



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

Reference: AB32646107

**FOI 069/17/18 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT**

1. I refer to the application by [REDACTED] under the *Freedom of Information Act 1982* (FOI Act), for access to:

*“1. A study into the Judicial System under the Defence Force Discipline Act ('The Abadee Report') - Presented on 11 August 1997;*

*2. The report of an Inquiry into Military Justice in the Australian Defence Force ('The Burchett Report') - Presented 12 July 2001;*

*3. The annual and final reports for the Australian Defence Force Prosecutions Office ('ADFPO'). The ADFPO was created shortly after 12 July 2001 and was replaced by the Director of Military Prosecutions (DMP) on 01 July 2003; and*

*4. The annual reports created by the Director of Military Prosecutions dated from the inception of the office in 2003 to June 2006.*

*Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents.”*

**FOI decision maker**

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

**Documents identified**

3. I identified 2 documents as matching the description of the request.

4. The decision in relation to each document is detailed in a schedule of documents.

5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

**Decision**

6. I have decided to:

- a. release in full 1 document matching the scope of Item 2;
- b. partially release 1 document matching the scope of Item 1 in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 47F of the FOI Act [personal information]. I note that there has been a limited release of a summary of the Abadee Report recommendations

made by the Joint Standing Committee on Foreign Affairs, Defence and Trade in the past.;

- c. refuse access to documents mentioned in Items 3 and 4 of the request under subparagraph 24A(1)(b)(ii)[Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.

### **Material taken into account**

7. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in the FOI Act;
- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
- e. the provisions of the *Defence (Inquiry) Regulations 1985*, relevant to publications;
- f. statements in *Hansard* published on Australian Parliament House website on the proceedings of the Joint Standing Committee on Foreign Affairs, Defence and Trade from:
  - (i) 14 November 1997 and 18 May 1998; and
  - (ii) paragraph 1.17 and Appendix E of the *Report on Military Justice Procedures in the Australian Defence Force* tabled on 21 June 1999.

### **Reasons for Decision**

#### **Sections 47F – Personal privacy**

8. Upon examination of the Abadee Report I identified information containing the names of those who made submissions and were interviewed in preparation of the document. I have decided that this constitutes personal information.

9. In determining whether release of the above personal information is unreasonable, I took into account, inter alia:

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt within the document; and
- c. the availability of the information from publicly accessible sources.

10. Against these criteria, I found:

- a. the specific identified information is not well known;
- b. the persons to whom the information relates is not widely known to be (or to have been) associated with the matters dealt with in the documents;
- c. the specific identified information is not publicly available from publicly accessible sources, and
- d. the persons to whom the information relates have not provided their consent to the release of their information.

11. With reference to the above, I do not consider it reasonable to disclose the names of those contributing to the Report. This information is not generally available from other sources and maintaining this confidence ensures that those people can be confident to speak frankly on such sensitive issues as military justice, without concern that their views will be released for public comment at a later time.

12. I consider the release of the identified information would be an unreasonable disclosure of personal information and therefore conditionally exempt under section 47F(1) of the FOI Act.

#### **Public interest considerations – Section 47F**

13. I have found that the identified document is conditionally exempt under section 47F of the FOI Act. Section 11A (5) provides that if a document is conditionally exempt, it must be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

14. I considered the factors favouring disclosure set out in section 11B(3) of the FOI Act. The relevant factor is that disclosure may promote some of the objects of the FOI Act, as information held by the Government is a national resource.

15. However, the disclosure of this information would not increase participation in the Defence process, nor would it increase scrutiny or discussion of Defence activities.

16. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factor I find particularly relevant to this request is that release of this information could reasonably be expected to prejudice or harm the protection of an individual's right to privacy.

17. It is for those reasons that I find that the public interest factors against disclosure outweigh the factors for disclosure and I deem the information exempt under section 47F of the FOI Act.

18. None of the factors listed in section 11B(4) [Irrelevant Factors] were taken into account when making my decision.

#### **Section 24A – Refuse Access**

19. I must, technically, refuse access to documents for Items 3 and 4 of the request under subparagraph 24A(1)(b)(ii) [Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act. Defence's search of both the electronic records management system (Objective) and hard copy files for the documents has not been able to uncover any relevant annual reports for either the ADF Prosecutions Office (ADFPO) from 12 July 2001 to 1 July 2003 or the Director of Military Prosecutions prior to 12 June 2006.

20. I suggest that in relation to Item 3, this may be because the ADF Prosecutions Office did not have any status as a statutory office at that time and therefore would not have been required to create reports of the kind that have been requested.

21. Similarly, in relation to Item 4, the Director of Military Prosecutions (DMP) did not have any status as a statutory office until 12 June 2006, the day on which it was created as a statutory office by the commencement of the *Defence Legislation Amendment Act (No.2) 2005*. For this reason, it could not be expected that the Director of Military Prosecutions would have created reports for the period 2003-2006, as the requirement to create them did not then exist.

### Further Information

21. In 1998, General Baker disclosed the Abadee Report to the Joint Committee on Foreign Affairs, Defence and Trade, saying:

‘We accept that practice of the law is not static. It changes over time and we need to change with it. This is why, although the High Court ruled in support of the Defence Force Discipline Act, I commissioned the examination by Judge Abadee into military justice, including emphasis on independence and impartiality’. (Statement given on 11/5/1998 to the Committee).

22. The terms of reference required him to provide his view on matters that were inextricably linked to the Commonwealth’s policy and legal practice related to its legal proceedings on military justice matters.

23. Only the Recommendations of the Abadee Report have been published and referred to in detail, both in questions on notice (*Hansard* 26 Feb 2001) page 24,449 and subsequently in legislation introduced to implement aspects of those recommendations. The substantial detailed opinion within the Report has not been released and it is considered that the material contained within continues to embody a large volume of legal opinion considering the legal risks and benefits of various approaches to military trials and justice generally.


24. However, having regard to the time that has elapsed since the report was completed and the fact that the recommendations in the Abadee Report have been published, extensively debated and largely implemented since the time of publication, it is considered that release of the document is now appropriate as many of the issues which might once have attracted legal privilege have now been openly discussed and debated in the process of military justice reform.

25. Item 2 of the request sought the *Report of an Inquiry into Military Justice in the Australian Defence Force* (‘The Burchett Report’). The request specified that the report was the version: ‘Presented 12 July 2001’. It is assumed that this refers to the covering note from Mr James Burchett, QC, written to the then Chief of the Defence Force (CDF), Admiral Barrie on that date.

26. The version of the Burchett Report that has been found on search of Defence’s records appears identical to that published by the Senate Standing Committee on Foreign Affairs, Defence and Trade in the context of its June 2005 *Inquiry into the effectiveness of the military justice system*.

27. I have decided to provide you with the version of the report that has been provided to me. I have also provided a copy of the annexes to the report which can also be found on the website where the Senate Standing Committee on Foreign Affairs, Defence and Trade has published its report.

28. However, it appears that this previously released version, with omitted items of identifying personal information is, in fact, the full original version of the final Burchett Report, as it is the only version that can be found. I note that the omissions from the text of the report appear as express omissions in that original version, explained as ‘deletions based on privacy and confidentiality considerations’.

  
/ Ingrid Singh  
Accredited Decision Maker  
Defence Legal  
21 Sep 2017