulations 1985*, (accessed 16 September 2008).

59 Regulation 117 reads:

- (1) Subject to subregulation (2), a Commission of Inquiry must not conduct an inquiry in public.
- (2) The appointing authority (CDF) may direct
 - (a) that a Commission of Inquiry conduct all or part of an inquiry in public; or
 - (b) that a person, or persons included in a class of persons, specified in the direction may be present during all or part of an inquiry.

Defence (Inquiry) Regulations 1985, (accessed 16 September 2008).

part of an inquiry in public. The committee understands that in some circumstances an inquiry or part of an inquiry should not be held in public. The regulations allow for the president of a commission under certain circumstances to direct that the inquiry conduct all or part of its proceedings in private. In the interests of transparency and accountability, the committee can see advantages in requiring commissions of inquiry to be conducted in public but allowing the president, as he or she now has, the power to determine to hear the inquiry or parts of it in private.

Committee view

4.71 The committee recognises that the introduction of CIOs presided over by a civilian with judicial experience has in some way removed the perception of Defence inquiring into itself. It would like to see the regulations governing the operation of the commissions changed to provide greater transparency such as the presumption that commissions will be conducted in public. Furthermore, where proceedings are to be private, the committee suggests that the regulations require the president to make a statement outlining the reasons for this decision (see recommendation 11 paragraph 5.57).

4.72 It accepts, as noted by Captain Willee, that such commissions cannot address the 'grief which afflicts those whose loved ones have been taken from them'.

Arrangements with coroners

4.73 Since its first report in June 2005, the committee has been trying to get a clearer understanding of the arrangements for coronial inquiries relating to a death in service. In June 2008, the CDF informed the committee that Defence has protocols in place with the state coroners of Victoria, Queensland and Tasmania and anticipated that eventually agreements would be reached with the ACT, Northern Territory and New South Wales.⁶⁰

4.74 The most recent published reports by ADF investigating officers make observations with regard to the involvement of a coroner. In January 2008, the investigation into the death of Sergeant Matthew Locke in Afghanistan recommended that State Coroners be informed of the need to conduct post-mortems following combat death incidents. The inquiry into the death of Trooper David Pearce, who also died while serving in Afghanistan, noted that an autopsy was not conducted by the Queensland coroner. The investigating officer stated further, 'Whilst I consider an autopsy to not be necessary in this case, I am unaware why such a decision was made'.⁶¹

60 *Committee Hansard*, 20 June 2008, pp. 23 and 25.

61 *Inquiry Officer's Report into the Death of 8229246 SGT MR Locke in Afghanistan on 25 Oct 07*, paragraph 51 and *Inquiry Officer's Report into the Death of 8298024 TPR DR Pearce and Injury to...in Afghanistan on 8 Oct 07*, paragraph 53.

4.75 In response to questions about formulating protocols for the relevant state or territory coroner to hold an inquest into an ADF sudden or unexplained death, Air Vice Marshal Austin, Defence Health Services Division, explained:

It is fair to say that we do not, in fact, have formal written agreements in place with the two states that you have mentioned [South Australia and Western Australia]. However, what we have done is improve the personal relationships that exist and nominate ADF liaison people with those jurisdictions. We believe that the relationship has been greatly enhanced as a consequence of that, and certainly there has been no evidence that, in any of the jurisdictions, we are now having the problems that we had experienced in the past.⁶²

4.76 The committee is not impressed with the progress made by Defence in developing protocols with all state and territory coroners for the inquiry into the sudden or unexplained death of an ADF person. It understands that the function and responsibilities of coroners are governed by their respective legislation and in no way should their independence be compromised. Even so, the committee remains unconvinced that the arrangements between Defence and state coroners are sufficiently robust to ensure that the rights of the all deceased and next-of-kin are appropriately protected.

4.77 Because of the confusion surrounding the relationship between the ADF and state and territory coroners, the committee believes that the newly appointed review team could consider this matter. The committee's main concern is with ensuring that the rights of the deceased and the next-of-kin are the same as those of civilians and are fully protected.

62 *Committee Hansard*, 20 June 2008, p. 25.

Chapter 5

Consolidating reforms

5.1 In light of the breadth of reforms that have been implemented over the past two years, the CDF emphasised the importance of allowing the new arrangements sufficient time to 'bed down' in order that any glitches could be identified and remedied. Overall, he was confident that the reforms in train would result in substantial improvements to the military justice system. In his view, they would better enable the ADF to achieve the correct balance between maintaining discipline and safeguarding individual rights.¹ The IGADF agreed with this assessment. After a recent visit to a number of overseas defence forces, he concluded that, allowing for the reform program to mature, the new ADF military justice system 'could quite likely represent best practice among comparable defence forces'.²

5.2 The committee recognises that 'substantial and commendable progress' has been achieved in improving Australia's military justice system.³ But as the implementation period draws to an end, the committee's main concern is that the reform program retains momentum. In this chapter, the committee looks at the measures taken to ensure that the gains made to date take hold.

Commitment to military justice system

5.3 Commitment by the government and ADF senior leadership is needed to ensure that the AMC and the summary trial procedures continue to work well. A similar commitment is needed to ensure that the Fairness and Resolution Branch and the Office of the IGADF maintain their key role in keeping the ADF's administrative system functioning fairly and effectively.

5.4 The CDF's commitment to the reform process has been one of the most notable features throughout the implementation phase. In presenting Defence's first progress report, the CDF stated:

Together with the Service Chiefs, we are committed to a fair and just military workplace and are personally driving the required changes. We are reviewing progress on a monthly basis as a standing item at the beginning of the COSC (Chiefs of Service Committee).⁴

1 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 70.

2 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 71.

3 Department of Defence, *Report on the progress to reforms to the military justice system*, 20 May 2008.

4 Department of Defence, *Report on progress of enhancements to the military justice system*, April 2006, p. 2.

5.5 On numerous occasions since then, he has re-committed to the reform process. In his October 2007 report, he indicated that he and the Service Chiefs would continue to monitor and review progress as a standing item at their Chiefs of Service Committee until the completion of the implementation of the reforms.⁵ The Defence Force Ombudsman also commented on the commitment at the senior levels within the Defence Force to ensure that matters are addressed:

I have had meetings personally with the Chief of the Defence Force, and it is clear to me that there is a strong personal commitment and strong personal leadership in ensuring that the problems exposed by the military justice inquiry and by some of our own investigations have been accepted and recommendations are implemented, and I have been impressed by the positive response that I receive. Finally, my experience generally as Ombudsman is that leadership is particularly important in getting an organisation to address serious problems of a systemic or cultural nature that are exposed by investigations.⁶

The committee notes and commends the CDF for his leadership in driving the reform program.

Adequate resources

5.6 Even so, the committee notes the importance of ensuring that sufficient resources are available to enable all elements of the military justice system to function properly. For example, the IGADF anticipated that as the reforms take effect and the system undergoes further refinement, the availability of appropriate resources is likely to be a continuing difficulty in some areas.⁷ He observed:

If we are to have an effective, fair and transparent military justice system to the standard that we all expect and that we all have been working to, there is a cost attached...As you know, the ADFIS...one of the new initiatives of the reform program, is up and running but is undermanned, so ways will have to be found and resources will have to be produced to make sure that it fills its complement and that its recruiting and retention are up to speed.⁸

5.7 The committee has already noted the concerns raised about the demand for increased resources with the operation of the AMC, current serious problems in staffing the ADFIS, and some slowness in appointing officers to the ODMP. In reference to the COIs, Captain Paul Willee stated that, although the Law Council had no current concerns about the process, there was the general problem of resources which 'are very stretched'.⁹ Furthermore, the committee recognises that staffing levels

5 *Committee Hansard*, 20 June 2008, p. 23.

6 *Committee Hansard*, 19 June 2006, p. 8.

7 *Committee Hansard*, 20 June 2008, p. 23.

8 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 77.

9 *Committee Hansard*, 20 June 2008, p. 42.

in the Fairness and Resolution Branch must be maintained at an appropriate level to prevent a return to the pre-2005 administrative system which was plagued by lengthy delays in processing complaints and ROGs.

Committee view

5.8 The committee notes that the government's commitment to securing a fair and effective military justice system must be supported by adequate funding and appropriate staffing. It believes that a robust reporting regime is required to keep both the government and the parliament apprised of any shortfalls in necessary funding or staffing for the elements that compose Australia's military justice system.

Maintaining the momentum

5.9 Mindful of the long history of repeated failures to secure lasting effects from reforms to the military justice system, the committee considers that there is a risk of the recent initiatives likewise failing. In this regard, it notes that many of the problems identified in the military justice system were 'manifestations of a deeply entrenched culture'. Thus, one of the committee's main concerns is to prevent the re-emergence of old attitudes and lax practices that run counter to securing an effective and fair military justice system. Improvements in process will not of themselves eliminate the underlying culture or deep-seated attitudes that allowed some of the abuses identified in 2005 to once again take root. As noted by the CDF:

The wrong sorts of behaviour can be very destructive to an organisation, but the right sorts of behaviour can be very productive and constructive. Whilst statements on values are fine in their own right, the real challenge that any organisation faces is to embed its values and its culture and to ensure that its values shape the behaviour of its people.¹⁰

5.10 The committee notes the CDF's commitment to a fair and effective military justice system. It believes, however, that the system should have inbuilt safeguards that do not rely on the commitment of any one person or group to ensure an effective and fair military justice system.

Visibility and scrutiny

5.11 In June 2008, the CDF acknowledged that maintaining the currency and health of the military justice system would be a vital task not necessarily ending 'once all the agreed recommendations have been finally implemented'. He was aware that it would be a requirement to monitor continuously the health and effectiveness of the system and to make changes as needed.¹¹ Nonetheless, he was confident that the measures taken in recent years to increase visibility and central oversight of the

10 *Committee Hansard*, Estimates, 2 November 2005, pp. 7–8.

11 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 10.

military justice system would ensure that the advances made will not be diminished.¹² The IGADF shared this view that the military justice system was now 'considerably more transparent' and 'more broadly accountable than it has been in the past'.¹³ He also argued that there needs to be ongoing scrutiny.¹⁴

5.12 Clearly, the CDF and the IGADF place a high reliance on visibility and regular scrutiny of the military justice system to ensure that the gains made in improving the system will not be lost. The committee now examines the oversight and monitoring regime in order to determine whether it is sufficiently robust to prevent any relapses. It considers the ADF discipline system first before examining the administrative system.

Discipline system

5.13 In large measure, the responsibility for providing the necessary visibility and oversight rests with the CMJ, the JAG, and the DMP. Their independent and critical voice is vital to the health of the system. They are well placed to identify and to issue early warning signals of problems in the discipline system. In particular, the requirement for the CMJ, the JAG and the DMP to provide an annual report to the minister for presentation to the parliament is an important means of upholding the integrity of the ADF's discipline system.

5.14 The committee is confident that the discipline system, with its independent military court; an independent chief military judge; a statutorily independent DMP; and a JAG, who is an independent senior civilian judge with oversight responsibility, provides a sturdy accountability framework. The requirement for the CMJ, the DMP and the JAG to provide an annual report to the minister for presentation to the parliament is an important safeguard. There are also a number of other means to improve the transparency and accountability of the discipline system.

Military justice reporter

5.15 The committee explored the matter of the AMC having a reporting mechanism such as 'a military justice reporter'. The Registrar of the AMC informed the committee that there was no military justice reporter, but that the establishment of a Defence intranet site was contemplated. This site would provide notifications of listings of the matters coming up for trial, trial outcomes and a decisions database that would give the reasons for rulings.¹⁵

12 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 10.

13 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 71.

14 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 78.

15 *Committee Hansard*, 20 June 2008, p. 8.

5.16 According to the Registrar such a database would be closed to the wider public, including the parliament, because of 'privacy concerns'. He explained:

...the Australian Military Court, by virtue of not being a chapter 3 court, is not picked up as a federal court within the terms of that particular phrase within the Privacy Act. So we do not get the protections of the Privacy Act in terms of any disclosure of information that a federal court would normally undertake. That is an issue for us and it is why, in the absence of any clear legislative authorisation under either the Privacy Act or the DFDA, it creates difficulties in terms of public disclosure of information. Under the Defence Force Discipline Act, it is intended that our proceedings are open to the public and there is another provision that allows a military judge to give an order for the non-publication of certain parts of proceedings. By implication one could say that, if you add the two together, you may get an implied authorisation to publish material from the proceedings of the court. But we would prefer not to rely upon inferences or the implications that flow from those provisions and be given quite clear authorisation.¹⁶

5.17 He also indicated that the service chiefs would 'have to be consulted as to the wider publication of that as well'. He could not comment on this matter at the moment but, in his view, the wider reporting on the business of the AMC is 'a policy issue that will need to be addressed'.¹⁷ The DMP, however, had a different view about privacy concerns noting that the proceedings are public and people can attend whether or not the hearing is on defence land:

In the civil world, of course you can go to any court any morning and look at the list and see whose names are on it. I think we tend to get a little bit precious in relation to that. My view is that people will never know if we do not start to communicate what is happening. Particularly when it comes to prosecutions, if the concept of general deterrence is not communicated, if the issues are not out there and if they are not given to the general community as well as the defence community—bearing in mind that we are dispersed throughout Australia, overseas and the like—then we are not going to achieve the aim of general deterrence. So I do not share the view that we have to have the niceness of a definition of what privacy or a court is. I would very much like to see us publicly putting the lists in the Army, Air Force and Navy newspapers as to who is going to trial and I would like us very much to report what happened to them. I do not think that is a breach of privacy. I have opponents in relation to that, as you appreciate. In some respects I have deferred to their concerns. On my website, for instance, having regard to their concerns, I do not name the people who are convicted, but I give sufficient detail of the offending and the result.¹⁸

16 *Committee Hansard*, 20 June 2008, p. 10.

17 *Committee Hansard*, 20 June 2008, p. 10.

18 *Committee Hansard*, 26 June 2008, p. 7.

Committee view

5.18 The committee is strongly of the view that information about the operation and business of the AMC should be as accessible as possible: that information about process, procedures and practices be readily and easily available to the public. If the Registrar's concerns about privacy have substance, then the committee believes that the government should take whatever action is required to require the AMC to publish material such as court lists, transcripts and judgments. The committee understands that some material should not be published such as material deemed by a military judge to be private. This confidentiality should be respected. Otherwise, if the AMC is to instil public confidence in the administration of military justice, it must be accessible to the public.

5.19 To ensure that information about the AMC is readily available, the committee recommends that the government make sure that adequate funds are allocated to assist the AMC establish appropriate mechanisms for disseminating information. The committee is also of the view that establishing these mechanisms and making information available should not be left to the discretion of the CMJ but should be required under legislation.

Recommendation 8

5.20 The committee recommends that the government amend the DFDA to require the AMC to publish material such as court lists, transcripts of proceedings and judgments in a readily and easily accessible form.

5.21 On this issue of transparency and accountability of the AMC, the committee notes that the CMJ declined an invitation to appear before the committee to give evidence on the operation of the court and related matters. On behalf of the CMJ, Colonel Cameron, Registrar of the AMC, informed the committee that the CMJ believed that it would be inappropriate for him, or other military judges, to appear before the committee.¹⁹ The CMJ was concerned about maintaining proper independence from the executive and the legislature. Colonel Cameron also wrote the committee and, in support of the CMJ's position, cited the *Guide to Judicial Conduct (2nd edition)* published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration Incorporated. He explained further:

Aside from the issue of maintaining an appropriate distance between the judiciary and the Executive, the Guide also refers (at paragraph 5.6.1) to '...(the) risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or pre-judgement in cases that later come before the judge even in areas apparently unconnected with the original debate'.²⁰

19 *Committee Hansard*, 20 June 2008, p. 2.

20 Colonel G. Cameron, Registrar, AMC, to Standing Committee on Foreign Affairs, Defence and Trade, 16 July 2008.

5.22 As noted in Chapter 2, however, the now amended *Defence Force Discipline Act 1982* (DFDA) makes clear that the newly established AMC 'is not a court for the purposes of Chapter III of the Constitution'. It is 'a service tribunal'.²¹ The committee is strongly of the view that the CMJ should, when invited by the committee to give evidence on the operation of the court and matters raised in the AMC's annual report, accept that invitation.

5.23 The view reflects the Senate's understanding of the requirement for statutory authorities to be accountable to parliament for their expenditure of public funds. On a number of occasions the Senate has affirmed the principle that:

Whilst it may be argued that statutory authorities are not accountable through the responsible minister of state to Parliament for the day-to-day operations, they may be called to account by Parliament itself at any time and that there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise...²²

5.24 *Odgers' Australian Senate Practice* concludes that officers of statutory authorities 'so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees'.²³

5.25 More importantly, the committee also gave careful consideration to the relevant paragraphs contained in the *Guide to Judicial Conduct (2nd edition)* cited by Colonel Cameron. Paragraph 2.2.1 is concerned with the principle of the separation of powers, which according to the Guide 'requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government'. It states:

The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others (see par 5.6). An appropriate distance should be maintained between the Judiciary and the Executive, bearing in mind the frequency with which the Executive is a litigant before the courts.

Communication with the other branches of government on behalf of the judiciary is the responsibility of the head of the jurisdiction or of the Chief Justice.

It is not uncommon for the executive government, or even Parliament itself, in matters affecting the administration of justice generally, to want to use

21 Notes 1 and 2 to section 114, *Defence Force Discipline Act 1982*.

22 Procedural orders and resolutions of the Senate of continuing effect, *Standing Orders and other orders of the Senate*, September 2006, no. 44, p. 136.

23 *Odgers' Australian Senate Practice*, Harry Evans (ed), 11th edition, 2004, chapter 17–Witnesses, <http://www.aph.gov.au/Senate/pubs/odgers/chap17toc.htm>.

the expertise of judges other than in the exercise of their judicial duties. The fact that the High Court has recently held the conferral of certain non-judicial functions on judges to be invalid...does not necessarily mean that any such request for extra-judicial advice or service must be refused, but acceptance requires very careful consideration and appropriate safeguards.²⁴

5.26 The committee cannot see anything in this advice that would cause the CMJ to decline an invitation to appear before the committee to give evidence about the administration of Australia's military justice system. The committee notes, however, that the guide suggests that acceptance 'requires careful consideration and appropriate safeguards' and now turns to this matter.

5.27 Paragraph 5.6.1 of the guide takes the view that appropriate judicial contribution to public consideration and debate on the administration of justice and the functioning of the judiciary in the media, at public meetings and at meetings of a wide range of interest groups is 'desirable'.²⁵ It suggests that such involvement 'may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions'.²⁶

5.28 Nonetheless, it advises that 'considerable care should be exercised to avoid using the authority and status of the judicial office for purposes for which they were not conferred'. The guide highlights some points for judges to bear in mind when considering whether it is appropriate to contribute:

- A judge must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;
- The place at which, or the occasion on which, a judge speaks may cause the public to associate the judge with a particular organisation, group or cause;
- There is a risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or prejudice in cases that later come before the judge even in areas apparently unconnected with the original debate;
- A distinction might be drawn between opinions and comments on matters of law or legal principle, and the expression of opinions or attitudes about issues or persons or causes that might come before the judge;

24 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 2.2.1.

25 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

26 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

- Expressions of views on private occasions must also be considered carefully as they may lead to the perception of bias;
- Other judges may hold conflicting views, and may wish to respond accordingly, possibly giving rise to a public conflict between judges which may bring the judiciary into disrepute or could diminish the authority of a court;
- A judge, subject to the restraints that come with judicial office, has the same rights as other citizens to participate in public debate;
- A judge who joins in community debate cannot expect the respect that the judge would receive in court, and cannot expect to join and to leave the debate on the judge's terms.

If the matter is one that calls for a response on behalf of the judiciary of the State, Territory or court collectively, that should come from the relevant Chief Justice or head of the jurisdiction, or with that person's approval. Subject to that, and bearing in mind the points made above, care is called for before contributing to community debate using the judicial title, or when it will be known that the contribution is from a judge.²⁷

5.29 Again nothing in this guidance suggests that the CMJ, even if he were a judge of a court properly constituted under Chapter III, should not appear before a parliamentary committee. To the contrary, the guide clearly contemplates, and indeed endorses, the contribution of a chief judge to consideration or public debate that 'would add to the public's understanding of the administration of justice and to public confidence in the judiciary'.

Recommendation 9

5.30 The committee recommends that the CMJ appear before the committee to give evidence on the operation of the AMC and matters raised in the CMJ's annual report when invited by the committee to do so. The CMJ has a vital role, through his or her appearance before the committee, to contribute to the public understanding of the administration of military justice and to build public confidence in the system.

5.31 Aside from the failure of the CMJ to appear before the committee when invited, the committee's main concern, with regard to scrutiny and accountability of the discipline system, is with the future role of the JAG.

Judge Advocate General

5.32 In reviewing the former JAG's 2005 annual report, the committee considered that the JAG's report was an invaluable tool for providing independent and expert systemic insight into the operation of the military justice system. It believed that the JAG's statutory independence provided an effective mechanism necessary to identify

27 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

concerns with the Defence Force discipline system. The committee cited his report as an example of how independence and impartiality in the reporting regime can improve the overall function and accountability of the military justice system. The committee welcomed and supported the JAG's proactive stance in using his annual report to identify problems in the military justice system; suggest improvements to the system; and provide public information regarding the operation of particular aspects of the military justice system. The former JAG's 2006 annual report and the current JAG's 2007 annual report similarly demonstrate the value of having a strong independent civilian judicial oversight of the operation of the DFDA and related legislation.

5.33 The creation of the AMC has meant, however, that many of the former functions of the JAG are now performed by the CMJ.

Future of the JAG

5.34 Consistent with the views of his predecessor, the current JAG, Major General Richard Tracey, strongly supported the retention of the office as an important means for achieving 'a just and transparent military justice system'. He traced the history of the office of the Judge Advocate General noting its evolution over time to 'reflect changes in the military discipline system'. He was of the view that the JAG could have a continuing important role especially through the JAG's annual reports to parliament which 'provide an independent judicial insight into military discipline within the ADF'.²⁸

5.35 Both the CMJ and the DMP are permanent military officers, while the JAG is a senior civilian judicial officer. In contrast to the reports of the CMJ and the DMP on particular aspects of the discipline system, the JAG's report provides oversight and assessment of the operation of the military discipline system as a whole and any related legislation within the reporting year. The JAG is also well placed to make comparisons between the ADF military discipline system and any relevant developments in military discipline overseas.²⁹

5.36 The JAG noted that his role need not be limited to a reporting function. He suggested that the experienced senior civilian judicial standing and independence of the JAG could be used to enhance the fairness, quality, efficiency and effectiveness of the Australian military discipline system into the future. For example, the JAG could:

- play a role in ensuring the quality of appointees to the positions of CMJ, military judges, the DMP and the Registrar of the AMC; and
- be available to the CDF as a sounding board, a source of advice about military discipline issues and, in particular, to be able to advise the CDF about

28 *Committee Hansard*, 20 June 2008, pp. 14–15.

29 *Committee Hansard*, 20 June 2008, p. 14.

developments in the civilian system that may have implications for the military justice system or could highlight problems.³⁰

5.37 In his view, an advisory role need not compromise the independent oversight role of the JAG. He explained:

It depends what sort of advice. Certainly, the CDF gets his day-to-day legal advice from the department, and I would not envisage that the Judge Advocate General would intrude on that at all. But it may be that issues of policy arise where he is presented with competing views as to how he might deal with a particular situation and he might feel he needs a sounding board. I do not think this is the sort of thing that could be legislated for. I simply think that, if the office is there, then the option is available to the Chief of the Defence Force if he needs it at any point.³¹

5.38 He was of the view that legislation could be 'cast with sufficient generality to provide the legal foundation for the office to so act without in any way encumbering the CDF's discretion as to whether he seeks advice or whether he does not'.³²

5.39 The CDF recognised that the JAG has been a very important part of Australia's military justice system but noted that it was time to consider the role and function of the JAG under the new system. He advised the committee that he would like the review team of Sir Laurence Street and Air Marshal Fisher to look at how the JAG could be used in the future—'if indeed we need a JAG in the future'.³³

Committee view

5.40 For a number of years, the committee has commended the JAG's annual report as an important means of providing the necessary judicial oversight of the DFDA. With the creation of the AMC and the appointment of a CMJ, the committee urges the government to ensure that the level of independent civilian oversight of Australia's military justice system continues. It is of the opinion that the JAG has a vital and valuable role to play in providing this oversight and that this critical oversight work continue. Nevertheless, the committee supports the CDF's proposal to refer the matter of the JAG to the newly created review team.

Funding arrangements for the Office of the JAG

5.41 The JAG noted that if the office were to be retained then it would need to be separate from the Military Court to avoid a perception of influence. He indicated that his office would 'probably need to be established within another part of the Defence Force—one possibility is the office of the Vice Chief of the Defence Force'. The JAG

30 *Committee Hansard*, 20 June 2008, pp. 14–15, 18.

31 *Committee Hansard*, 20 June 2008, p. 18.

32 *Committee Hansard*, 20 June 2008, p. 18.

33 *Committee Hansard*, 20 June 2008, p. 31.

also suggested that his office should be staffed by at least one senior officer who would be in a position to do the day-to-day work necessary 'to collate all the relevant material and keep me briefed about developments within the Defence Force so that I can make judgements and prepare the annual report'.³⁴

Committee view

5.42 The committee notes the JAG's concern regarding staff and sources of funding for his office. The committee believes that in consultation with the JAG, the government should address his concerns. In considering the role and function of the JAG, the review team should also consider these matters.

Administrative system

5.43 Unfortunately, the same level of independent scrutiny of the discipline system does not apply to the administrative system. In this regard, the Defence Force Ombudsman reports annually on Defence matters submitted to him. The committee believes, however, that while it supports the continuation of the Ombudsman's reporting obligations, the Office of the Defence Force Ombudsman is not sufficiently immediate to the administrative system to provide the appropriate level of monitoring, analysis and review. The IGADF is ideally placed to fill this role.

Inspector General Australian Defence Force

5.44 The IGADF became a statutory officer under the Defence Act in December 2005. Having regard to recommendations made by the CDF, the Minister by written instrument appoints the IGADF for a period that must not exceed five years. The appointment is renewable.³⁵ The IGADF monitors the implementation progress of the reforms to Australia's military justice system.³⁶ He provides independent internal oversight of, and audits, the military justice system. The functions of the IGADF are:

- to inquire into or investigate matters concerning the military justice system;
- to conduct performance reviews of the military justice system;
- to advise on matters concerning the military justice system; and
- to promote military justice values across the Defence Force.³⁷

34 *Committee Hansard*, 20 June 2008, p. 17.

35 Sections 110 E,F,G, *Defence Act 1903*

36 *Committee Hansard*, 20 June 2008, p. 21. Under section 110 of the *Defence Act 1903*, the IGADF is a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

37 Section 110C, *Defence Act 1903*.

5.45 According to the IGADF, the inquiry and audit activities of his office provide 'better oversight about what is happening in the system than ever before'. He noted that previously there was 'little central visibility, oversight or analysis of the system as a whole on any routine basis'.³⁸ He informed the committee:

While many of the recent reforms to the military justice system, such as the establishment of the permanent Military Court and the new joint investigative service, are relatively visible high-profile initiatives, other important, if less obvious, systemic changes are also being made. These are changes which should materially help to improve the quality of the military justice system by enabling a more constant and consistent surveillance of its components so that flaws in potential areas for reform can be identified and rectified more easily. For example, we now have in place far more effective recording systems for disciplinary and adverse administrative action and for tracking administrative inquiries and the implementation of recommendations arising from them.³⁹

5.46 In its first progress report dated August 2006, the committee commended the work of the IGADF. It noted that his office bears a heavy responsibility for ensuring that many of the reforms then being implemented would 'in fact result in an effective and fair military justice system'.⁴⁰ The committee was firmly of the view that his success would in large measure depend on winning the trust and confidence of ADF members and of being seen as independent from the military chain of command.⁴¹

5.47 This responsibility is more apparent with the completion of the reform implementation phase. The IGADF told the committee that he has a 'broad oversight role of the ADF military justice system and, since the closure of the Military Justice Implementation Team, a monitoring role now attaches to the IGADF in relation to the implementation of those reforms'. He explained his office's role in monitoring the daily operation of the military justice system including through an audit program, which, in his view, is 'proving very successful':

We have audited something like 167 of the 500 or so units in the ADF. They have not all passed, by the way—a small number have not. But...the availability of the reporting systems, plus the scrutiny afforded by my office on a routine basis together with the periodic checking and validation of these processes by external teams means that it is not an entirely internal matter.⁴²

38 *Committee Hansard*, 20 June 2008, p. 24.

39 *Committee Hansard*, 20 June 2008, p. 24.

40 Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system: First progress report*, August 2006, paragraphs 4.77–4, 784.97–4.98.

41 Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system: First progress report*, August 2006, paragraphs 4.77–4, 784.97–4.98.

42 *Committee Hansard*, 20 June 2008, pp. 26–27.

5.48 The IGADF also informed the committee that the case management system for recording police investigations had been upgraded and a new system for monitoring complaint handling was under development. He explained:

The information collected, together with other proactive actions, such as the rolling unit Military Justice Audit Program conducted by my office, will allow the health and effectiveness of the ADF military justice system to be continuously monitored to an extent that was not previously possible. In this respect, I might also mention in passing the interesting development of an entirely new system for the analysis of military justice data being undertaken now, with the help of some quite clever consultants, by the Performance Management Section of my office. It is still in its pilot stage but, if it works as planned, it will break some new ground in the always difficult area of assessment of health and effectiveness of military justice systems.

I am very hopeful that the visibility of military justice issues afforded by the new reporting systems, the ongoing scrutiny of the system through the enquiry and audit processes or activities of the office of the IGADF, together with the periodic checking and validation of these processes by external teams, such as that now being undertaken by Sir Laurence Street and Air Marshal Fisher, will enable necessary reforms to the military justice system to be identified more quickly and made more systematically in a way that can, where necessary, better respond to changes in the law and community expectations as they happen.⁴³

5.49 The committee, and indeed the parliament, will depend on the IGADF's frank and honest reporting to keep it informed about the timeliness of investigations or the processing of complaints, standards of investigations, staffing requirements and shortfalls in the ADFIS, the Fairness and Resolution Branch and the OIGADF and any other relevant section. It will look to the IGADF to identify emerging patterns of unacceptable behaviour or failings within the military justice system. It is for this reason that the committee once again urges the government to strengthen the independence of the IGADF, for example, by placing the office under the same reporting regime as the CMJ and the DMP.

Reporting regime

5.50 The committee notes that the IGADF is a statutory appointment but, unlike the CMJ, JAG and DMP, is not required to report separately to parliament. Under section 110R of the *Defence Act 1903*, the IGADF 'must prepare and give to the Chief of the Defence Force such reports on the operations of the Inspector-General ADF as the Chief of the Defence Force directs'.

5.51 Furthermore, the *Defence Act 2003* makes clear that the IGADF is to provide the CDF with:

43 *Committee Hansard*, 20 June 2008, p. 24.

- a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and
- an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.⁴⁴

5.52 The only interpretation that the committee can place on this provision coupled with the IGADF's reporting obligations is that the independence of the IGADF is curtailed. While the IGADF is to provide the CDF with a mechanism for internal audit and review independent of the ordinary chain of command, his reporting obligations are nonetheless confined within the chain of command. Clearly, the intention of the legislation is to make the IGADF a key advisor to the CDF without any obligations to make public or inform the parliament about his findings or any recommendations on the military justice system.

5.53 In its 2005 report, the committee argued that a reporting regime that is transparent and promotes accountability would greatly improve the perceived independence of the Office of the IGADF. It noted, however, that there does not appear to be any adequate avenue for the IGADF to air his or her concerns about the military justice system to any authority other than the CDF. It appeared to the committee that this constraint was a sound reason for providing the IGADF with effective reporting procedures.⁴⁵

5.54 At that time, the committee also argued that adequate measures should be in place that would hold the CDF publicly accountable should he or she fail to act in part or in full on a recommendation by the IGADF.⁴⁶ It suggested that there should be a requirement for the CDF to provide written explanations to the IGADF for rejecting recommendations that would enable the IGADF to comment on any concerns related to such matters and which would be recorded, for example, in the Annual Report.⁴⁷

5.55 When asked about having the legislative independence to report through an annual report to parliament through the minister, similar to CMJ, JAG, and DMP, the IGADF responded:

...the IG ADF was a creature envisioned and created, I think legislatively, to help the CDF. So, unlike the DMP and the AMC, my reporting function

44 Section 110A, *Defence Act 1903*.

45 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 219.

46 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 11.10 and 11.11.

47 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 11.10 and 11.11. See also Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, p. 36.

is to the CDF. I provide him with a comprehensive annual report each year, extracts of which are published in the Defence annual report. But the difference is, I suppose, that I do not report directly.⁴⁸

5.56 Again this statement highlights the inconsistency in the legislative approach taken for the IGADF and that for the CMJ and the DMP. Unlike the CMJ and the DMP, the IGADF is too closely associated with the chain of command to be seen to provide independent oversight of the military justice system.

5.57 If the IGADF is to earn the trust of members of the ADF and more broadly of the Australian community, he or she must be independent and impartial, and be seen to be so. The independence and impartiality of the IGADF is also paramount if the office is to function as a credible and effective oversight body, able to investigate and report findings free from the limitations imposed by the chain of command. Furthermore, there must be legislative mechanisms that would allow the IGADF to carry out this oversight function effectively. The committee cannot be satisfied, and is not satisfied, that the IGADF's disclosure regime and level of independence is appropriate. The committee believes that the IGADF needs legislative provisions that protect the integrity of the office similar to those for the CMJ and DMP.

Committee view

5.58 The IGADF monitors Australia's military justice system and has oversight of the completion of outstanding implementation actions.⁴⁹ The committee believes that the administrative system needs to be independently and critically monitored and any failings identified early and drawn to the minister's and the parliament's attention. The committee recognises that the IGADF should fill this role but believes that the independence and impartiality of this office needs to be strengthened. The committee recognises that at this stage there is strong justification for further legislative change to enhance the independence of the IGADF which, in the committee's view, needs to be addressed as a matter of priority. The committee suggests the IGADF be required to present an annual report to the minister for tabling in parliament according to the same reporting obligations that apply to the CMJ and DMP. It would allow the IGADF the opportunity to make objective and frank assessments of the health of Australia's military justice system.

Recommendation 10

5.59 The committee recommends that the *Defence Act 1903* be amended to include in section 110 the requirement for the IGADF, as soon as practicable after each 31 December, to prepare and give to the Minister, for presentation to

48 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Committee Hansard*, 10 July 2008, p. 78.

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

the Parliament a report relating to the functions of his office as set out in section 110C(1).

5.60 This recommendation is a necessary first step in restoring credibility to the office of the IGADF when it comes to his independence and function as an effective oversight authority. Other measures should also be considered using the provisions that apply to the CMJ and DMP as a model.

Recommendation 11

5.61 The committee recommends that the government consider additional measures to strengthen the independence of the IGADF using the provisions governing the CMJ and the DMP as a template.

5.62 COIs now form an important part of the ADF administrative system. They inquire into serious and complex matters, often where the death of an ADF member is involved. In some cases they inquire into highly technical matters that may have severe political implications. Public expectations of such inquiries are generally high and next of kin look to such an inquiry to answer questions that sometimes cannot be answered. As noted in the previous chapter, the committee would like to see the regulations governing the operation of the commissions changed to provide greater transparency such as the presumption that commissions would be conducted in public. Furthermore, where proceedings are to be private, the committee suggests that the regulations require the president to make a statement outlining the reasons for this decision. These measures would improve the transparency of the investigation and help instil public confidence in the integrity of the process.

Recommendation 12

5.63 The committee recommends that the regulations governing the establishment of COIs be amended requiring COIs to be conducted in public except in circumstances where the president deems there to be a compelling reason for privacy. In cases where the president makes such a decision, the regulations should require the president to issue a public statement containing the reasons for this decision.

Implementation of reforms

5.64 As noted earlier, Former Chief Justice of New South Wales, Sir Laurence Street, and a former Chief of the Air Force, Air Marshal Les Fisher (Retd) have been appointed to assess the effectiveness of the current reform program. They are to report to the CDF by 10 February 2009. The CDF has asked this review team 'to report on whether the many reforms to the military justice system are appropriate and effective and to identify whether any further enhancements are required'.⁵⁰

50 *Committee Hansard*, 20 June 2008, p. 22.

5.65 The committee welcomes the establishment of this review team. There are a number of matters that the committee would like to draw to the attention of this team. Some concerns go back to the committee's initial 2005 report and, although discussed since then at public hearings, the committee remains uncertain as to whether reforms have adequately addressed these matters.

Chain of command influence

5.66 One of the strongest messages coming out of the committee's 2005 report was the actual or perceived chain of command influence in investigations. The committee has discussed the COIs and the ADFIS. It has not discussed in detail the routine investigations undertaken under the administrative system.

5.67 In 2005, the committee recommended a number of changes to the Defence (Inquiry) Manual which have in large measure been made. These included measures to enhance the transparency, accountability and impartiality of administrative inquiries by requiring an investigating officer to produce a written statement of independence before commencing an investigation. The committee suggests that the review team consider the effectiveness of these amendments to the *Administrative Inquiries Manual* and whether they are sufficiently binding on investigating officers to ensure impartiality and prevent undue command influence.⁵¹

5.68 The committee suggests that the review team also look at the changes that have been made to the *Administrative Inquiries Manual* to assess whether they could be strengthened for example by promulgating them as regulations. While inadequate or unclear guidance in the ADF's investigation manuals was of concern in 2005, the committee was also concerned about the lack of compliance with such guidelines. The committee suggests that the review team consider whether there are provisions in the administrative inquiries rules and regulations to ensure an appropriate level of compliance.

Tracking system

5.69 Defence's annual report contains statistics for the year on: unacceptable behaviour complaints in the ADF (653); claims for detriment caused by defective administration (CDDA) (40); redress of grievance (265); submissions to the IGADF (45); and whistleblower reports (168). The Defence Force Ombudsman also received 252 approaches from members of the ADF.

5.70 An important aspect of effective monitoring involves the implementation of recommendations coming out of investigations. The committee's 2005 inquiry found a failing in the system whereby in some cases recommendations 'appear never to have

51 For relevant changes see answer to question 6, taken on notice 19 June 2006. The paragraphs in the *Administrative Inquiries Manual* are 4.3–4.6 and 5.7 and 5.28–5.34.

been considered by anyone with appropriate authority'.⁵² The committee is strongly of the view that the ADF's monitoring system must also include an assessment of any follow-up action required by an investigation. The committee suggests that the review team investigate the effectiveness of the tracking system that the ADF uses to monitor the progress of complaints.

Claims for detriment caused by defective administration scheme (CDDA)

5.71 Defence's annual report stated that although the CDDA scheme had not been developed specifically to deal with ADF personnel disputes, it is a means by which ADF members can seek compensation, whether or not their redress of grievance has been upheld. It stated further:

The restrictive criteria that apply under the scheme mean that compensation cannot be awarded in many instances, although the person may have grounds for complaint.⁵³

5.72 The annual report states further that:

While the CDDA scheme may be available to pay compensation where the redress of grievance has been upheld in full or in part, it is not an appropriate avenue through which to reopen matters where the member remains dissatisfied with the outcome of the grievance process.⁵⁴

5.73 The committee has received correspondence from some ADF members dissatisfied with the administration of this scheme. It believes that this aspect of the ADF's administrative system warrants consideration by the review team.

Defence Force Discipline Act 1982 (DFDA)

5.74 *The Report of an Audit of the Australian Defence Force Investigative Capability* found there was a common view among ADF members that the *Defence Force Disciplinary Act* (DFDA) had 'simply had its day'. They describe the document as 'outdated and anachronistic' and suggested that it 'does not match modern disciplinary, legal and policing requirements'.⁵⁵ The audit noted that the DFDA had not undergone a fundamental review for over a quarter of a century.

5.75 The call for a review of the DFDA, however, is not new. The audit finding that the DFDA needed to be updated is consistent with those of previous reports dating back to the 1989 Report of the Defence Force Discipline Legislation Board Review. It noted the importance of ensuring that the DFDA was in line with

52 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 6.31 and 8.89

53 Department of Defence, *Annual Report 2006–07*, p. 166.

54 Department of Defence, *Annual Report 2006–07*, p. 167.

55 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.8, p. 31.

comparable and more modern legislation in relation to 'the need to extend the proscription of evolving classes of illicit drugs which are now widely available and used in society and from which the ADF is unlikely to be immune'.⁵⁶

5.76 The 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* (the Burchett Report) also noted the need to update the DFDA. This review recommended, *inter alia*, that consideration be given to reviewing the nature of the punishments that may be imposed under the DFDA in the light of contemporary standards.⁵⁷ The committee's 2005 report on Australia's military justice system was particularly concerned about the grey areas that had developed between the disciplinary and administration systems. It concluded that:

...it appears that a review of the penalties imposed under the military justice system is long overdue. The time for review is also fortuitous in that a significant body of work has recently been done by the Australian Law Reform Commission on criminal, civil and administrative procedures and penalties.⁵⁸

5.77 It recommended that, building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the ADF commission a similar review of its disciplinary and administrative systems. It recommended further that this review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy. In its response to this proposal, the government recorded its intention to 'continue a more detailed review'.

5.78 Since its 2005 report, the committee recognises that a number of major pieces of legislation and other reforms to Australia's military justice system have been implemented. In response to a question on notice regarding the DFDA, the Department of Defence stated in 2007:

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

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

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

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

- 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.⁵⁹

5.79 The committee is not satisfied, however, that a review taking account of both the discipline and administrative system as a whole has taken place. In other words, while it believes that the reforms have been significant, they have focused on particular aspects of the DFDA or the administrative system. In light of the findings of the inquiries referred to above, the committee suggests that the review team look at the DFDA and the administrative system.⁶⁰ This review could consider, for example, the class of offences set out in the DFDA and their punishments and the provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment.

Other matters

5.80 The CDF and the IGADF have noted the importance of allowing sufficient time for the reforms to 'bed down'. The committee agrees that as the implementation phase moves forward teething problems may emerge. Indeed, the CMJ and the JAG have drawn attention in their annual reports and during the committee's recent public hearing to certain matters such as refinements to recent legislation which they believe are required. For example, in his annual report, the JAG raised concerns about the restriction placed on the automatic right to elect trial by the AMC by the creation of a class of 'non-elective' offences.⁶¹ and 'the practicality and utility of the internal review process which the *Defence Legislation Amendment Act 2008* retained in conjunction with the appeals to the AMC.⁶²

5.81 The Law Council has also identified some concerns, notably the right of the DMP to appeal interlocutory points and its continuing concerns about the simplified rules of evidence for summary proceedings. The committee suggests that the review team look at these matters.

Consultation

5.82 In its consideration of the Defence Legislation Amendment Bill 2006, the committee held serious misgivings about a number of provisions in the proposed legislation. It identified 11 areas that it believed required close attention. In its report,

59 Answer to written question on notice W9 following public hearing 26 February 2007.

60 See also Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system, second progress report*, March 2007, p. 34.

61 Judge Advocate General, *Report for the period 1 January to 31 December 2007*, paragraph 28.

62 Judge Advocate General, *Report for the period 1 January to 31 December 2007*, paragraph 30.

the committee made plain that the government needed to reconsider the proposed legislation. It stated:

Before preparing the final draft of the bill, the committee believes that a thorough consultation process needs to be undertaken on the proposed changes to the military tribunals. Open and frank debate is vital to the success of such reforms.⁶³

5.83 The amended bill was introduced into parliament without a comprehensive process of consultation. Moreover, the same approach was evident in preparing the Defence Legislation Amendment Bill 2007. In this case the committee found:

...although Defence consulted with people such as the Judge Advocate General, the Inspector General-ADF and the Director General of Military Prosecutions, and government agencies including the Solicitor General, it did not consult with external bodies such as the Law Council of Australia.⁶⁴

5.84 In her annual report, the DMP commented on the drafting arrangements for the Defence Legislation Amendment Bill 2006 and the Defence Legislation Amendment Bill 2007. She wrote:

I was concerned, however, that such consultation often occurred late in the drafting process. Equally, greater opportunities and more time to comment on the initial drafting instructions may have saved significant time and effort.⁶⁵

5.85 In 2006 and again in 2007, the committee made clear its intention when it recommended that the government undertake a comprehensive consultation process on any future proposed legislation that would make significant changes to Australia's military justice system. It cited in particular the importance of consulting with the Law Council of Australia. This recommendation has been disregarded. For example, with regard to DLAB 2008, the DMP was of the view that there were some fundamental difficulties with the proposed legislation, particularly with the different classes of offences. She explained:

I was getting the impression that there was a real misunderstanding about how fundamental it was that we could have disparate elections; that we could have co-accused going all over the place; that I could have this and I could have that. So we actually met with the parliamentary draftspeople to explain just what we perceived as our difficulty. I think that that was a remarkably helpful afternoon. They understood, I think, for the first time

63 Standing Committee on Foreign Affairs, Defence and Trade *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006, paragraph 1.29.

64 Standing Committee on Foreign Affairs, Defence and Trade *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007, paragraph 3.36.

65 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, 2008, paragraph 86.

just how fundamental and necessary it was that the DLAB be amended—as it was very late in the piece—to incorporate these changes.⁶⁶

5.86 Captain Paul Willee, from the Military Justice Group, Law Council of Australia, was highly critical of the approach taken by the Department of Defence to consultation on important military justice matters:

My concern is that in some senses it would have been better if we had gone with the old adage, 'More haste, less speed.' When these deadlines are so tight, they almost invite error. Perhaps it is time to move towards more acceptable deadlines so that the situation that happened with the legislation being passed on the last occasion...does not happen again. We could not address it beforehand because we did not know about it until the day it came forward.⁶⁷

5.87 He explained further:

...we are unable to be an effective contradictor, unless we have some timely indication of what is going to be brought before the committee. As far as I know, we are the only civilian—external, fully non-dependent or obliged to the military for anything—carrying out this role...

We do not seek to impose upon the military a full consultation process. We understand perfectly the speed and compass which they have covered and we admire them for it. But it is not beyond the wit of a competent administrator to organise a situation where, if you have got timelines you put one that says, 'Please send a draft copy to the Law Council of Australia' so they at least have 24 hours notice of what it is that is going to be covered—⁴⁸ would be better because we could then address it with some sensibility.⁶⁸

In defence of the ADF's consultation process, the CDF noted:

Our people have been working flat strap for two years on the reform of the military justice system. Just about everything we have done has been done to very tight deadlines. We want to consult with as many people as possible but, at the end of the day, you cannot consult until you have got something to consult with.⁶⁹

5.88 He acknowledged that 'because of that workload, 'the consultative process may be a little later than would be ideal'.⁷⁰ Mr Cunliffe, Head Defence Legal, stated:

I can assure you that, in relation to legislation that was affecting the DMP or relating to the DMP, we would consult. On several policy proposals that

66 *Committee Hansard*, 26 June 2008, p. 12.

67 *Committee Hansard*, 20 June 2008, p. 44.

68 *Committee Hansard*, 20 June 2008, p. 41.

69 *Committee Hansard*, 20 June 2008, p. 31.

70 *Committee Hansard*, 20 June 2008, p. 31.

step has already been taken internally before we get to the drafting. The drafting, at least for internal consultation, is arguably a bit too late. It is at the policy development stage that the first step requires that because bad policy is what leads to bad drafting by and large. The drafters do a good job.⁷¹

Committee view

5.89 This report is the fifth in a series of reviews of Australia's military justice system. It reinforces its recommendation from previous reports that the government undertake a comprehensive consultation process on any future proposed legislation that is intended to make significant changes to Australia's military justice system. Indeed, the committee is most concerned about Defence's failure to consult with external and independent experts when considering reforms. This attitude indicates that Defence is not only reluctant to be open and receptive to constructive criticism and new ideas but does not appreciate that wider consultation produces better legislation and ultimately a more effective military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia. It notes that this approach should also apply to any significant changes to subordinate legislation.

5.90 In light of the repeated failures of Defence to consult widely before preparing legislation and the subsequent need for amendments, the committee believes that a consultation process needs to be formalised. It suggests that Sir Laurence Street's review team assess the effectiveness of the processes employed by Defence when preparing legislation for presentation to parliament and make suggestions on how it could be improved. It also suggests that the government consider creating a legislative requirement for Defence to consult widely with experts in military law such as the Law Council or for the Minister to issue a directive requiring an adequate consultation process during the drafting phase of legislation. To underline the importance of wide consultation the committee repeats its recommendation contained in two previous reports but apparently ignored.⁷²

Recommendation 13

5.91 The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation, including subordinate legislation, that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia.

71 *Committee Hansard*, 20 June 2008, p. 39.

72 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006, paragraph 1.32 and *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007, paragraph 3.38.

Chapter 6

Conclusion

6.1 In its 2005 report, that committee recommended two major reforms—the establishment of a permanent military court in accordance with Chapter Three of the constitution and the establishment of an ADF Administrative Review Board. Although watered down, the government accepted the recommendation about having a permanent military court and has created the AMC. The committee accepts that although the court does not fully satisfy the committee's recommendation, its establishment is a significant positive reform. The committee does not want to propose another round of recommendations. It does, however, wish to make a few targeted recommendations on matters it regards as important.

Recommendation 1

The committee recommends that the DFDA be amended to include provisions governing the conduct and protection of military jurors (paragraph 2.31).

Recommendation 2

The committee recommends that Defence undertake an audit of all legal officers in the ADF with a view to ensuring that the legal skills, expertise and experiences available to the ADF are being used to full advantage and to identify any deficiencies that may need addressing (paragraph 2.74).

Recommendation 3

The committee recommends that in 12 months, Defence report to the committee on its progress implementing reforms to improve the ADF's investigative capability (paragraph 3.34).

Recommendation 4

The committee recommends that the government commission an independent review of the ADF's investigative capability at the conclusion of the 5-year remediation period (paragraph 3.35).

6.2 In addition, the committee suggests that the government consider the following matters discussed in Chapter 2:

- legislation providing for the selection of military juries on a fully random tri-service basis; and
- the right of the DMP to appeal interlocutory points.

6.3 In 2005, the government did not accept the committee's other major recommendation dealing with the establishment of an independent ADF review board. The main reason for recommending the establishment of this body was the clear and identified need for a statutorily independent authority with appropriately qualified and

trained staff to address and resolve administrative matters in the ADF. The government instead established a streamlined fairness and resolution branch to deal with complaints and ROGs in the ADF. Evidence has shown undoubted improvements in the system stemming from this initiative. The committee does, however, make two recommendations:

Recommendation 5

The committee recommends that a specific time limit, for example 90 days, be imposed on referrals of ROGs to the service chiefs (paragraph 4.14).

6.4 The committee believes that the effective monitoring of attitudes in the ADF is critical to the success of the implementation of reforms to Australia's military justice system. Indeed, the recent inquiry into the learning culture of the ADF underlines the need for another independent and comprehensive review at some time in the near future. The committee also identifies a need to have a more effective regular reporting mechanism on attitudes in Defence toward the military justice system including the reporting of wrongdoing and aspects such as fear of reprisal.

Recommendation 6

The committee recommends that the ADF commission an independent review of the learning culture in the ADF, along similar lines as the investigation conducted in 2006. The main purpose of the inquiry would be to assess whether the recommendations contained in the 2006 report have been effectively implemented and whether additional measures need to be taken to improve the learning culture in the ADF. This review should take place within five years and the report on its findings should be made public (paragraph 4.39).

Recommendation 7

The committee recommends that the findings of Defence's attitude survey contain a greater level of detail and analysis than that provided in the most recent publication (paragraph 4.42)

6.5 The committee is firmly of the view that to ensure that Australia's military justice system is fair and effective, the system must have an open and transparent system that is accountable. In this regard it has recommended, as noted above two follow-up investigations into the ADF's investigative capability and its learning culture and an improved reporting regime on attitudes in the ADF. The committee believes, however, that permanent measures need to be introduced into the system that would improve the level of disclosure and accountability in the military justice system.

Transparency and accountability

6.6 Overall, the committee is satisfied with the current reporting regime requiring the JAG, the CMJ and the DMP to report to the parliament through the minister. Nonetheless, it is of the view that additional measures could be taken to improve

transparency and the level of public scrutiny of the operation of the discipline system. The committee argues strongly that if the AMC is to instil public confidence in the administration of military justice, it must be accessible to the public. It notes the importance of the AMC making material publicly available such as court lists, transcripts and judgements and raises the matter of having a 'military justice reporter'.

Recommendation 8

The committee recommends that the government amend the DFDA to require the AMC to publish material such as court lists, transcripts of proceedings and judgments in a readily and easily accessible form (paragraph 5.20).

6.7 In Chapter 5, the committee also highlighted the importance of the CMJ being available to provide evidence to the committee on the operation of the AMC and administration of the ADF's discipline system when invited to do so and made the following recommendation.

Recommendation 9

The committee recommends that the CMJ appear before the committee to give evidence on the operation of the AMC and matters raised in the CMJ's annual report when invited by the committee to do so. The CMJ has a vital role, through his or her appearance before the committee, to contribute to the public understanding of the administration of military justice and to build public confidence in the system. (paragraph 5.30).

6.8 In addition, the committee drew attention to the important function that the JAG has had in achieving an open and transparent military justice system. It urged the government to ensure that, with the establishment of the AMC and the CMJ, this level of independent oversight of the discipline continue.

6.9 The committee is also aware of the need to ensure that the administrative system continues to build on the recent improvements by having a more open, transparent and accountable system. In this regard, it made two recommendations.

6.10 The first recommendation is based in the committee's firm belief that, as fully and comprehensively argued in its 2005 report, the administrative system needs a strong independent and critical oversight authority. This authority would have the responsibility for identifying and reporting on any problems in the military justice system including delays in the system or resource or staffing deficiencies in the Fairness and Resolution Branch, the Office of the IGADF and other sections of Defence involved in the ADF's administrative system such as the legal branch. It would also audit and report on matters such as recordkeeping, the progress of complaints and the implementation of recommendations coming out of administrative inquiries.

6.11 At the moment the IGADF has this responsibility but the committee believes that although the IGADF is a statutory appointment his position needs to be, and

perceived to be, more independent from command. A first step would be to change the reporting requirements of the IGADF.

Recommendation 10

The committee recommends that the *Defence Act 1903* be amended to include in section 110 the requirement for the IGADF, as soon as practicable after each 31 December, to prepare and give to the Minister, for presentation to the Parliament a report relating to the functions of his office as set out in section 110C(1) (paragraph 5.59).

6.12 This recommendation is a necessary first step in restoring credibility to the office of the IGADF when it comes to his independence and function as an effective oversight authority. Other measures should also be considered using the provisions that apply to the CMJ and DMP as a model.

Recommendation 11

The committee recommends that the government consider additional measures to strengthen the independence of the IGADF using the provisions governing the CMJ and the DMP as a template (paragraph 5.61).

6.13 The committee is also concerned with improving the transparency of COIs.

Recommendation 12

The committee recommends that the regulations governing the establishment of COIs be amended requiring COIs to be conducted in public except in circumstances where the president deems there to be a compelling reason for privacy. In cases where the president makes such a decision, the regulations should require the president to issue a public statement containing the reasons for this decision (paragraph 5.63).

6.14 In this report, the committee has noted the importance of and recommended independent follow-up reviews of the ADF's investigative capability and the ADF's learning culture. The committee has also welcomed the establishment of Sir Laurence Street's review team. The committee has compiled a list of matters that this review team could examine and report on which include:

- the jurisdiction of the AMC and the appropriateness of the AMC to hear civilian cases;
- the random and tri-service basis for the selection of military jurors;
- code of conduct for military jurors;
- the rules of evidence for summary trials;
- the adequacy of the information made available on the work of the AMC including the proposal for the AMC to produce 'a military justice reporter' or similar publication;
- the function and future role and of the JAG (if any);

- the role of the IGADF and how the IGADF's independence could be strengthened to ensure the positive results of reforms to the military justice system, especially to the administrative system, do not dissipate with the passage of time;
- the relationship between the ADF and state and territory coroners;
- the potential for command influence in ADF investigations;
- the ADF's tracking system for handling complaints;
- the DFDA and whether it is in line with comparable and up-to-date legislation including provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment (paragraphs 2.34–2.36); and
- the role of the Law Council and adequacy of Defence's consultative process.

6.15 The review team could also consider the recommendations that the committee has made in this report and especially comment on one of the most difficult reform areas for the ADF—improving its investigative capability.

Consultation

6.16 In this report, the committee once again underlines the importance of wide consultation during the drafting of legislation dealing with Australia's military justice system. Indeed, the committee is most concerned about Defence's failure to consult with external and independent experts when considering reforms on military justice. This attitude indicates that Defence is not only reluctant to be open and receptive to constructive criticism and new ideas but does not appreciate that wider consultation produces better legislation and ultimately a more effective military justice system. The committee repeats the following recommendation which it has made on a number of previous occasions.

Recommendation 13

The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation, including subordinate legislation, that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia (paragraph 5.91).

Final report on the implementation of reforms

6.17 This report marks the end of the committee's undertaking to report on the implementation of reforms to Australia's military justice system. It is not the end of the committee's responsibility to make the system open and accountable. The committee will continue to monitor the operation of the system through its examination of the annual reports of the JAG, CMJ, DMP, IGADF and Defence. It will also consider future reviews including the review by Sir Laurence Street and former Chief of the Air Force, Air Marshal Les Fisher (Retd). It particularly notes the

importance of ADF ensuring that there are follow-up reviews of the ADF's investigatory capability and the learning culture in ADF schools and training establishments. The committee requests that Defence provide the committee with these reports.

6.18 The key recommendations, however, are directed at ensuring that Australia's military justice system has appropriate and effective monitoring, disclosure and reporting regimes that should produce an open, transparent and accountable system. If implemented they should assist the ADF maintain its reform momentum and achieve a fair and effective military justice system.

SENATOR MARK BISHOP
CHAIR

Appendix 1

Public submission and tabled papers

Submission

1 Law Council of Australia

Tabled papers

Colonel Geoff Cameron, Registrar, Australian Military Court, Department of Defence – Briefing notes – 20 June 2008.

Major General Richard Ross Sinclair Tracey, Judge Advocate General – Presentation to the inquiry – 20 June 2008.

Air Chief Marshal Angus Houston AC AFC, Chief of Defence Force, Department of Defence – Opening statement – 20 June 2008.

Mr Geoff Earley, Inspector-General, Australian Defence Force, Department of Defence – Opening remarks – 20 June 2008.

Professor John McMillan, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman – Opening remarks – 26 June 2008.

Brigadier Lynette Ann McDade, Director of Military Prosecutions, Office of the Director of Military Prosecutions – Matters arising from 2007 report.

Law Council of Australia, additional information, 29 August 2008.

Australian Military Court, Colonel G. Cameron, Registrar – answer to a question raised by the Chair on 20 June 2008 and additional information, 16 July 2008.

Appendix 2

Public hearings and witnesses

Friday, 20 June 2008—Canberra

AUSTIN, Air Vice Marshal Tony Kenneth, Defence Health Services Division, Department of Defence

CAMERON, Colonel Geoff, Registrar, Australian Military Court, Department of Defence

CRONAN, Group Captain Paul, Acting Director-General Defence Legal Services, Department of Defence

CUNLIFFE, Mr Mark, Head Defence Legal, Department of Defence

EARLEY, Mr Geoff, Inspector-General, Australian Defence Force, Department of Defence

GRUTZNER, Colonel Tim, Provost Marshal, Australian Defence Force, Department of Defence

HARRIS, Ms Diane Julie, Director-General Fairness and Resolution, Department of Defence

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

LLOYD, Dr David William, Chief Legal Counsel, Department of Defence

TRACEY, Major General Richard Ross Sinclair, Judge Advocate General

WILLEE, Captain Paul, Chair, Military Justice Group, Law Council of Australia

Thursday, 26 June 2008—Canberra

CLENDINNING, Ms Anna, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

DUCKER, Ms Lynley, Director, Defence Team, Office of the Commonwealth Ombudsman

McDADE, Brigadier Lynette Ann, Director of Military Prosecutions, Office of the Director of Military Prosecutions

McMILLAN, Professor John, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

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

Appendix 3

The Committee's recommendations and the Government's response

Committee's recommendations	Government response
<p>Recommendation 1</p> <p>3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 2</p> <p>3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 3</p> <p>3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 4</p> <p>3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.</p>	<p>Government Response: Agreed in part</p> <p>The Government agrees in part, noting that the ADF makes an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution. This determination is based on an assessment of whether dealing with the matter under the DFDA can be reasonably regarded as substantially serving the purpose of maintaining and enforcing Service discipline. Where civilian police do not pursue a matter and it can be regarded as substantially serving the purpose of maintaining and enforcing Service discipline, then the matter may be dealt with under the DFDA. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will</p>

Committee's recommendations	Government response
	include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.
<p>Recommendation 5</p> <p>3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:</p> <ul style="list-style-type: none"> • Fully implementing the recommendations contained in the Ernst & Young Report; • Encouraging military personnel secondments and exchanges with civilian police authorities; • Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces; • Increasing participation in civilian investigative training courses; and • Designing clearer career paths and development goals for military police personnel 	<p>Government Response: Agreed in part</p> <p>The Government agrees this recommendation with one exception. The Ernst and Young Report was a review of the Army police investigation service and did not address the Navy and Air Force police investigation services. Army accepted 53 of the 55 of Ernst and Young recommendations. Two were not accepted on the basis that they appeared to infringe on the individual rights of ADF members. Work to implement the 53 agreed recommendations commenced in August 2004, and is progressing well. 33 recommendations, including the two that are not accepted, are complete, including establishment of the Provost Marshal - Army in January 2005. 22 recommendations are pending additional work which is being progressed by Army.</p> <p>Some of the recommendations are specific to the Army and not directly relevant to the Navy and Air Force. The Government agrees that all Service police will act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.</p>
<p>Recommendation 6</p> <p>3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.</p>	<p>Agreed</p> <p>The Government will conduct a tri-service audit of Service police to establish the best means for developing investigative capability. Defence acknowledges that the current military police investigation capability has significant shortcomings and is inadequate for dealing with more serious offences that are not referred to civilian authorities. As identified by the Senate Committee, Defence has begun to rectify shortfalls as part of the implementation of agreed recommendations from the recent</p>

Committee's recommendations	Government response
	<p>Ernst and Young review into Army military police, including the establishment of the Provost Marshal</p> <ul style="list-style-type: none"> - Army, Navy and Air Force have completed or are conducting similar reviews to build on the outcomes of the Ernst and Young review. The recommended audit will bring together this work and establish the best way to develop the investigative capability of all Service police. <p>To supplement this, Defence will establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF began work to form a Serious Crime Investigation Unit in February 2004. Establishment of the unit has been in abeyance pending the outcomes of this Review. In-principle agreement has been reached with the AFP for a senior AFP officer to be seconded to mentor and provide oversight of this team, and implementation will now proceed. The unit will be headed by a new ADF Provost Marshal outside single Service chains of command. Service police may be supplemented by civilian investigators. The unit will deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Greater numbers of more skilled investigators will be available to investigate complex and serious issues in operational environments and contingencies inside and outside Australia.</p>
<p>Recommendation 7</p> <p>4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 8</p> <p>4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>

Committee's recommendations	Government response
<p>where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.</p>	
<p>Recommendation 9</p> <p>4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.</p>	<p>*NOT AGREED. Referral of offences to civilian authorities.</p>
<p>Recommendation 10</p> <p>4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.</p>	<p>Government Response: Agreed</p> <p>The Government agrees, noting that action has already commenced to establish the Director of Military Prosecutions as a statutory position. The statutory appointment will allow the Director of Military Prosecutions to operate independently and free from perceptions of command influence. It will also promote confidence among ADF members in the independence and impartiality of the appointment and in the functions of the Office.</p>
<p>Recommendation 11</p> <p>4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.</p>	<p>Government Response: Agreed</p> <p>The Government agrees. The Office of Director of Military Prosecutions was established on an interim basis in July 2003; it is timely to review the Office to ensure that it has sufficient resources to meet current and future work loads and is able to respond to operational requirements.</p>
<p>Recommendation 12</p> <p>4.49 The committee recommends that the</p>	<p>Government Response: Agreed</p> <p>The Government notes that the Committee</p>

Committee's recommendations	Government response
<p>ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.</p>	<p>recognised that the ODMP had been performing an admirable job and agrees to review the training requirements for permanent legal officers assigned to the Office of the DMP. The review will be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.</p>
<p>Recommendation 13</p> <p>4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.</p>	<p>Government Response: Agreed</p> <p>The Government notes that the ODMP has been actively engaged in increasing its profile over the last eighteen months, and agrees action should continue to raise the awareness and profile of the Office. Increased awareness and profile will help ADF members understand the role of the DMP, and ensure that Commanders have ready access to impartial and independent advice on the proper investigation and prosecution of Service offences, especially those that are serious criminal offences.</p>
<p>Recommendation 14</p> <p>4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to the statutory appointment of the Director of Military Prosecutions at the one star rank.</p>
<p>Recommendation 15</p> <p>4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to appropriate remuneration for the appointment of the Director of Military Prosecutions. In accordance with the Government's response to Recommendation 10, action is being taken to create a statutory appointment of the DMP. Remuneration of the statutory appointment will be determined by the Remuneration Tribunal (Cth).</p>
<p>Recommendation 16</p> <p>4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.</p>	<p>Government Response: Agreed in principle</p> <p>The Government notes the Committee's underlying concern that the current ADF structures could give rise to a perception that ADF legal officers may not always exercise their legal duties independently of command influence.</p>

Committee's recommendations	Government response
	<p>The independence of the ADF permanent legal officers was criticised in the ACT Supreme Court in <i>Vance v The Commonwealth</i> (2004). In part, the case concerned legal professional privilege. A significant factor in the case was that ADF and Department of Defence legal officers do not normally have practising certificates and this was seen as an indication that they were not independent and impartial and entitled to legal professional privilege. In May 2005, the Commonwealth appealed the decision, and the ACT Court of Appeal unanimously upheld the appeal on 23 August 2005.</p> <p>Although there are practical difficulties in implementing Practising Certificates, the legal officers in the office of the DMP will be required to hold them, and other permanent legal officers will be encouraged to take them out. The matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).</p>
<p>Recommendation 17</p> <p>4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to establish a Director of Defence Counsel Services (DDCS) to improve the availability and management of defence counsel services to ADF personnel. The DDCS will be established as a military staff position within the Defence Legal Division to coordinate and manage the access to and availability of defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve.</p>
<p>Recommendation 18</p> <p>5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to create a permanent military court to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court will be established under appropriate Defence legislation. The court will satisfy the</p>

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	<p>principles of impartiality and judicial independence through the statutory appointment of judge advocates with security of tenure (five-year fixed terms with a possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). During the period of their appointment, the judge advocates will not be eligible for promotion, to further strengthen their independence from the chain of command. The appointments will be made by the Minister for Defence.</p> <p>The appointment of new military judge advocates would see the need to consider further, during implementation, the position of the Judge Advocate General. The remaining functions of the Judge Advocate General would be transferred to the Chief Judge Advocate and the Registrar of Military Justice. The Australian military court would consist of a Chief Judge Advocate and two permanent judge advocates, with a part-time reserve panel. The panel of judge advocates would be selected from any of the available qualified full or part-time legal officers. The court would be provided with appropriate para-legal support sufficient for it to function independent of the chain of command. In meeting all of the requirements of military justice, the court would include options for judge advocates to sit alone or, in more serious cases, with a military jury. The use of a jury would be mandatory for more serious military offences, including those committed in the face of the enemy, mutiny, desertion or commanding a service offence.</p>
<p>Recommendation 19</p> <p>5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.</p> <ul style="list-style-type: none"> • Judges should be appointed by the Governor-General in Council; 	<p>Government Response: Not agreed</p> <p>In response to Recommendation 18, the Government agreed to the option to establish an Australian military court. The Government does not support the creation of a permanent military court under Chapter III of the Constitution. Current advice is that there are significant policy and legal issues</p>

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<ul style="list-style-type: none"> Judges should have tenure until retirement age. 	<p>raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.</p> <p>Importantly, a military court is not an exercise of the ordinary criminal law. It is a military discipline system, the object of which is to maintain military discipline within the ADF. It is essential to have knowledge and understanding of the military culture and context. This is much more than being able to understand specialist evidence in a civil trial. There is a need to understand the military operational and administrative environment and the unique needs for the maintenance of discipline of a military force, both in Australia and on operations and exercises overseas. The judicial authority must be able to sit in theatre and on operations. It must be deployable and have credibility with, and acceptance of, the Defence Force. The principal factor peculiar to the Defence Force is the military preparedness requirements and the physical demands of sitting in an operational environment. The Chapter III requirements are not consistent with these factors, and the Government does not support the Chapter III features for a military court.</p> <p>In addition, a Chapter III court would require its military judicial officers to be immune from the provisions of the DFDA subjecting them to military discipline. While this is appropriate regarding the performance of their judicial duties, the Government does not support making them exempt from military discipline in the performance of their non-judicial duties such as training.</p> <p>The limitations resulting from those constraints means that having a separate military court outside Chapter III is preferable to bringing the military justice system into line with Chapter III requirements.</p> <p>The Government will instead establish a</p>

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	<p>permanent military court, to be known as the Australian military court, to replace the current system of individually convened trials by Courts Martial and Defence Force Magistrates. The Australian military court would be established under appropriate Defence legislation and would satisfy the principles of impartiality and judicial independence through the statutory appointment of military judge advocates by the Minister for Defence, with security of tenure (fixed five-year terms with possible renewal of five years) and remuneration set by the Remuneration Tribunal (Cth). To enhance the independence of military judge advocates outside the chain of command, they would not be eligible for promotion during the period of their appointment.</p> <p>Advice to the Government indicates that a military court outside Chapter III would be valid provided jurisdiction is only exercised under the military system where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.</p>
<p>Recommendation 20</p> <p>5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.</p>	<p>Government Response: Not agreed</p> <p>The Australian military court will have a permanent panel of military judge advocates with legislated independence. Appointment should be based on the same professional qualifications and experience that apply to other judicial appointments such as those applicable to a Federal Magistrate as set out in the <i>Federal Magistrates Act 1999</i> (Cth) Schedule 1 clause 1 (2). While recent civilian experience could be a factor to be taken into account, other qualified military legal practitioners should not be excluded on the basis that they do not have recent civilian experience.</p>
<p>Recommendation 21</p> <p>5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees that judge advocates appointed to the Australian military court should have appropriate experience and that</p>

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	<p>appointments should be based on the same professional qualifications and experience that apply to other judicial appointments, such as those applicable to a Federal Magistrate as set out in the <i>Federal Magistrates Act 1999</i> (Cth) Schedule 1 clause 1 (2).</p> <p>The Australian military court will have a permanent panel of military judge advocates with legislated independence. The Government notes that military judge advocates will predominantly be drawn from the Reserve, and would have adequate civilian and military experience. Nevertheless, other qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience.</p>
<p>Recommendation 22</p> <p>5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds will need to be determined once the structure of the Australian military court is established, but will be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.</p>
<p>Recommendation 23</p> <p>5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.</p>	<p>Government Response: Agreed</p> <p>The Government agrees with the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian military court. The current process of review will be discontinued. The existing right of appeal from Courts Martial and Defence Force Magistrates (to be the Australian military court) to the DFDA Tribunal will be retained. Currently, the DFDA may only hear appeals on conviction on points of law, and may quash a conviction or substitute a conviction on an alternative offence. This will be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.</p>

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<p>Recommendation 24</p> <p>7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that: the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).¹</p>	<p>Government Response: Agreed</p> <p>The Government will continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. Defence uses the Australian Standard for Whistleblower Protection Programs AS 8004-203, and the scheme is currently undergoing a comprehensive review by the Defence Inspector General. This review and its implementation will emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. The Government supports annual reporting of the operation of the scheme against documented performance standards.</p>
<p>Recommendation 25</p> <p>7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.</p>	<p>Government Response: Agreed in part</p> <p>The Government notes that Defence already reports statistics on reporting unacceptable behaviour in its annual report. The Government agrees that Defence will continue to include this data in the Defence annual report. The Government does not agree to report on potential under-reporting of unacceptable behaviour, as an exercise necessarily speculative in nature. Defence does, however, have in place a range of initiatives to manage and coordinate its complaints processing function to raise awareness and encourage reporting as appropriate.</p>
<p>Recommendation 26</p> <p>8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of administrative inquiries. The Manual will provide improved guidance on the use of quick assessments.</p>

¹ Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

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<p>Recommendation 27</p> <p>8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to improve guidance to Commanders who are responsible for the selection of inquiry officers to carry out administrative inquiries, such as routine unit inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. This will improve independence and impartiality, as well as enhance the quality of inquiry outcomes.</p>
<p>Recommendation 28</p> <p>8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers: Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry. A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report. The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation. The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report</p>	<p>Government Response: Agreed in part</p> <p>The Government agrees to consider proposals to enhance the transparency and accountability in the appointment of investigating officers. The Government agrees that investigating officers be required to produce statements of independence and to make known any potential conflicts of interest. The Government does not support the proposal that conflict of interest reports be included in reports to the Commanding Officer, rather, the Government will direct Defence to amend the Administrative Inquiries Manual to require that investigating officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the appointing authority to any potential conflict of interest or objection to an investigating officer. Resolution of any conflict would then occur prior to the commencement of the investigation.</p>

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to be made available to all participants in the inquiry.	
<p>Recommendation 29</p> <p>11.67 The committee makes the following recommendations—</p> <p>a) The committee recommends that:</p> <ul style="list-style-type: none"> • the Government establish an Australian Defence Force Administrative Review Board (ADFARB); • the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF; • the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term; • the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff; • all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement; • the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB; • the CDF be required to give a written response to ADFARB findings/recommendations; if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint; • the ADFARB be required to make an annual report to Parliament. <p>b) The committee recommends that this report</p> <ul style="list-style-type: none"> • contain information that will allow 	<p>Government Response: Not Agreed</p> <p>The Government agrees there is a need to improve the complaints and redress of grievance management system, and proposes that the shortfalls in the existing system would best be met by streamlining the existing ADF complaints management and redress of grievance system and retaining independent internal and external review and oversight agencies. The committee's recommended ADF Administrative Review Board (ADFARB) would not support the relationship between command and discipline, would reduce contestability and introduce duplication.</p> <p>The ADFARB concept proposed by the Senate Committee is based on the Canadian Forces Grievance Board (CFGB). The CFGB deals with only about 40 per cent of Canadian Defence Force grievances, is highly resource intensive and does not replace the Canadian internal complaints resolution body, or the Canadian Forces Ombudsman. Defence is concerned that the ADFARB concept would reduce contestability in the system by absorbing the ADF's only independent review authority, noting the proposal that the ADFARB take responsibility for and continue the work of the IGADF. As proposed, the ADFARB would also duplicate the role of the Defence Force Ombudsman.</p> <p>The Government does not agree to establish an ADFARB on the basis that it would be a costly exercise that would not provide real benefits in terms of increasing perceived independence. The Government is also concerned that an ADFARB would remove the responsibility and accountability of commanders for the well being of ADF personnel in their command.</p> <p>The Government proposes instead to reform and streamline the complaints and redress of</p>

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<p>effective scrutiny of the performance of the ADFARB;</p> <ul style="list-style-type: none"> • provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and • comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions. <p>c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:</p> <ul style="list-style-type: none"> • a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and • where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter. <p>d) The committee further recommends that to prevent delays in the grievance</p>	<p>grievance management system, in line with the recommendations of a joint Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. Implementation of these recommendations has commenced in line with a CDF Directive 2/2005. Changes to the system will improve the rigour, impartiality and timeliness of processing complaints.</p> <p>The overarching principle guiding the redress of grievance system remains that complaints should be resolved at the lowest effective level and in the quickest possible time. Primary responsibility to resolve complaints remains with the unit commanders.</p> <p>Defence's Complaint Resolution Agency (CRA) – an existing body which is established outside the ADF –will become the lead agency in the coordination of complaints and redresses of grievance.</p> <p>In its expanded role, the CRA will have three major functions.</p> <ul style="list-style-type: none"> • The CRA will initially provide advice to commanding officers on the management of every application for redress of grievance and monitor the handling of those redress applications at the unit level. It will have an enhanced advisory and oversight function of every application. • The CRA will have the authority to advise on appropriately trained and qualified investigating officers at this initial stage and, if necessary, will require an alternative investigating officer to that nominated by the commander. • Where ADF personnel refer their complaint to the Service Chief or the Chief of the Defence Force following the decision of the commanding officer, the Complaint Resolution Agency, as in the present situation, will conduct an independent review of the matter and provide recommendations to the decision

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<p>process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.</p> <p>e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:</p> <ul style="list-style-type: none"> • the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and • although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires. <p>f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:</p> <ul style="list-style-type: none"> • improving the training of investigating officers; • maintaining a register of investigating officers, and • developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations. <p>g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:</p>	<p>maker.</p> <p>All complaints will be registered with the Complaint Resolution Agency within five days of initiation and it will be empowered to take over the management of all cases unresolved by commanders 90 days after lodgment. In all cases, the Agency will be the central point for monitoring progress and resolution. A single register for tracking complaints across the ADF will be implemented.</p> <p>Other improvements to the ROG system being implemented include improvements in training of commanding officers and investigating officers, consolidating Defence complaint mechanisms, and managing centrally the various complaint hotlines operating in Defence.</p> <p>For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—the Inspector General of the ADF and the Defence Force Ombudsman.</p> <p>The existing Inspector General of the ADF was established as recommended by Mr Burchett QC to deal exclusively with military justice matters. The IGADF was established to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command and an avenue by which failures and flaws in the military justice system can be exposed and examined so that any cause of any injustice may be remedied.</p> <p>Although it is not a general complaint handling agency like the CRA, it does provide an avenue for those with complaints about military justice who are, for some reason, unable to go through their chain of command, to have their complaints investigated and remedied. The Government has drafted legislation to establish the Inspector General of the ADF as a statutory</p>

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<ul style="list-style-type: none"> • the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation; • the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or • the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint. <p>h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.</p>	<p>appointment in order to further strengthen its independence.</p> <p>In addition to this review mechanism and completely external to the ADF is recourse to the Defence Force Ombudsman. This position will retain legislative authority to receive and review complaints and to initiate on its own motion investigations into ADF administration processes. The Defence Force Ombudsman has statutory power to investigate a matter, make findings and recommend a course of action to the appropriate decision maker and to table a report in Parliament if deemed necessary.</p>
<p>Recommendation 30</p> <p>11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.</p>	<p>Government Response: Agreed</p> <p>The Government has taken action to clear the backlog of grievances, in line with recommendations from Defence Force Ombudsman/CDF Redress of Grievance System Review 2004. This is scheduled to be completed by the end of 2005, with no requirement for additional funding or a task force.</p>
<p>Recommendation 31</p> <p>12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.</p>	<p>Government Response: Agreed</p> <p>The Government will amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.</p>
<p>Recommendation 32</p>	<p>Government Response: Agreed</p>

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<p>12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings <u>will</u> be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.</p>	<p>The Government will amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case</p>
<p>Recommendation 33</p> <p>12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry <u>will</u> be authorized to appear before the Board and <u>will</u> have the right to appoint a legal practitioner to represent them.</p>	<p>Government Response: Agreed in part</p> <p>The Government notes that the substance of this recommendation was agreed to following the 1999 senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence (Inquiries) Regulation 33. The Government agrees that in cases where either the appointing authority, before the inquiry starts, or the President of a Board of Inquiry makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons will be entitled to appear before the Board and will have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Further, the Government agrees that where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. The Government also agrees that the representatives of the estate of deceased persons who have died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, will be entitled to be legally represented before the Board of Inquiry into that incident. Consistently, the Government agrees that where the representative of the estate of such persons choose to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation will be provided at Commonwealth expense, in accordance with standing arrangements. It is noted that the identification of 'persons adversely affected' involves the application of the principles of natural justice; it does not automatically encompass every person who is, or may be, a</p>

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	witness or has some other interest in the inquiry.
<p>Recommendation 34</p> <p>12.120 The committee recommends that: all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry; the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary); the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle; the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.</p>	<p>Government Response: Not agreed</p> <p>The Government agrees that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government will propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. CDF shall appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service. The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience will be the President. This form of inquiry will be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.</p> <p>External independent legislative oversight by Comcare will continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process.</p> <p>State and Territory Coroners will continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF is working towards completing a Memorandum of Understanding with State and Territory Coroners. The Defence Force Ombudsman will continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF.</p> <p>The Government does not support the concept of an ADFARB, as reflected in the response to recommendation 29, and so can not agree to refer notifiable incidents, including suicide, accidental death or serious</p>

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	injury to an ADFARB for investigation/inquiry.
<p>Recommendation 35</p> <p>13.19 Building on the report by the Australian Law Reform Commission, <i>Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction</i>, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.</p>	<p>Government Response: Agreed in principle</p> <p>The report of the Australian Law Reform Commission <i>Principled Regulation: Federal Civil and 13 Administrative Penalties in Federal Jurisdiction</i> is focused on commercial and corporate law matters, and not the employment of personnel. Any review of the military justice system would require a broader basis that allows examination of all aspects of the military justice system.</p> <p>The Government agrees that in addition to ongoing internal monitoring and review, Defence will commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.</p>
<p>Recommendation 36</p> <p>13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.</p>	<p>Government Response: Agreed in principle</p> <p>The Government agrees to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review will also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review will be undertaken outside the broad review proposed at recommendation 35, and will be completed within the two-year implementation period.</p>
<p>Recommendation 37</p> <p>13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited</p>	<p>Government Response: Agreed</p> <p>The Government supports the need for transparency and parliamentary oversight of the military justice system and will provide,</p>

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<p>to):</p> <p>(d) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.</p> <p>(e) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;</p> <ul style="list-style-type: none"> • Director of Military Prosecutions • Inspector General of the ADF • The Service Military Police Branches • RMJ/CJA • Head of Trial Counsel • Head of ADR 	<p>in the Defence annual report, reporting on the state of health of the military justice system. Reporting will include progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system. Defence will also amend the Defence (Inquiry) Regulations to provide for an annual report on the operation of the D(I)R, fulfilling a recommendation of the Burchett report. Defence will also report twice a year to the Senate committee, on progress of the reforms throughout the two year implementation process.</p>
<p>Recommendation 38</p> <p>14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.</p>	<p>Government Response: Agreed</p> <p>The Government agrees to commission an expert to examine whether the human rights of children are being respected. The Government also notes that Defence has already implemented significant policy initiatives under the Government's Cadet Enhancement Program to address shortcomings in the care and control and rights of minors in the ADF Cadets, including:</p> <ul style="list-style-type: none"> • implementation of a behaviour policy, providing training and materials on the expected standards of behaviour, and including guidance and advice on the handling of sexual misconduct; • development of a wellbeing program, specifically targeted at the mental health wellbeing of ADFC cadets; • introduction of an ADFC cadet and adult cadet staff training enhancement program; • a review of child protection policy and

Committee's recommendations	Government response
	<p>processes in line with State and Territory legislation;</p> <ul style="list-style-type: none"> • a review of screening processes for new staff; and • production of a youth development guide for adult cadet staff.
<p>Recommendation 39</p> <p>14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.</p>	<p>Government Response: Agreed</p> <p>The Government agrees, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that will more than meet the Committee's recommendations on the human rights of minors.</p>
<p>Recommendation 40</p> <p>14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.</p>	<p>Government Response: Agreed</p> <p>The Government agrees and notes that the Service Chiefs have already provided additional resources to the ADF Cadets to improve administrative support.</p>

*The Government does not agree to the recommendations (1, 2, 3, 7, 8, and 9) that taken together propose the automatic referral of investigation and prosecution of criminal offences with a Service connection to civilian authorities.

The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.

The maintenance of effective discipline is indivisible from the function of command in ensuring the day-to-day preparedness of the ADF for war and the conduct of operations. Justices Brennan and Toohey of the High Court in *Re Tracey; ex parte Ryan* (1989) (and repeated by Justice McHugh in *Re Colonel Aird; ex parte Alpert* (2004)) said '*Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community of which the offender is a member, the preservation of respect for and the habit of obedience to lawful authority and the enhancing of efficiency in the performance of service functions.*'

As a core function of command, military justice cannot be administered solely by civilian authorities. Recourse to the ordinary criminal courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the Defence Force. Further, the capacity to investigate and prosecute offences under the Defence Force Discipline Act 1982 is necessary to support ADF operations both within and outside Australia. The Government does not accept that the DFDA—or more broadly the system of military justice—is a “duplication” of the criminal system.

Importantly, jurisdiction under the DFDA for any offence may only be exercised where proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline—a purpose different to that served by the criminal law. Moreover, extensive guidelines for the exercise of DFDA jurisdiction and the satisfaction of this service connection test are set out in comprehensive Defence instructions. It is a core element of the DFDA that not all criminal activity is or should be dealt with by the military police.

The Government is also concerned that the civil code does not have the disciplinary provisions required to keep order and encourage discipline and cohesive teamwork, and may actively undermine the ability of commanding officers to address disciplinary issues through the more expeditious summary action 15 available under the DFDA. This particularly applies to those cases that may be considered insignificant in a civilian context—petty theft for instance—that may have serious implications for service discipline and morale, and may seriously undermine the authority of a commanding officer to maintain effective discipline. The proposed enhancements to the military justice system seek to provide a balance between military effectiveness and external oversight by ensuring that the system meets legal standards, conforms as far as possible to community expectations, and provides reassurance to the Parliament and the community that ADF members’ rights are being protected without compromising the ADF’s ability to remain an effective fighting force. It is based on the premise of maintaining effective discipline and protecting individuals and their rights, administered to provide impartial, timely, fair and rigorous outcomes with transparency and accountability. Where Defence prosecution substantially serves the purpose of maintaining and enforcing Service discipline, offences in Australia will be dealt with under the DFDA.

Past challenges to the system of retention or referral of cases in the High Court have been unsuccessful and the current system and thresholds will be maintained, with determination decisions undertaken by the Director of Military Prosecutions. Defence will work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This will include reviewing and clarifying the guidelines and examining the need for, and implementing as necessary, formal arrangements with the states and territories for referral of offences. Defence also intends to establish a common database for tracking referrals.

The Government is also of the view that outsourcing the criminal investigative function would complicate proposed efforts to address the problem of the capability of the military police. Military police will still be required to perform criminal investigative roles if, for instance, civilian authorities decline to investigate a matter, and subsequently referred it back to the military police.

The Government has accepted recommendations 5 and 6, to improve the quality of criminal investigations conducted by Service police, including through the establishment of an ADF Joint Investigation Unit.

Appendix 4

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

October 2007



Australian Government
Department of Defence

SEC/OUT/2007/ 306
CDF/OUT/2007/959

Senator M. Payne

Chair

Senate Standing Committee on Foreign Affairs, Defence and Trade
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Payne,

REPORT ON THE PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM

In tabling the Government response to your Committee's report '*The Effectiveness of Australia's Military Justice System*' dated 16 June 2005, Senator Hill noted that: '*...as a further measure of the Government's determination to thoroughly and effectively reform the military justice system, Defence will provide six-monthly reports on progress to the Senate Foreign Affairs, Defence and Trade Committee throughout the two-year implementation period*' (Senate Hansard 5 Oct 2005 refers). We are pleased to provide the fourth report on the ADF's progress of reforms to the military justice system, in accordance with the Government direction.

The Government response to the Senate report agreed in whole, in part, or in principle, with 30 of the 40 Senate recommendations and advised alternative solutions to meet the outcomes sought by the reports recommendations concerning: the referral of offences to civil authorities; the legislative basis of a permanent military court; and the establishment of an Australian Defence Force (ADF) administrative review board. The agreed enhancements will balance the maintenance of effective discipline, which is indivisible from the function of command and the preparedness of the ADF for operations, with the protection of individuals and their rights.

To date, a total of 23 full recommendations (10, 11, 12, 13, 14, 15, 17, 18, 21, 24, 25, 26, 27, 28, 30, 31, 32, 33, 36, 37, 38, 39 and 40) have been completed and considerable work has either been completed, or is underway on the remaining agreed recommendations (4, 5, 6, 16, 22, 23, 29, 34 and 35). The enclosed spreadsheet provides, in more detail, an overview of progress to date. It outlines the action directed in the Government response; the planned completion date and the current status of implementation.

We also intend to provide you with a final report in early December 2007 to update progress since this report and advise future intentions.

Together with the Service Chiefs, we are committed to a fair and just military workplace and are personally driving the required changes. We will continue to review progress on a monthly basis as a standing item at the meetings of the Chiefs of Service Committee until the completion of implementation.


We trust that this report provides you with the information necessary to enable an informed assessment of our progress with implementing reforms to the military justice system.

Yours sincerely,



Nick Warner
Secretary

29 October 2007



A. G. HOUSTON, AO, AFC
Air Chief Marshal
Chief of the Defence Force

28 October 2007

Enclosures:

1. ADF Report to the Senate Standing Committee on Foreign Affairs, Defence and Trade on Progress of Reforms to the Military Justice System October 2007

AUSTRALIAN DEFENCE FORCE

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

ON

PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM

OCTOBER 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.

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Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
1, 2, 3, 7, 8 and 9	<p>In response to Recommendations 1, 2, 3, 7, 8 and 9, the Government agreed that:</p> <ul style="list-style-type: none"> • Defence would work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This would include: <ul style="list-style-type: none"> • reviewing and clarifying the guidelines, and examining the need for, and implementing as necessary, formal arrangements with the States and Territories for referral of offences; and • establishing a common database for tracking referrals. 	<p>Oct 2007</p> <p>Oct 2007</p>	<p>UNDERWAY (SEE RECOMMENDATIONS 4, 5 AND 6)</p> <ul style="list-style-type: none"> • The management and effectiveness of the relationship between the military and civilian authorities on referral issues has been well advanced by the recent signing of a Defence/AFP Memorandum of Understanding on 7 Aug 07, and offers of assistance from other State and Territory police agencies. • <i>Defence Instruction (General) PERS 45-1 – Jurisdiction under the DFDA Guidance for Military Commanders</i> is currently being updated to provide clearer guidance to ADF commanders in relation to the referral of offences to civilian authorities. • A major upgrade (Stage 2) to the Defence Policing and Security Management System is currently underway. User testing, which commenced late Jul 07, identified some issues that have resulted in a delay to implementation of the application on the Defence Restricted Network (DRN). Implementation on the DRN is expected to commence from Dec 07.
4	<p>The Government agreed in part, noting that the ADF made an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution; and that:</p> <ul style="list-style-type: none"> • Defence would as for Recommendations 1, 2 and 3 above. 	<p>As for Rec 1</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> • Action as per Recommendation 1.

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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>	Jun 2006	<p>COMPLETED (INCORPORATED IN RECOMMENDATION 6)</p> <ul style="list-style-type: none"> The outcomes of the Audit of ADF Investigative Capability and its implementation plan have overtaken Ernst and Young. As such, the planned completion dates have been revised to reflect the Audit report.
	<p>The Government [also] agreed to:</p> <ul style="list-style-type: none"> increase participation in civilian investigative training courses; 	Jun 2007	
	<ul style="list-style-type: none"> encourage military personnel secondments and exchanges with civilian police authorities; 	Jun 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> 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 exchanges.
	<ul style="list-style-type: none"> undertake a reserve recruitment drive to attract civilian police into the Defence Forces; and design clearer career paths and development goals for military police personnel 	<p>Oct 2007</p> <p>Oct 2007</p>	<ul style="list-style-type: none"> A reserve recruiting campaign to attract civilian police into the ADF is planned to be initiated by Nov 07. Clearer career paths and development goals for service police have been enhanced by the creation of ADF Investigative Service and will be informed by the current review of service police being undertaken by the Services.

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6	<p>The Government agreed:</p> <ul style="list-style-type: none"> To conduct a Tri-Service audit of Service police to establish the best means for developing investigative capability. <ul style="list-style-type: none"> That Defence would establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The [investigative] unit would be headed by a new ADF Provost Marshal outside single Service chains of command. 	<p>Jun 2006</p> <p>Dec 2006</p> <p>Jun 2006</p>	<p>COMPLETE</p> <ul style="list-style-type: none"> 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. The ADF Investigative Service has been formed. The Provost Marshal ADF (PM ADF) now controls (vide CDF Directive dated 21 Mar 07) some 140 qualified investigators and direct support personnel, giving him central oversight and control of ADF investigations. The initial PM ADF (Colonel Tim Grutzner AM) was appointed on 14 May 06 and heads up the new ADF Investigative Service. Mr Adrien Whiddett has been re-engaged to mentor the implementation of the Audit Report into the ADF's Investigative Capability. In addition, a senior AFP Officer, currently attached to the Australian Crime Commission, Federal Agent Neil Burnage, has been made available by the AFP to assist on an as required/part time basis with addressing opportunities for AFP assistance in enhancing the ADF investigative capability.
	<ul style="list-style-type: none"> 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. 	<p>Oct 2007</p>	<p>UNDERWAY</p> <ul style="list-style-type: none"> Work is underway to develop Defence Investigative Standards, based on the Australian Government Investigative Standards and the recently revised AFP Professional standards and is due for completion by Dec 07.
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>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The statutory position of the 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 by Brigadier Lynette McDade.

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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>COMPLETED (NOV 06)</p> <ul style="list-style-type: none"> • Eleven additional positions, required to implement the enhancements to the military justice system, have been established, albeit not yet filled. • Additional resources such as IT and accommodation have been reviewed and the DMP will relocate to permanent accommodation in Canberra in 2007. • 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).
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>COMPLETED (MAY 07)</p> <ul style="list-style-type: none"> • A review of the training requirements for permanent legal officers assigned to the ODMP and Reserve legal officers who may be assigned prosecution duties by the DMP has been completed. The review has resulted in the establishment of a training continuum for legal officers who are, may be or have previously been posted to the ODMP. Training of the ODMP personnel has commenced and comprises of initial training completed at the time of posting-in, together with ongoing training - both individual and on the job training - as well as training in the civilian environment.
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>COMPLETED (AUG 07)</p> <ul style="list-style-type: none"> • The awareness and profile of the role of the ODMP has been raised over the first year of its operation with a statutorily appointed Director. The ODMP will continue to sustain awareness of its functions on an ongoing basis. • The DMP has conducted a range of briefs to the Services and various command and staff courses and articles on the appointment, function, role and independence of the DMP have appeared in the Service Newspapers. • The DMP is also providing web based information.
14	The Government agreed to the statutory appointment of DMP at one star rank.	Dec 2005	<p>COMPLETED (MAR 06)</p> <ul style="list-style-type: none"> • DMP has been established at one star rank and the position has been filled by Brigadier Lynette McDade.

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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>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The Commonwealth Remuneration Tribunal made a determination on remuneration for the DMP, effective 12 Dec 05 (the determination also covered the Inspector General ADF, Chief Judge Advocate and Registrar of Military Justice).
16	<p>The Government agreed in-principle that:</p> <ul style="list-style-type: none"> legal officers in the Office of the DMP would be required to hold Practicing Certificates, and other permanent legal officers would be encouraged to take them out; and that the matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society). 	Oct 2007	<p>COMPLETE</p> <ul style="list-style-type: none"> All legal officers in the Office of the DMP now hold Practicing Certificates. Permanent legal officers are being encouraged to take out practicing certificates. <p>UNDERWAY</p> <ul style="list-style-type: none"> An amendment to the <i>Defence Act 1903</i> to address the matter of legal officer's independence and professional ethical stands was included in the <i>Defence Legislation Amendment Bill 2007</i>, which was introduced into Parliament on 15 Aug 07. The Bill was passed by the House of Representatives on 19 Sep 07 and introduced into the Senate on 20 Sep 07. The Bill has now lapsed with Parliament prorogued. The Bill will be reintroduced into the new Parliament following the election.
17	The Government agreed to establish a Director of Defence Counsel Services (DDCS) as a military staff position within the Defence Legal Division, to coordinate and manage the access to and availability of Defence counsel services by identifying and promulgating a Defence panel of legal officers, permanent and reserve.	Jun 2006	<p>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> The position of DDCS 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>.

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18, 19 and 20	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.	Oct 2007	<p>COMPLETED</p> <ul style="list-style-type: none"> • Legislation (the <i>Defence Legislation Amendment Act 2006</i>) to create the AMC was passed by Parliament on 5 Dec 06 and assented on 11 Dec 06. • The AMC commenced on 1 Oct 07. • The AMC rules were signed by the Chief Military Judge on 17 Oct 07 and commenced on 18 Oct 07.
21	<p>The Government:</p> <ul style="list-style-type: none"> • agreed in principle that judge advocates appointed to the Australian Military Court should have appropriate experience, and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments; and • noted that military judge advocates would predominantly be drawn from the Reserve and would have adequate civilian and military experience, nevertheless, qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience. 	Oct 2007	<p>COMPLETED (OCT 07)</p> <ul style="list-style-type: none"> • Brigadier Ian Westwood was appointed by the Governor-General on 22 Aug 07 to the statutory position of Chief Military Judge of the Australian Military Court and sworn into his position on 3 Oct 07. • Colonel Peter Morrison and Lieutenant Colonel Jennifer Woodward were appointed by the Governor-General on 6 Sep 07 as the two permanent military judges of the Australian Military Court and sworn into their positions on 3 Oct 07. • The Commonwealth Remuneration Tribunal made a determination on remuneration for the Chief Military Judge and military judges on 13 Feb 07.
22	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.	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> • The form of the right to elect trial from summary procedures to the Australian Military Court was included in the <i>Defence Legislation Amendment Bill 2007</i>, which was introduced into Parliament on 15 Aug 07. The Bill was passed by the House of Representatives on 19 Sep 07 and introduced into the Senate on 20 Sep 07. The Bill has now lapsed with Parliament prorogued. The Bill will be reintroduced into the new Parliament following the election

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23	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.	Oct 2007	COMPLETE <ul style="list-style-type: none"> Amendment to the right of appeal to the DFDAT was included in the Act which created the Australian Military Court.
			UNDERWAY <ul style="list-style-type: none"> The right of appeal from summary authorities to a military judge of the Australian Military Court is being progress in conjunction with Recommendation 22.
24	The Government: <ul style="list-style-type: none"> Agreed to continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. The current comprehensive review and its implementation would emphasise the present provisions against reprisals in the current Defence Whistleblower instruction. Supported annual reporting of the operation of the scheme against documented performance standards. 	Dec 2005	COMPLETED (DEC 05) <ul style="list-style-type: none"> The first of a series of regular reviews was completed into the Defence Whistleblower Scheme and the operation of the Scheme is to be reported annually in the Defence Annual Report (this internal review indicates that the scheme is operating satisfactorily).
		Jun 2006	
25	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.	Jun 2006	COMPLETED (DEC 05) <ul style="list-style-type: none"> Reporting of wrong-doing was included in the 2004-05 Defence Annual Report and will continue to be reported (wrong-doing is generally accepted as being inappropriate behaviour).
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	COMPLETED (APR 06) <ul style="list-style-type: none"> Amendments to the Administrative Inquiries Manual were completed and promulgated in Apr 06. In addition to covering these recommendations, the amendments incorporate agreed action from the earlier Acumen Alliance Review.
27	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	COMPLETED (APR 06) <ul style="list-style-type: none"> As for Recommendation 26.

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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>COMPLETED (DEC 05)</p> <ul style="list-style-type: none"> The backlog of Redresses of Grievance cases has been cleared (there is no longer a backlog of cases which previously caused undue pressure on the complaints resolution system).
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>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> As for Recommendation 26.
32	The Government agreed to amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case.	Jun 2006	<p>COMPLETED (APR 06)</p> <ul style="list-style-type: none"> As for Recommendation 26.
33	<p>The Government noted that the substance of this recommendation was agreed to following the 1999 Senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence [Inquiry] Regulations 33.</p> <p>The Government agreed in part that:</p> <ul style="list-style-type: none"> In cases where either the appointing authority, before the inquiry starts, or the President of a BOI makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons would be entitled to appear before the Board & would have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish. Where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements. The representatives of the estate of deceased persons who had died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, would be entitled to be legally represented before the BOI into that incident. Where the representative of the estate of such persons choose to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements. 	<p>Dec 2006</p> <p>Dec 2006</p> <p>Dec 2006</p>	<p>COMPLETED (MAR 06)</p> <ul style="list-style-type: none"> Amendments to the <i>Defence (Inquiry) Regulations 1985</i> (D(I)R) 33 were completed as at 31 Mar 06.

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<p>34</p>	<p>In response to Recommendation 34, the Government agreed that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government would:</p> <ul style="list-style-type: none"> propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry. CDF should appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in Service. The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience would be the President. This form of inquiry would be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry. External independent legislative oversight by Comcare would continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process. The Defence Force Ombudsman would continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF. 	<p>Dec 2006</p>	<p>COMPLETED (DEC 06)</p> <ul style="list-style-type: none"> 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. Amendments to the <i>Defence (Inquiry) Regulations 1985</i> to support the conduct of a CDF COI, were considered and passed by the Federal Executive Council on 21 Jun 07 and commenced on 26 Jun 07. A panel of suitably qualified persons with judicial experience to preside over/sit on a CDF COI has been establishment. A CDF COI coordination and support cell has been establishment within the Office of the CDF.
	<ul style="list-style-type: none"> 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. 	<p>Oct 2007</p>	<p>UNDERWAY</p> <p>The ADF is also consulting with State and Territory Coroners to establish protocols regarding the review of outcomes of ADF inquiries into deaths of personnel. Four State Coroners have already signed protocols, a fifth has provided draft protocols for Defence review and the sixth has agreed to establish liaison arrangements. A seventh is working on a draft protocol.</p>

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35	<p>The Government agreed in principle that, in addition to ongoing internal monitoring and review, Defence would commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.</p>	Oct 2007	<p>UNDERWAY</p> <ul style="list-style-type: none"> Proposed 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, including the broad timeline, and options for the authority under which the review might be conducted have been agreed by CDF. This independent review will be conducted in an open and transparent manner, and include a more detailed review of the DFDA. The review will commence in mid 2008 after the current enhancements have bedded down.
			<p>COMPLETED (DEC 06)</p> <p>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 on track with action on over half the agreed recommendations underway. Implementation is being reported separately.</p>
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>COMPLETE</p> <ul style="list-style-type: none"> Examination of the combination of criminal and administrative law was completed by obtaining independent external advice on double jeopardy from the Australian Government Solicitor. The advice has been incorporated into a revised Defence Instruction (General) 35-6, which deals with Formal Warnings and Censures in the ADF. 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. 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.

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37	<p>The Government supported the need for transparency and parliamentary oversight of the military justice system. The Government agreed to provide, in the Defence Annual Report, reporting on the state of health of the military justice system. Reporting would include: progress in the implementation and effectiveness of reforms to the military justice system, arising both from this report and previous reviews under implementation, and the workload and effectiveness of the key bodies within the military justice system.</p> <p>Defence would also amend the 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.</p>	<p>Jun 2006</p> <p>Jun 2006</p>	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> • A report on the state of health of the military justice system is included in the 2005-2006 Defence Annual Report, and will be an ongoing element of this report. • The Defence (Inquiry) Regulations have been amended to provide for an annual report on the operation of the <i>Regulations</i>. (Amendments were approved by the Federal Executive Council on 22 Jun 06.) • Reports to the Senate FAD&T Committee on progress with enhancements to the military justice system have been submitted in Apr and Oct 06 and Apr 07. This reporting will continue until the end of the implementation period.
38	<p>The Government agreed to commission an expert to examine whether the human rights of children are being respected.</p>	<p>Jun 2006</p>	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> • Jenni Whelan, a consultant & former solicitor at the Human Rights and Equal Opportunity Commission, has been engaged, under a standing offer for up to two years, to review specific policies and programs for compliance with the Convention on the Rights of the Child in order to determine whether the human rights of children are being respected.
39	<p>The Government agreed that the ADF take steps immediately to draft and make regulations dealing with the ADF Cadets to ensure that the rights and responsibilities of Defence and cadet staff are aligned, noting that as part of the significant work initiated under the Government's Cadet Enhancement Program, Defence is finalising amendments to the regulations that would more than meet the Committee's recommendations on the human rights of minors.</p>	<p>Jun 2006</p>	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> • The ADF Cadet Forces Regulations 1977 have been amended. (Amendments were approved by the Federal Executive Council on 22 Jun 06.)
40	<p>The Government agreed that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations and noted that the Service Chiefs had already provided additional resources to the ADF Cadets to improve administrative support.</p>	<p>Jun 2006</p>	<p>COMPLETED (JUN 06)</p> <ul style="list-style-type: none"> • Further administrative positions across all three cadet organisations have been established and filled.

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Appendix 5

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

June 2008



Australian Defence Headquarters
Department of Defence
CANBERRA ACT 2600

CDF/OUT/2008/402

Senator Mark Bishop

Chair

Senate Standing Committee on Foreign Affairs, Defence and Trade

Department of the Senate

PO Box 6100

Parliament House

CANBERRA ACT 2600

Dear Senator Bishop

REPORT ON THE PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM

I refer to your letter of 3 April 2008 to the Honourable Joel Fitzgibbon, Minister for Defence, in which you advised of the Committee's intention to hold a further hearing into, and seek information on, progress with the implementation of reforms to the ADF military justice system.

I am pleased to provide you with the following update on progress with the implementation of measures to enhance our military justice system, arising from the Government Response to the 2005 Senate Foreign Affairs, Defence and Trade References Committee Report, 'The Effectiveness of Australia's Military Justice System'.

In December 2007, the projected two year implementation period concluded and the dedicated Military Justice Implementation Team disbanded. The Inspector General ADF now has oversight of completion of the outstanding implementation actions. Almost all of the agreed responses to the 2005 Senate Inquiry have been completed and 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.

Implementation update

The task of implementing the many important recommendations arising from the 2005 Senate Committee Inquiry has been, and remains, a considerable undertaking. Overall, I am pleased with the achievements to date. Substantial and commendable progress has been achieved and results are within realistic expectations.

Our fourth progress report to the Committee in October 2007, noted that there were nine recommendations then outstanding, including two proposed alternatives to Senate Committee recommendations which were not agreed. Since then, substantial work has been completed and a further three recommendations have now been closed. Attached to this submission at

Enclosure 1 is a schedule providing further detail. In the interests of simplicity the schedule addresses only those recommendations where implementation remains incomplete.

A major step forward was achieved when the Defence Legislation Amendment Act 2008 (DLAA 08) received Royal Assent on 20 March 2008. Importantly, among other things DLAA 08 introduces an updated summary justice system which is scheduled to take effect on 20 September 2008.

As the Committee would be aware, this is a particularly significant initiative for the ADF as the vast majority of disciplinary matters under the Defence Force Discipline Act (DFDA) are dealt with at the summary level on a day-to-day basis.

I am confident that the new summary arrangements will not only update and simplify the current system for the benefit of commanders and those who administer military justice, but will also substantially enhance the rights of those who find themselves subject to the disciplinary system. The new system will, for example, provide accused persons with a right to elect to be tried before the Australian Military Court (AMC) for all but a limited number of less serious commonly occurring Service offences, as well as a right to appeal summary convictions and punishments to the AMC. The simplification of the rules of evidence before summary tribunals will address a long standing criticism of the current system that the requirement to apply the full law of evidence in summary proceedings was an unnecessary complexity. The simplified rules will however preserve members' rights by requiring summary authorities to have regard to basic evidentiary principles including relevance, reliability, weight, probative value and procedural fairness.

Although the passing of DLAA 2008 has established the legislative basis for the new summary system, much work remains to be completed before the commencement date of 20 September 2008. This includes rewriting relevant manuals, instructions and guidance, revising military justice training course contents, providing appropriate conversion training to practitioners and administrators, as well as general familiarity training to ADF members.

On present indications the necessary preliminary work will be completed in time to meet the commencement date.

The Committee has previously separately considered the provisions of DLAA 2008 which deal with a range of detailed issues. Apart from the new rights to elect trial by and appeal to the AMC, to which I have already referred, other significant changes to the military justice system introduced by this legislation include:

- Provision to ensure that legal officers are able to provide advice independently of potential undue command influence;
- Increased AMC and summary jurisdiction to try offences involving drugs, including cannabis, narcotic substances (amphetamine, cocaine, heroin, methamphetamine etc) and anabolic steroids;
- Extension of the summary system to cover members up to the rank of Rear Admiral/ Major General/ Air Vice Marshal;

- Provision to disqualify a summary authority from dealing with a charge where he or she was involved in the investigation of, issuing a warrant in relation to, or charging the accused person with the offence in question;
- Provision to require a summary authority trial to commence within three months of a charge being laid, unless, in certain circumstances, a longer period is allowed by a superior authority;
- Where an accused intends to plead guilty in a summary authority trial, provision to allow the accused to apply for the trial to be conducted in his or her absence if there are exceptional circumstances;
- AMC and summary authorities will be given increased flexibility in sentencing, namely, the ability to suspend part of a punishment or order;
- Standardisation of the powers of punishment of summary authorities regardless of the Service of the convicted person. The current differences in the punishments applicable to members of the Navy, from those applicable to Army and Air Force members, will be removed;
- Significant modification of the review process for summary convictions, punishments and orders; and
- Expansion of the discipline officer scheme to cover all ADF members up to the rank of Lieutenant/ Captain/ Flight Lieutenant.

In addition to the changes introduced by DLAA 08, recent amendments to the Defence Force Regulations have also come into effect. These provide an updated process for members of the ADF to submit complaints about certain matters relating to their service. The amended regulations provide for more practical limitations on who may submit a redress of grievance and the matters they contain. It introduces timeframes relating to the process for submission, inquiry into, and referral to higher authority of redresses of grievance. The amended regulations also allow commanding officers, service chiefs and myself (as appropriate) to accept applications for redresses of grievance submitted or referred outside of the timeframes, and provide powers to suspend consideration of grievances that are being inquired into by certain other bodies. The new instruction relating to redresses of grievance is undergoing final preparation before being released for clearance. Once the instruction is issued I fully expect that the revised arrangements will substantially improve ADF complaint handling process by streamlining the system, allowing for greater transparency and oversight, and more timely outcomes.

One of the final recommendations to be implemented in response to the Senate Inquiry Report, is the requirement to provide for periodic independent reviews of the military justice system by a suitably qualified eminent person or persons. I am pleased to advise that the first such independent review is now underway. Former Chief Justice of NSW, Sir Laurence Street, and a former Chief of the Air Force, Air Marshal Les Fisher (Retd) have been appointed to assess the effectiveness of the current reform program so far. The calibre of the review team reflects the importance I place on this task.

The team has been asked to provide its report to me by 10 February 2009. I expect that this report will be an important indicator as to whether the many reforms to the military justice system to which the ADF has committed have been, or are likely to be, appropriate and effective and whether any further changes are required.

Committee's Third Progress Report

Your letter of 3 April 2008 sought further information about a number of specific issues raised in the Committee's Third Progress Report. The following paragraphs address those issues.

Audit of ADF Investigative Capability

As required by the Senate Committee Report into 'The Effectiveness of Australia's Military Justice System' (Recommendation 6), I commissioned a tri-service audit of the ADF Service Police Investigative Capability (DICA) and released the report in December 2006. The report found that the ADF's investigative capability required extensive remediation and that this was likely to take at least five years. 99 recommendations for achieving best practice policing in the ADF were accepted and implementation began immediately.

As previously reported, the ADF Investigative Service (ADFIS) is now established and headed by a Provost Marshal ADF (PMADF). Following the closure of the Military Justice Implementation Team, the PMADF is responsible to me for implementation of the DICA recommendations. Steady progress is being made. To date, 45 recommendations have been completed, some 27 are close to completion and four recommendations will be ongoing activities.

Last month, I was pleased to attend the official opening of the new ADFIS headquarters in Canberra by the Parliamentary Secretary for Defence Support, the Hon Dr Mike Kelly, AM, MP in Canberra. Commissioning the new headquarters represented an important milestone for this new joint organisation. It was most encouraging to see the members of ADFIS, comprising investigators from all three Services, demonstrating their equipment and enthusiastically explaining measures that are being put in place to ensure the ADF will have the effective, professional investigative capability it requires into the future. In this respect, a memorandum of understanding is now in place with the Australian Federal Police (AFP). Although Defence has always had personnel undertake civil police courses, secondments and worked closely with the AFP on a number of fronts, the memorandum provides a foundation for further, more detailed agreements such as intelligence sharing and forensic capability development. Enhanced training opportunities are also being pursued with some State Police Services.

ADFIS now has investigators deployed with the major ADF deployed force elements overseas including Iraq, Afghanistan, Timor Leste and the Solomon Islands. The unit includes a major investigation team that is deployable at short notice to a serious incident in Australia or overseas.

ADFIS investigators have recently been directed to provide direct support to Commissions of Inquiry, as well as to Inquiry Officers appointed to inquire into the deaths of ADF members killed in combat.

The DICA report recognised that it would take time to establish and develop ADFIS to its optimum potential and the task at hand should not be underestimated. As with some of the

other critical areas of the ADF, recruitment and retention of suitable personnel remains a principal concern and it is likely to be some time before ADFIS will be able to achieve its full complement. A number of measures including direct and lateral recruitment and improvements to pay and conditions are being examined. Despite these difficulties, I remain convinced that ADF needs are best served by having a professional investigative capability that is not only effective, but is also organic and therefore able to quickly respond to incidents and matters requiring specialist policing skills across the entire range of ADF operations.

Learning Culture Inquiry Report

An independent inquiry into the learning culture in ADF schools and training establishments was completed in July 2006. I released the inquiry report and strategies for implementing agreed report recommendations in December 2006 and a two-year, phased implementation plan was endorsed by the Chiefs of Services Committee in March 2007. The implementation plan built on several initiatives already underway and, as part of the process of continuous improvement, is expected to continue to influence changes to ADF training well after achievement of the last of its endorsed milestones.

The first phase of the implementation plan (identification of the doctrinal, policy and procedural changes needed to give effect to Defence commitments, along with the courses requiring amendment) is almost complete. The second phase (amending courses and implementing amended policy, in particular at the training institution level) is underway.

Implementation of 46 of the 47 agreed recommendations from the report is progressing satisfactorily. 17 full recommendations have been completed to date. Some of the key milestones include:

- Defining the optimal learning culture (now pending incorporation into Australian Defence Doctrine);
- Defining the difference between tough training from bullying and providing principles for the conduct of tough training;
- Rules for the development of codes of conduct across ADF training;
- Aligning the ADF fraternisation policy, within ADF training, with contemporary standards; and
- The development of principles for the conduct of focus groups that promote open and honest communication while preserving command authority and discipline and ensuring accountability.

Given that some initiatives are evolutionary in nature, it is difficult to identify a date by which completion of the entire program might be said to be achieved. Most recommendations are on schedule for completion by the end of this year, although a small number now have modified timelines – the main reason for this is an ambitious initial timeline coupled with task complexity. These new timelines extend beyond 2008.

I am monitoring implementation progress on a quarterly basis and the achievements will be reported in a specifically commissioned section of the Defence Annual Report.

The operation of the Australian Military Court

Among the many important reforms being made to the ADF military justice system, the creation of the permanent Australian Military Court was probably the most significant in that it has radically changed the previous ad hoc system of trials by Courts Martial and Defence Force Magistrates and is statutorily independent of the chain of command. The court opened in October 2007. The introduction of the court was finalised by the passage of the Defence Legislation Amendment Act 2008 which, as previously mentioned, will introduce a right of appeal from summary proceedings and new rights to elect trial by the AMC in the first instance after 20 September 2008.

The AMC is presided over by a Chief Military Judge and two permanent Military Judges, all of whom are legal practitioners appointed by the Governor-General. The AMC conducts trials by military judge and military jury and in certain cases by military judge alone. The military judges are independent from the military chains of command and executive in the performance of their judicial functions. Provision is made for the appointment of part-time military judges, although none have yet been appointed.

Since the court opened, 83 matters have been referred for trial. 27 matters have been finalised, 22 are currently listed for trial, four matters have been withdrawn and 15 are not currently being actioned for reasons such as deployment of members. Matters before the AMC are prosecuted by the independent Director of Military Prosecutions who is required to report annually to Parliament on the operation of her office. Her first report is due to be tabled shortly. Defending officers are arranged by the Directorate of Defence Counsel Services.

The number of trials referred to the AMC is considerably greater than might have been expected from the numbers of matters proceeding before Court Martial and Defence Force Magistrate during the years immediately preceding the establishment of the AMC. Where appropriate, civilian criminal matters continue to be referred to the civilian jurisdictions.

On 19 June 2007, the High Court handed down its judgment in the case of *White v Director of Military Prosecutions* [2007] HCA 29, which dealt with a challenge to the AMC's jurisdiction on grounds that it purported to exercise the judicial power of the Commonwealth, although not a court established under Chapter III of the Constitution. The challenge was unsuccessful with the High Court holding that the disciplinary powers of military tribunals did not involve an exercise of the judicial power of the Commonwealth but are to be exercised judicially for the purpose of maintaining or enforcing service discipline.

Since then a further issue with respect to the validity of the constitution of military juries has arisen, with a trial adjourned after the Military Judge upheld the Defending Officer's objection that the military jury had not been arrayed according to law. Resolution of this issue is being progressed through amendment to the *Australian Military Court Rules 2007*.

The Chief Military Judge is required to report annually to Parliament. His first report is to be tabled shortly.

The operation of CDF Commissions of Inquiry

Legislation to facilitate creation of Chief of the Defence Force Commissions of Inquiry (COI) received Royal Assent in December 2006 (the *Defence Legislation Amendment Act 2006*). Amendments to the *Defence (Inquiry) Regulations 1985* to enable the appointment of COIs were considered and passed by the Federal Executive Council on 21 June 2007 and commenced on 26 June 2007. With the introduction of these Regulations, COIs superseded Boards of Inquiry (BOIs) as the primary mechanism for inquiring into the deaths of ADF members.

A civilian with judicial experience now presides over each COI. COIs are required generally to be appointed into deaths of ADF members which arise out of, or in the course of, a member's service. The Minister for Defence may dispense with the requirement to appoint a COI where a death occurs in circumstances in which he determines that a COI is not required. COIs may also be appointed into incidents involving serious injuries or other matters as determined by me. The appointment of civilian presidents enhances COI impartiality and creates separation from the normal chain of command. A panel of suitably qualified civilians with judicial experience to preside over a COI has been established. There are currently 15 individuals on the panel. A COI coordination cell has been established within my office.

The principal aim of COIs is to inform internal military decision-making. COIs determine the facts and circumstances surrounding an incident so that an informed decision can be made about how, and if possible why, an incident occurred to help avoid a similar recurrence. The ability of ADF Commanders to appoint internal administrative inquiries and obtain timely information on incidents that affect personnel, assets, training and policy, is vital for the safety and reputation of our people and the maintenance of our capability. COIs are not carried out with the intention of meeting the requirements of any other organisation or person outside of Defence. Defence is nevertheless committed to supporting the families of deceased ADF members throughout the COI process, and beyond. COIs do not replace coronial inquests.

COIs are conducted separately from the normal chain of command and according to terms of reference determined by me as the appointing authority. COIs are required to apply procedural fairness but, as fact finding inquiries. They are not courts of law and do not exercise judicial power. While COIs do not conduct criminal or disciplinary investigations (or focus on the attribution of blame) they may however make comments or findings that are critical of the conduct of individuals.

Defence appreciates the importance of conducting COIs in a way that promotes public confidence in the integrity of its inquiry processes. It is now my general practice to appoint COIs as public inquiries, subject to considerations of security and the exercise of legal discretions by COI Presidents. The *Defence (Inquiry) Regulations* authorise COI Presidents to direct that all or part of the hearings be closed on grounds of security or out of fairness to a person affected by the inquiry. This discretion properly permits COI Presidents to determine on a case-by-case basis whether particular aspects of a COI should be held in public or in private.

13 CDF COIs and BOIs into service deaths have been completed since October 2005 and two more are currently underway. Another 25 cases are currently in preparatory phases or are still being analysed to determine whether a COI will be appointed.

Regrettably, the ADF has recently experienced a number of combat deaths. In such circumstances it will not necessarily follow that a COI will be appointed on each occasion. Sadly, the reality is that combat deaths must be expected when our soldiers, sailors and airmen and airwomen go in harms way and, in the normal course of such events, little would be achieved by the review of such matters in the environment of a formal COI. I nevertheless recognise that special circumstances can exist to warrant the appointment of a COI into combat deaths. I have therefore established a practice whereby a preliminary assessment by a specially appointed inquiry officer is made in the case of ADF combat deaths to determine what happened and identify whether any special circumstances exist to warrant further inquiry by a COI. This approach has worked well. The reports made by such inquiry officers into the deaths of Sergeant Matthew Locke MG, Private Luke Worsley and Trooper David Pearce who were killed in combat in Afghanistan were recently made public.

COI reports are submitted to me and, after consultation with relevant stakeholders, I issue directions concerning the implementation of agreed recommendations. I then make recommendations to the Minister concerning the report's release (noting that release of a COI report is not permitted without the authorisation of the Minister pursuant to reg. 63 of the *Defence (inquiry) Regulations 1985*). Approved release will normally involve a COI report being published on the Defence website.

Progress made between Defence and State coroners in formulating protocols for the relevant coroner to hold an inquest into an ADF sudden or unexplained death

Protocols with coroners from Victoria, Queensland and Tasmania have been concluded. While those with the ACT, NSW and NT remain outstanding, each of the relevant coroners has agreed to proceed with these protocols, and have been encouraged to have them in place as soon as possible. The South Australian and Western Australian State Coroners have declined to provide a protocol to Defence. However, contact details for an ADF Liaison Officer have been provided to the South Australian and Western Australian Coroners.

The protocols provide for agreed processes and actions to be observed and taken by ADF authorities and State and Territory coroners that have jurisdiction over deceased ADF members. The introduction of these protocols will help to clarify respective responsibilities where dual or joint jurisdictional issues arise. Interaction between the ADF and Coroners relating to recent ADF deaths on operations has been very positive.

Matters raised in the Commonwealth Ombudsman's report, Australian Defence Force: Management of Complaints about Unacceptable Behaviour, Report 04/2007, June 2007 especially fear of reprisal and record keeping

Three of the recommendations of the Ombudsman's report relate to record keeping. The Inspector General ADF undertakes monthly audits of selected units to assess the quality of quick assessments, inquiries and record keeping in incidents of complaints of unacceptable behaviour.

A series of performance reporting indicators have been agreed between the Fairness and Resolution Branch and the Inspector General ADF which are analysed at least annually. These indicators are being incorporated into a new complaint management, tracking and reporting database, ComTrack. The first phase of ComTrack was launched in December 2007. Phases two and three are scheduled to be launched in late September and November 2008 respectively.

Fear of reprisal by respondents is common to many complainants. Defence has introduced a training course for commanders, supervisors and managers which includes information on providing support to all parties to a complaint. The mandatory annual equity awareness presentations also include information on this issue, encourage early resolution at the lowest appropriate level and provide options to assist personnel to achieve this goal.

We now have an extensive program of alternative dispute resolution processes. Conflict Coaching is one process designed to enhance an individual's ability to manage and self-resolve conflict in the workplace and to build workplace resilience.

In May/June 2008, seven Fairness and Resolution Centres will be formally opened. Staffed by trained and experienced military and civilian staff, these centres offer a range of advisory and conflict resolution services to all Defence personnel.

The instruction on *Management and reporting of unacceptable behaviour* is being revised and will include increased emphasis on providing support to all parties to a complaint in the workplace.

Conclusion

The task of implementing the agreed recommendations arising from the Senate Committee's 2005 Report has been a considerable undertaking. The changes being made to the ADF military justice system are the most significant since introduction of the Defence Force Discipline Act in 1985. While implementation of most of the recommendations has been completed or is well advanced, it will be important that these reforms are given time to bed down. This will allow them to achieve their full potential benefits in practice. The ongoing development of the ADF Investigative Service and the introduction of the new summary justice system are examples of initiatives that will need time to mature.

Overall, I believe progress of the reform program has been commendable and within realistic expectations given the magnitude of the task. I remain confident that the changes being made will substantially improve the capacity of the military justice system to achieve its purpose of ensuring that the correct balance is struck between the requirement to maintain a high standard of discipline within the ADF and the need to make sure that ADF members are treated fairly. In this respect I look forward to receiving the report of Sir Laurence Street and Air Marshal Fisher in February 2009 as to whether this balance is being achieved and whether the direction of the reform program is appropriate. I regard success in getting this balance right as one of the fundamentals of continuing operational effectiveness.

I would like to reassure the Committee that my personal commitment, and that of the Secretary and Service Chiefs, to drive the implementation of the agreed reforms arising out of the Committee's 2005 Report remains undiminished. We are also very much aware that maintaining the currency and health of the military justice system is a vital task that will not necessarily end once all the agreed recommendations have been finally implemented. It will be an ongoing requirement to continuously monitor the health and effectiveness of the system and to make changes as they are required. As a result of measures we have taken to increase visibility and central oversight of the military justice system in recent years I believe we are much better placed to do this than was the case in the past.

I hope the foregoing provides you with the information necessary to update the Committee on our progress with implementing reforms to the military justice system.

Yours sincerely



A.G. HOUSTON, AC, AFC
Air Chief Marshal
Chief of the Defence Force

5 June 2008

Enclosure:

1. Summary of Outstanding Military Justice Reforms as at June 2008

SUMMARY OF OUTSTANDING MILITARY JUSTICE REFORMS

AS AT JUNE 2008

Potential risk area

IMPLEMENTATION OF AGREED RESPONSE TO THE 2005 SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE REPORT 'THE EFFECTIVENESS OF AUSTRALIA'S MILITARY JUSTICE SYSTEM'			
TOTAL RECOMMENDATIONS: 32			
Serial	Recommendation	Planned completion	Status
1	Recommendation 4: Requires the promulgation of revised DI(G) PERS 45-1 - Exercise of jurisdiction under DFDA - Guidance for military commanders and the roll out of the Defence Policing and Security Management System (DPSMS) for use by Service police.	Jul 08	DI(G) PERS 45-1 - Exercise of Jurisdiction under the Defence Force Discipline Act - Guidance for Commanders is being finalised and the Defence Policing and Security Management System is currently being rolled out.
2	Recommendation 5: Finalise secondments and exchanges with civilian police, increase participation in civilian investigation training courses, make use of civilian police services, design clearer career paths and development goals for service police and initiate a reserve recruiting campaign to attract civilian police into the ADF.	Dec 08	Clearer career paths and development goals for Service Police have been enhanced by the creation of the ADF Investigative Service (ADFIS). This work, and revised recruiting targets, will be informed by the current review of Service Police functions and roles being undertaken by the Services.
3	Recommendation 6: Substantially complete. Outstanding items are to finalise and promulgate Investigative and Service Police Professional Standards.	Jun 08	Investigative Standards, based on the Australian Government Investigative Standards, are close to finalisation. The Service Police Professional Standards framework is based on the recently revised AFP Professional Standards. This recommendation will be complete when these standards are promulgated.
4	Recommendation 29 (additional agreed recommendation): Requires amendments to the Defence Force Regulations to be considered and assented to by the Federal Executive Committee and then promulgate DI(G) PERS 34-1 - ROG Tri-Service Procedures.	Jun 08	The Defence Force Regulations came into affect on 3 May 2008. The revised DI(G) PERS 34-1 Redress of Grievance – Tri Service Procedures is undergoing final preparation before being cleared and then distributed. This recommendation will be complete once DI(G) PERS 34-1 is issued.

Enclosure 1

5	<p>Recommendation 34 (additional agreed recommendation): Put in place protocols with State and Territory coroners regarding the review of outcomes of ADF inquiries into deaths of personnel</p>	Dec 08	<p>Protocols with coroners from the ACT, NSW and NT remain outstanding. These remaining coroners have each agreed to proceed with these protocols, and have been encouraged to have them in place as soon as possible. The South Australian and Western Australian State Coroners have declined to provide a protocol to Defence. However they have been provided with contact details for ADF Liaison Officers.</p>
6	<p>Recommendation 35: Conduct first independent review on the health of the military justice system at the conclusion of the two-year implementation plan.</p>	Feb 09	<p>The first independent review of military justice reforms is underway. Former Chief Justice of NSW Sir Laurence Street and a former Chief of the Air Force AIRMSHL Les Fisher (Retd) will lead the review. The Terms of Reference were signed by the Chief of the Defence Force on 6 March 2008. The review team will report by February 2009.</p>
<p>Total Number of Outstanding Recommendations at June 2008: 6</p>			