6 August 2008

Committee Secretary
Standing Committee on Legal and Constitutional Affairs
The Senate
PO Box 6100, Parliament House
Canberra ACT 2600

Dear Peter Hallahan

Below please find my submission to the Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984

Thank you for the extension of time till 8 August

Yours faithfully

Gregory Michael McMahon

SUBMISSION TO THE INQUIRY INTO THE EFFECTIVENESS OF THE COMMONWEALTH SEX DISCRIMINATION ACT

by

G McMahon[1]

Scope

This submission seeks to influence the considerations of the Inquiry with respect to:

- **TOR g**: preventing discrimination
- **TOR h**: providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process
- **TOR l**: effectiveness in addressing intersecting forms of discrimination
- **TOR m**: any procedural or technical issues
- **TOR o**: other matters relating to and incidental to the Act

Particular aspects of interest to the author include:

- The ways in which discrimination is applied culturally within an organisation
- Protections to the officer who reports to the organization discrimination that has occurred to another
- Organisational responsibilities where the person that has been subject to the discrimination is unaware that the discrimination has occurred and that the disclosure about the discrimination has been made

Imposition of Discrimination

I summarise studies that have been conducted into forms of discrimination in the Defence Forces

The initial emphasis was on discrimination against reservist members of the Australian Defence Forces, undertaken as the representative of the Australian Council of Trade Unions on the Committee for Employer Support of Reserve Forces, later the Defence Reserve Support Committee.

---

[1] G McMahon, BE, B Com, MEngSc, BSc, MEconSt, BEcon, MPD
National Secretary, Institute of Management Consultants,
National Director Whistleblowers Australia
Fellow Australian Institute of Management
Author, Bullying Using Organizational Procedures, *Bullying from Backyard to Boardroom*, McCarthy et al, Federation Press, 2001
Author, Regulatory Capture, Causes and Effects, International Institute of Public Ethics Biennial Conference, iipe.org/conference, 2001

Advice sought from the author about sex discrimination and sexual harassment of women in the Australian Army by a Minister Assisting the Minister for Defence caused the studies to be widened.

Experience as a tactics instructor and leadership instructor at army training schools, both Reserve and Regular Training Establishments, provided additional perspective, and widened considerations to the class of military officer who had formerly been a warrant officer. A major case study was also followed in one School

The upshot of these studies has been a growth in appreciation of the phenomenon of **inter-section** of categories of targets for discrimination.

The category of member most in need of protection from discrimination in the officer ranks of the Australian Army, it appears from these studies, is the female reservist officer who came to her commission through the ranks, that is, from a rank of Senior Non-Commissioned Officer. Such an officer is at an intersection of the three targets for discrimination observed in the Australian Defence Force

The case study was of an instructor at a principal Army Tactics School, who supported a tactics instructor, at the School on exchange from the Army of another country, in responding to a decision by the Senior and Chief Instructors at the Centre. The decision was tending to discriminate against a female reserve officer in the group of trainees for which the overseas officer was the Directing Staff. The case study crystallized some conclusions from the studies conducted.

ASPECT OF CULTURE	**TARGET OF DISCRIMINATION / BULLYING**		
	Female Officers	**Reservist Officers**	**Former Warrant Officers**
Training received (informal)	How to mask sexism	Names for them & jokes about them	How to omit them from ‘circles’ of activities
Intentions Held	Put them out of the military	Put them in their place	Put them in secondary roles
The Way we Think	Reliability has value, and females are not reliable	Commitment has value, and Reservists are not that committed	Intelligence has value, and warrant officers do not have the thinking powers required
Beliefs held	They are here for a partner	They are here for tax-free pay	Best with implementing orders, not planning them
Attitudes held	Resentment	Tolerance	Use them as ‘hired hands’
Assumptions made	They don’t have the ability	They have less ability	They have limited abilities

A summary of observations made during these studies are set out in the table above. The observations are organized against a model for the culture of an organization used by leadership consultants in managing organizational change.

The Case Study

The case study was an intersection of the reservist and the female targets of discrimination set out in the table.

The contest for all categories of targets in the above table is to win some acknowledgement from the dominant community of Regular Army male graduates from Duntroon, that the targets have real abilities – in other words, the contest is to prove themselves. Such a contest is also real for all officers in the Army. For the dominant community, however, the presumption is made that abilities are held until events prove otherwise

The problem arises where the culture of discrimination decides before the fact that abilities do not exist or do not exist in sufficient quantum

In the case study, the Senior Instructor from the dominant community of officers decided, upon completion of only 20% of a program of training, that none of the trainees were deserving of the highest grading of competency from the training

The Directing Staff Instructor from an overseas country advocated at the 50% point of the training that one of the officers in the syndicate that he was training might be deserving of the highest grading. The officer was a woman. After discussion with the Chief Instructor, it was determined to resolve the issue at a particular individual performance task at the 80% point in the training.

Members from the dominant community who had received the highest grading from the training had been given practice exercises before the testing exercise. These officers were then favoured with feedback and coaching on how they could improve their performance in the testing exercise. The female reservist officer, however, was tested first up on the day without any practice exercises, Chief Instructor in attendance, arms folded with visible body language pressurizing the situation with the oversees instructor and the trainee.

The case study developed further where a reservist officer on the Directing Staff instructor team disclosed in turn to the Senior Instructor and the Chief Instructor, the Head of School, and the Head f the Defence Registered Training Organisation that the treatment of that officer, another female officer, and other officers on the training program may have been unacceptable behaviour. The second instructor also disclosed that the treatment may also be a breach of the Australian Quality Training Framework to which all Registered Training Organisations in Australia, civilian or military, are bound.

Protections

This submission advocates the need for protections, to persons alleging discrimination, or persons acting as witnesses to alleged discrimination, to be structured upon two organizations, not one

The two organizations have distinct but mutually supporting roles of:

- Investigating the allegations
- Protecting the complainant and the witness

Mutual Support is a much prized military tactic for successfully defending against an enemy.

The two functions are termed the **'Sword'** and the **'Shield'**.

This term was first coined by the Whistleblowers Action Group and Whistleblower Australia in promulgating their national policy on Whistleblower Protection. A copy of that policy is attached

The Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner are examples of the 'Sword' function. **What is missing in combating discrimination and other wrongdoing in the Commonwealth and State jurisdictions is the 'Shield' function.**

Australian organizations have learned that both the 'sword' organization and the 'shield' organization need to be established for any whistleblower protection program to be effective

This has been recognized by private industry, in no less a form than the Australian Standard AS 8004 – 2003 'Whistleblower Protection Programs for Entities'.

This best practice document has followed the Sword and the Shield doctrine, where it is careful to recommend that an entity establish both a Whistleblower Investigations Officer (the Sword) and a Whistleblower Protection Officer (the Shield) to manage whistleblower cases.

This mutual support approach needs to be followed within the public service entities as well as private organisations. Structurally, too, the organization for whistleblower protection within the total public service needs to consist of two separate bodies, one to be the 'sword' against wrongdoing, the other to be the 'shield' against reprisals.

Australia has ample examples of how the efforts at whistleblower protection can be undermined and reversed if only one of these two bodies is established. The principal examples of this failure, where only one of the two bodies is established, are

- The **'sword' only** approach – Qld's Criminal Justice Commission now Crime & Misconduct Commission [CJC/CMC] is a world renown example
- The **'shield' only** approach – The Australian Defence Force [Army]

CJC/CMC

Your inquiry will no doubt receive submissions about the rogue legal opinion used by this band of lawyers to excuse the Qld Cabinet of alleged criminal acts in destroying documents required for impending / foreshadowed legal action – the Heiner Affair.

A less well known feature of the Heiner Affair is that the victim of the alleged multiple rapes was an aboriginal girl in a State run Institution. This is yet another case of an **intersection** of targets of discrimination – it is doubtful if the Queensland Cabinet would have considered destroying supportive / probative evidence of the rape of a white adult male from a suburban family.

The Heiner Affair is one of five Whistleblower Cases of National Significance accredited by Whistleblowers Australia

A similar rogue legal opinion was used to excuse the forced transfer of whistleblower Jim Leggate, another Whistleblower Case of National Significance

The CJC/CMC were also at hand in a third Whistleblower Case of National Significance, that of Qld Police Inspector Col Dillon. Col Dillon was the police whistleblower who opened up the flow of evidence from honest police officers that rescued the Qld Fitzgerald Inquiry from failure. The post Fitzgerald Review of the Qld Police Force found that the treatment of Inspector Col Dillon by the Police Service, after the Fitzgerald Inquiry was completed, was 'anomalous in the extreme' – Inspector Dillon was transferred to a position reporting to an officer three levels lower in rank than Inspector Dillon. The CJC/CMC who served on the Review Steering Committee failed to do anything to correct the anomalous treatment, and it worsened. Eventually Inspector Col Dillon was assigned to a 'corridor gulag' – no office or desk or chair or tasking.

Three out of Australia's five Whistleblower Cases of National Significance are a product of alleged failures by the CJC/CMC to 'shield' the whistleblower, nor wield the 'sword' upon the wrongdoing

The failure of the 'sword' organization to wield the sword on wrongdoing is a phenomenon so common that it has a name – **Regulatory Capture**.

'Capture' of the 'sword' organization can be caused by a number of factors.

Firstly, the governing legislation can cause this flaw

The Ombudsman's Office can be limited in its involvement until after the entities own investigatory processes are completed. Entities in this regime can simply delay their processes and change the circumstances of the whistleblower [restructure / transfer / …as with Leggate and Dillon] such that the task before the Ombudsman becomes too problematic for the under-resourced Ombudsman's Office to redress. The Defence Force Ombudsman's Office allegedly has succumbed to this form of 'capture'.

A one year timeframe for persons to have their matter dealt with by their entities and reach the Ombudsman phase of their complaint, as is the case in Queensland, assists this process of 'capture'

External persuasion can also modify an Ombudsman's Office from pursuing proper process. Again the Defence Force Ombudsman provides a primary example. Faced with a legitimate military 'Redress' application against the Chief of Army, the DFO required the Chief of Army in another case study to redress one of three wrongs – but the DFO allowed the Chief of the Defence Force to refuse to accept that the document headed 'Application for Redress of Wrongs' was a Redress Application. This refusal to accept that the redress was a redress allowed the CDF to avoid having to give reasons why the redress of the other two wrongs was refused when the CDF was the Chief of Army who made the original decision.

In questioning the DFO for this apparent leniency, the DFO stated that one redressed matter was enough for the applicant, that the military justice system had made progress since all the Senate inquiries into that system had been completed, and that the applicant should be happy with that result. An emotion of sympathy for the hard times faced by the military in overcoming the appalling shortfalls in the military justice system was 'capturing' the DFO into a position of accepting continuing shortfalls in that system

These two externally initiated forms of 'capture' can lead to a third more entrenched form of capture – a culture of capture – internally activated by the vision held by the Ombudsman's Office of its role.

One State Ombudsman's Office may have exhibited such a culture, in the job application of the successful candidate for an Assistant Ombudsman position in that Office. This application from an internal candidate, already acting in the role, espoused a theoretical principle in support of investigating alleged wrongdoing, but immediately thereafter explained the practical and political restraints that the applicant would impose on themself when putting that theoretical principle into application.

The outcome from such capture is always the same outcome – the outcome that occurred for whistleblowers Lindeberg, Leggate and Dillon in the three aforementioned Whistleblower Cases of National Significance – they all lost their positions, their careers, and their employment

The role of the 'Shield' whistleblower body is to protect the whistleblower so that the whistleblower survives the denial, the delay, the destruction of the evidence and the

defamation of the whistleblower that occurs while the captured ‘Sword’ organization is distracted from its duty:

- Anti-Deny: The whistleblower is given advice, assistance and representation in hearings and preparations therefor
- Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament
- Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure
- Anti-Defamation: The evidence of the proficiency of the whistleblower in their job, prior to the making of the disclosure of alleged wrongdoing, is secured

If the whistleblower survives, the last line of defence in our system of justice and accountability remains intact – the ‘Sword’ organization in this scenario will be worn down into performing its duty through the capacity of the true witness to face the investigation

Australian Defence Force (Army)

In this organization the situation exists where there is a ‘Shield’ body, but there is no ‘Sword’.

In fact, the ADF has two whistleblower protection bodies – one for the Head of the Defence Department, and another for the Chief of the Defence Force.

The tactics used by Defence authorities to turn the whistleblower protection bodies against the whistleblowers is genuinely elegant.

The first rule effecting this turnaround is one that stipulates that the ‘Shield’ bodies are not allowed to investigate the disclosures made by the whistleblower – Rule 1

The second rule effecting the reversal is one that requires any investigation into the disclosed wrongdoing to cease once the whistleblower seeks protection from the ‘Shield’ authorities – Rule 2.

An Army Unit or School, say, seeking to end investigation into disclosed wrongdoing within its walls (bullying, discrimination, drug commerce, fraud, say) have endeavoured to apply to the ‘Shield’ authorities on the whistleblowers behalf, or falsely claim that the whistleblower has sought the protections of the ‘Shield’. This can be done so that the School or Unit can then apply Rule 2, and cease the investigation

The whistleblowers, on the other hand, say, a commander or an instructor, seeking to protect their men and women in uniform from wrongdoing, have had to refuse whistleblower protections for themselves from the ‘Shield’ bodies so as to keep the onus on their Units and Schools to continue with the investigation of the wrongdoing.

If a ‘Sword’ body was operating in the Australian Defence Force, the commander or instructor could seek protections for themselves and their members from the ‘Shield’ without having to put at risk an investigation into the wrongdoing that has beset them.

Unfortunately, in the Australian Defence Force, the closest thing to a ‘Sword’ body is the DFO, and the legislative regime, forces of persuasion and sympathetic identification with the ‘uniforms’ appears to have caused the phenomenon of ‘capture’ to deprive the DFO of any edge to their ‘Sword’.

Apart from the DFO, the integrity of any ‘sword’ wielded by the Australian Defence Force is best exemplified by the hallmark investigations by Chief of Army Cosgrove (the Burchett Inquiry) and by the current Chief of the Defence Force, in 2006, into bullying at Defence Schools. The Burchett Inquiry appeared to take on the properties of a ‘black hole’ for disclosures that did not make it to the ‘Sixty Minutes’ program. The 2006 investigation reported that there was no bullying at Defence Schools.

During the 2006 CDF’s investigation into bullying, however, allegations of unacceptable behaviour (including discrimination and bullying) by senior officers against officer trainees were made by an instructor at one of the Army’s prestige training establishments.

During the CDF’s investigation, as one of several examples, disciplinary action was undertaken against the instructor for being absent from parade at the death bed of the instructor’s mother.

The allegations of bullying and discrimination were not investigated, and the instructor was suspended from parading for 14 months without any disciplinary procedure.

In the end, the Head of the Defence Registered Training Organisation tore up all actions taken against the instructor except the suspension, and ordered that the instructor was not to be posted to an Army School.

A legal opinion from an Australian Army Legal Corps COLONEL that treatment of the instructor was a notifiable incident was passed over in favour of an opinion from a Captain on the staff of the Head of the Defence RTO, that officers can be suspended for long periods without the need of disciplinary procedures.

The Head of the Public Service refused submissions that the Public Service should intervene in the treatment of the instructor, claiming that military personnel are outside the ambit of the authority of the Commonwealth Public Service.

On all experiences of this matter, the case study appeared to confirm the effective absence of any ‘Sword’ within Defence to investigate wrongdoing. The instructor refused to seek protection of the ‘Shield’ authorities, after the School ordered that a COLONEL investigation officer cease his investigation of the bullying and discrimination – the School claimed that the cessation of the COLONEL’s investigation was appropriate because the instructor had asked for whistleblower protection.

A ‘sword’ organization within Defence appears to be a necessary addition to the Defence Whistleblower Protection schemes if bullying and discrimination at Army Schools is to be arrested

Responsibilities of Organisations

The case study showed up the situation where the target of the discrimination might not know that they had been the subject of discrimination

The Head of the Defence RTO considered the need to inform the officers allegedly affected by discrimination of the disclosures that the instructor had made. A decision appears to have been made not to so inform the officers concerned.

A mark to the integrity of that decision was the argument that the officers themselves had not made any complaints. The officers of course did not know of the disclosures, did not know that at least 40% of instructors had raised the issue with the School, and did not know of the usual practice exercises with feedback and coaching given to trainees from the dominant community of officers before taking specific tests.

The instructors in the Australian Army operate under a code of ethics and under the Australian Quality Training Framework. These values included:

Challenge bullying, unfairness and inappropriate behaviour

Have the courage to stand up for what is right and stop unacceptable behaviour

These were the values that the instructors were adhering to when they raised their concerns with their superiors.

What is missing in the Australian Defence Force is a value statement, equivalent to that taken up by instructors, adopted by the Organisation, to report to the targets of any alleged discrimination that their commanders and / or instructors have raised matters concerning their treatment. This requirement would assist full disclosures by all parties to suspected incidents of discrimination.

One might have thought that such an undertaking was a part of the commitment that the Australian Defence Force had to make when it was given Registered Training Organisation status with the national civilian vocational training regime. The ADF however appear to have paid trite service to the Australian Quality Training Framework in the case study outlined

The isolation of Defence Forces from the usual jurisdiction and procedures of the Commonwealth Public Service also serves to allow discrimination in this part of the public service to exist with little attention

Conclusion

TORs will be best served if the Commonwealth Public Service, and the wider community, are served by both a ‘sword’ organization to investigate discrimination and also a ‘shield’ that protects alleged victims and their witnesses from the deny / delay / destroy / defame tactics employed against them.

All parts of the community should be available to such bodies, in particular, the Australian Defence Force should again be investigated by the Senate for the continuing failures to use with honour and trustworthiness the special levels of authority that they have been given over their female and male members.