



JUDGE ADVOCATE GENERAL

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A CURSE FULFILLED

The curse referred to in the title of this address is that ancient Chinese curse which says "may you live in interesting times."

I joined the Australian Defence Force as a private recruit in what was then the CMF in December 1964, more than 36 years ago. Over that whole period I think it can fairly be said no part of it saw such pervasive and dramatic changes both within the ADF and in the wider international, social and political environment in which it operates and to which it must respond, than the last couple of decades.

We do indeed, live in interesting times.

As I am only the acting incumbent of the office of Judge Advocate General I consider it inappropriate to comment on the role of the JAG or related appointments.

Shortly after my appointment on 3 October 2001 I made my view clear that an acting appointment is a "caretaker" role and that I therefore intended to proceed on the basis of "business as usual" in accordance with the policies and practices already in place.

Furthermore, I do not propose to emulate General von Hülsen, who was one of those Prussian generals who believed they were capable of doing anything required of them. The success of General Moltke in the wars against Austria in 1866 and France in 1870 was enough to convince many Germans that the army had all the answers. As a result, it became accepted that not only was the army officer the only person fit to judge matters of defence, but further that he was more versatile than members of other professions. In fact, the German officer was capable of any duty – including the direction of the Prussian royal theatres. The officer in question, General von Hülsen, dressed himself as a ballerina and performed a pas de ballet in the presence of the Kaiser. Unfortunately, his 56 years caught up with him and he suffered a fatal heart attack at the height of his performance, thus making the supreme sacrifice in the course of entertaining his royal master. Do not expect to see a dancing JAG.

In this address I propose to talk about some of the developments affecting the role of the Defence Force lawyer in the ADF in recent years, the challenges presented and the responses called for, and so hopefully to set the scene for the discussions to come at this Conference.

What has always impressed me as a striking feature of the Service lawyer structure within the ADF has been the enormous range of legal talent, expertise and experience available to the ADF through the combination of permanent and reserve officers. The former provide depth in general military skills and experience as well as particular facets of military law; the latter encompass probably all areas of civilian legal practice and experience and include judges, magistrates, Queen's Counsel (or Senior Counsel), barristers and solicitors and academics, affording a

depth of professional expertise which could never be available within an organisation comprised wholly of permanent officers.

The most recent figures available to me show there are 442 lawyers in TDLS, consisting of 102 permanent and 327 active reserve legal officers and 13 Defence Department civilian lawyers.

The breakdown of permanent and reserve legal officers in the three services are:

	<u>Permanent</u>	<u>Active Reserve</u>
Navy	32	128
Army	38	112
RAAF	32	87
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Totals	102	327 (Total: 429)

One great attraction for me as a military lawyer has always been the unique opportunity to combine military experience with professional legal practice in areas of law of which most lawyers and members of the community are entirely unaware, yet which operate both within Australia and to ADF personnel outside Australia.

There is something particularly satisfying about being a member of the Defence Force and being able to contribute specialist legal skills to the performance of that role. In my experience, this sentiment is a reflection of an underpinning philosophy of service to Australia and to the ADF.

There is something special too about the role of the lawyer within the ADF. My remarks here go well beyond military discipline and the system of military justice, of which I shall say more in a moment.

The most fundamental aspect of a lawyer's role in any part of society is maintenance of the Rule of Law. In a military context that can have an effect on the conduct of operations, through advice to commanders on International Humanitarian Law and the Law of Armed Conflict, or affect management or policy within the ADF itself through, for example, military discipline law, or administrative law involving boards of inquiry and matters of discrimination, equal opportunity and sexual harassment.

As the CDF made clear in what he said on the "Unacceptable Behaviour" videotape played on the national stand-down on 5 February 2001, if the ADF itself is dedicated to the maintenance of the Rule of Law in the national and international community, it must likewise adhere to the Rule of Law in its own organisation and processes. But it is more fundamental even than that, because as the CDF also explained, respect for the Rule of Law is the foundation of the professionalism within the ADF and goes directly to its warfighting capacity; without it, the ADF would be no more than an undisciplined rabble. Lack of respect for the Rule of Law impairs morale and military effectiveness.

Until the mid to late 1980s the three Service legal organisations were quite separate. With some limited exceptions, the role of the military lawyer was seen to be a Personnel role confined essentially to discipline and administrative law – and the latter did not seem to go much beyond advising on redress of grievances.

The first significant change was seen with the introduction of the *Defence Force Discipline Act 1982*, which came into operation on 3 July 1985.

That one Act, which provided a single military discipline system for all three Services in both peace and war and both inside and out of Australia, replaced a complicated, esoteric and confusing maze of

legislation which included three United Kingdom statutes (two of which had ceased to operate in the UK), three Australian statutes and nine sets of Australian regulations. It was difficult enough for lawyers to work through: for commanders and other non-lawyers who had to deal with it the system was extraordinarily difficult.

It is perhaps surprising to realise that it was not until that same date, 3 July 1985, that regulations provided for the conduct of administrative inquiries within the ADF. They were the *Defence (Inquiry) Regulations*. The impetus for them was the sinking of HMAS Voyager. Numerous inquiries have been held under those regulations since then and they have become a significant feature of the work of Defence Force lawyers. The work includes advising the Minister, CDF and Service Chiefs, drafting terms of reference, acting as counsel assisting, or appearing as counsel representing interested parties. Some of the more well-known Boards of Inquiries conducted under the *Defence (Inquiry) Regulations* include a long-running RAAF BOI concerning certain events at Butterworth, the Blackhawk BOI, the HMAS Westralia BOI, a BOI into the death of CPL Jones in East Timor and the F111 fuel tank BOI (the F111 Deseal-reseal BOI). A BOI into the ill-fated Mt Everest expedition is still underway. Some of these Boards threw up serious problems – not to do with the subject-matter of the inquiry, but with the conduct and procedures of the Boards themselves. Some of them demonstrated a capacity for the system to learn from earlier Boards. For example, on the Blackhawk BOI, the parent of a deceased officer was accepted as having an interest, entitling him to be recognised and represented as an interested party. Also, the Minister directed that subject to the power of the President to hold parts of the hearings *in camera*, the Inquiry itself was to be open to the public and the media, even though a great deal of the evidence

concerned Special Air Service Regiment counter-terrorist tactics. It takes little imagination to picture what the media would have made of that Inquiry had it been conducted in secret. That lesson learned, the Westralia BOI was also conducted as an open inquiry – and (a further lesson) a civilian member was included on the Board for the first time.

Over the years following the end of the Vietnam War in 1972, there were several shifts in the perception of military threats to Australia and of the type of conflict for which the ADF should prepare. The idea that the ADF should be prepared to fight a conventional war against an invading force was replaced with a perceived need to prepare to conduct operations within Australia to meet armed incursions by relatively small elements of enemy forces. This was of course, a completely different legal scenario, and raised many complex legal issues, particularly those which extended across State and Territory borders.

There was increasing participation by Australia in United Nations peacekeeping operations, including the UN Emergency Force in the Sinai (1976-1979), the UN Military Observer Group in India and Pakistan (1949-1986) and a large contingent (300 Engineers and support staff) to Namibia as part of the UN Transition Assistance Group in early 1989.

Another constant feature of the times was a new level of parliamentary and public scrutiny of the ADF – not to mention a growth in the number of internal inquiries and surveys, both generally and into aspects of military discipline.

In July 1995 the CDF requested the Commonwealth Defence Force Ombudsman to conduct an investigation into an allegation of sexual assault on a Defence base. The investigation was not into the alleged assault itself, but into the ADF response to it. The report was presented in January 1998. It addressed both systemic issues, arising from the way

the ADF responds to serious personnel incidents and the comprehensiveness and quality of ADF inquiry procedures and how they might be improved.

In November 1995 the DJAG(A), BRIG Abadee, was tasked to report to the then CDF on judicial independence and other aspects of the DFDA. That report was presented in August 1997.

BRIG Abadee concluded that although the constitution or structure of each Service tribunal established by the DFDA met the legal requirements of independence and impartiality for Service tribunals exercising disciplinary power, there were nonetheless powerful and legitimate concerns in relation to the existing system, which revealed a need for change in order to improve appearances and perceptions of impartiality and independence.

The Abadee Report made 48 recommendations of which 39 were agreed to by CDF. Ministerial approval was given in September 2000 for the necessary legislative amendment to eliminate the multiple roles of Convening Authorities and to provide for fixed term appointments of JA/DFM and s 154 reporting officers. Other changes already made administratively included the establishment of the Judge Advocate Administrator (recently re-titled Chief Judge Advocate) and measures for the selection of JA/DFM and s 154 reporting officers for particular trials to be made by the JAG rather than the Convening Authority and the establishment of a Prosecution Cell. Although BRIG Abadee's recommendation that consideration be given to the creation of a tri-Service Director of Military Prosecutions was not initially accepted, it now has been and moves are under way to that end.

In November 1997 the Commonwealth Senate referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade, terms of

reference requiring the Committee to inquire into and report on the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and disciplinary processes. The inquiry was re-instated in the following Parliament in March 1999.

The Committee's Report was tabled in June 1999. The Committee's view of military justice went beyond military discipline. Three distinct components of the military justice system within the ADF were identified: military inquiries, military discipline and administrative action. The Committee itself noted that its inquiry had been conducted in what it described as "a somewhat dynamic environment", with the ADF moving to address the recommendations of the Abadee Report and the Ombudsman's 1998 review of practices and procedures. Those circumstances were a persuasive argument that time should be allowed for the benefits of changes flowing from them to be realised before further change be contemplated. Even so, the Committee expressed the view that ADF-initiated changes to the military justice system would not fully address both the perceived and actual independence and impartiality of the system.

The Defence Force Ombudsman's report of January 1998 and what had come out of the Senate JSC inquiry resulted in the promulgation of a new Defence Instruction in October 2001 – DI(G) Admin 45-2: "Reporting and Investigation of Alleged Offences within the Australian Defence Organisation."

Another outcome of the Ombudsman's report was the establishment of a Complaints Resolution Agency, which is independent of the chain of command and is responsible directly to the CDF and the Secretary of the Department of Defence. That is headed by a senior Legal Officer.

Speaking of complaints about administrative processes, one frequent cause of frustration for those responsible for the process is the vigorously pursued, patently unreasonable, complaint.

Colonel Henry Hallam Parr was once asked to provide proof of the existence of one of his officers so that the man could draw his pay. Colonel Parr was only too happy to oblige and wrote out a certificate to the effect that the officer was alive, dated it and returned it to the man. But that was not good enough for the officer. He complained that Colonel Parr had refused to backdate the certificate. The complaint was that as he had already proved that he was alive in the current month, what he needed was proof that he had been alive the previous month.

In December 2000, as a consequence of much publicised concerns about certain events in 3 RAR, the CDF appointed the Hon James Burchett, QC, together with a number of military Inquiry Assistants, to conduct an audit of military justice in the ADF.

The Burchett Report was presented in July 2001. There were some 55 recommendations. These included the establishment of an independent Defence Force Director of Military Prosecutions and that a position of Courts Martial Registrar be created, as well as the establishment of a position of Military Inspector General. The role of the Military Inspector General would be to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the ADF. These particular recommendations have been, or are in the process of being, implemented.

The invitation for expressions of interest for appointment as the Military Inspector General closed in November 2001. CAPT Steve Foldesi (RAN) has been appointed to the position of Registrar of Military Justice, working under the Chief Judge Advocate. The RMJ will be

responsible for the establishment and operation across the ADF of case management systems and processes for all military justice matters, including the monitoring of administrative inquiries. Options for the establishment of a DMP are presently being examined.

From the early 1990s there was increasing pressure for the integration of legal services within the ADF. The first step towards that was the co-location of the three Service legal organisations in August 1995.

Apart from the significance of the tri-Service nature of military discipline law introduced by the DFDA, influences directing this trend included the rapidly developing and expanding operational law role of military lawyers and the devolution of financial and contractual responsibility to defence regions and to commanders. Each of these meant increased reliance by commanders upon their legal officers for advice upon a much wider range of issues than had ever been the case historically and many of which crossed Service boundaries.

Legal officers were now being deployed on operations. From the mid-1980s there had been a growing recognition and acceptance that a legal officer was not merely an incidental specialist, but one who was integral to proper operations planning and the development of policy and practice. This eventually resulted in the recognition that the legal officer should be incorporated into the Operations Plans Cell rather than the Personnel Cell of a Headquarters. That principle was accepted and implemented in EXERCISE KANGAROO 87 and since.

The internationally recognised success of the Australian Battalion Group operation in Somalia in 1993 was due, I would suggest, to the contribution of (then) MAJ Michael Kelly who was deployed as the Group's legal officer. His personal initiative and involvement led to the

re-establishment of civilian police authority, the re-instatement of civilian judges and the construction of a police post, gaol and courthouse; followed by the apprehension, trial and conviction, appeal and immediate execution, of a local warlord – following which the bandit forces promptly left the area. I understand the Australian operation in Somalia is regarded in UN circles as a model. MAJ Bruce Oswald confronted horrific operational circumstances in Rwanda in 1994. These legal officer deployments were important not only because of the integral roles played by those officers, but because they demonstrated the need for and importance of specialist legal support on peace enforcement and peace-keeping operations. This culminated in the legal officer deployments to East Timor.

Another growing aspect of the broadening legal practice of Defence Force lawyers was Alternative Dispute Resolution. This called for them to acquire and apply yet another range of professional expertise and skills.

A recurring theme of JAG Annual Reports to Parliament from at least 1990 onwards was the need to stimulate legal training and education within the ADF. There was a recognition that the professional demands on Service lawyers had become so specialised, yet so varied and so all-encompassing, that they could not hope to be met without a formal, structured, initial and continuing legal education program. It was also recognised that commanders and members of the ADF needed to be better trained in aspects of discipline and administrative law which they were called upon to administer or which affected them.

Successive Judge Advocates General had been urging more integration of Defence legal services for some years, but it was only as a result of the Defence Efficiency Review that they were fully integrated

from 1 July 1998 as the Defence Legal Office. This combined the three Service legal organisations and Australian Public Service Lawyers from the Department of Defence.

The most recent development in that process was the organisational restructure and name change on 31 March 2001, when the Defence Legal Office became The Defence Legal Service. The Service is now undergoing a process of organisational renewal, of which we have already heard something from CDRE Smith.

In late 2001 the position of Judge Advocate Administrator was re-titled "Chief Judge Advocate".

A much needed practical development in the provision of legal support within the ADF was the introduction of paralegal staff in April 1999. The initiative was recommended in the 1997 Skippon Report and again in the 1999 Report "The Defence Legal Office – An Organisational Review of the Canberra Office". A project identifying the competencies needed and training required is expected to be finalised this year. There are currently 32 Service and civilian paralegal staff and they have already made a major contribution to the work of TDLS.

Despite the organisational changes made, or perhaps partly because of them, combined with the greatly increased scope, complexity and volume of work attaching to the role and growing demand from civilian private law firms for lawyers with Defence Force experience, there was an increasing attrition rate of Defence Force lawyers. Indeed, for two successive years, 1997 to 1999, it was in excess of 20%. Significantly, the losses were heaviest amongst experienced officers, that is, those with more than four years experience as ADF legal officers.

In February 2000 the Defence Force Remuneration Tribunal handed down a decision and made a Determination setting out a new Legal

Officers' Specialist Career Structure and pay scale. For the first time, all members of the legal organisation would be required to attain progressively higher competency levels in order to advance in rank and some pay increments. Competency levels would be based on academic achievement combined with professional assessment of skill and work experience in areas relevant to the Defence Force lawyer's role. The new regime also included a requirement for permanent legal officers to take on some additional duties which in recent years had mainly been performed by Reserve legal officers. Initially that would include some types of advocacy work and a greater involvement in "legal aid", ie, the provision of legal advice to individual members of the ADF. The establishment of the Prosecution Team was one initiative which flowed from this.

Not entirely coincidentally, the Military Law Centre was established in January 2000 to take responsibility for the coordination, formulation and delivery of legal training within the ADF. The MLC is a Directorate of the Defence Legal Service and is presently a lodger unit at the Australian Defence Force Academy in Canberra. It operates in conjunction with the University of Melbourne Law School and its academic courses are given University accreditation. I predict the Graduate Diploma in Military Law and ADF Masters in Military Law will become highly-prized and much sought after legal professional qualifications not only within but outside the ADF.

The agreement entered into in May 2001 between the Defence Legal Service and the Faculty of Law at Melbourne University for the establishment of the Asia Pacific Centre for Military Law as a centre of excellence for the teaching and researching of operations law as well as aspects of general military law within the Asia Pacific Region, is an

exciting initiative. It has the potential to make an important contribution to the recognition and maintenance of the Rule of Law in the region.

The external environment was changing also, quite dramatically.

On 20 September 1999 we saw the deployment to East Timor of a multinational force under unified command led by Australia. This deployment of the International Force East Timor (INTERFET) resulted from a humanitarian crisis in East Timor resulting from a complete collapse of law and order. INTERFET was replaced on 23 February 2000 with a peace-keeping force under UN Command forming part of the UN Transitional Authority in East Timor (UNTAET). ADF personnel are still deployed to East Timor as it goes through the process of elections and full independence.

There has been a substantial involvement of and dependence upon military lawyers in East Timor. This was the largest overseas deployment by the ADF since the Second World War. The operational and legal environment was extremely complex. The problems arising from that were exacerbated by the size and timing of the operation.

ADF support to the East Timor operation was significant and comprehensive. It included strategic legal advice from the Defence Legal Office (by the Director General and General Counsel and from the Directorates of Agreements and Operational and International Law), from legal officers in HQ, ADF and environmental commands and others, as well as from legal officers deployed to East Timor. In fact, some 11 legal officer positions were so deployed, through which have been rotated more than 20 legal officers.

The range of legal issues upon which Defence Force lawyers at all levels had to deal, was extraordinary. It included the application of International Law, including International Humanitarian, Human Rights

law and the Law of Armed Conflict, to the operation; issues of command, control and discipline across the coalition partners; dealing with cross-border issues; drafting, advising and training on rules of engagement; the application of maritime law; establishing and implementing an apprehension and disarmament policy and establishing a detainee detention facility with judicial review of detention, to mention only a few.

Over the last ten years, there have been other Defence legal officer deployments, exchanges or secondments to Bosnia, Bougainville, Cambodia, Canada, China, the Czech Republic, Fiji, Germany, Iraq, Kuwait, Malaysia, Nauru, Papua New Guinea, Paraguay, South Africa, the United Kingdom and the United States.

At home, we saw OPERATION GOLD with the Olympic Games in 2000. Legal aspects of that obviously concerned advice on the use of the ADF in support of the civil police and other authorities, crowd control, search and seizure by members of the ADF and of course support in the anti-terrorist role.

In April 2001 DGTDLs appointed a Team to conduct a Review of ADF Reserve Legal Officers. The Review Team presented its Report in November 2001. It may be expected that it will result in significant changes in the organisation, roles and tasking of Reserve legal officers and the relationship between Permanent and Reserve legal officers.

These changes will no doubt give better effect to the need of which LTGEN Cosgrove has spoken for the Reserve and Permanent components of the ADF to serve together as part of a total force in assisting it to achieve its operational outcomes.

Substantial changes to the legislation relating to military discipline had to be made to bring it into line with the provisions of the *Criminal*

Code Act 1995 (Cth) which commenced operation on 1 January 1997. Those provisions setting out the general principles of criminal responsibility in respect of all Commonwealth offences came into operation on 15 December 2001.

This necessitated the drafting of amendments to the portfolio of Defence legislation (the most important being the DFDA) to "harmonise" that with the new *Criminal Code* and to be in place before 15 December 2001. This was an enormous and painstaking task which extended over some 14 months and resulted in the amending legislation passing successfully through the Commonwealth Parliament. It received Royal Assent on 1 October 2001.

Defence Force legal officers must not only be familiar with the substantial changes in discipline law made by this legislation but provide training in them throughout the ADF.

The most dramatic event in 2001 which had immediate and continuing ramifications was of course the terrorist attack in America on 11 September. The Australian Government has committed to the international coalition against terrorism. The ADF has provided a contingent of some 1550 people. Coalition operations in Afghanistan have already raised legal issues of considerable difficulty and will continue to do so.

Finally, also in 2001 the "Tampa" crisis and subsequent events showed the use of the ADF, especially the Navy, in a border protection role which involved advice from The Defence Legal Service on complex and often unprecedented issues of international humanitarian law and the law of the sea.

Interesting times indeed, with the promise of more interesting times ahead!

Meeting the challenge will continue to require from all of us, service above self and the highest level of military and legal expertise and professionalism.

The observation by the CDF, that the concept of the ADF as a force for good brings with it, in upholding, in everything we do, the Rule of Law, is fundamental to the role of the Defence Force lawyer. Not only because that is the foundation of our profession and ethics, but for an even wider reason, in the context of current world events.

Although not speaking only of military lawyers, the words of Hon Justice Michael Kirby, of the High Court of Australia, speaking at the Law Society of Western Australia High Court Dinner in Perth on 21 October last year are apposite. On the importance of the role of judges and lawyers, his Honour said:

"For we are the alternative model for the world. At this time, and at all times, the choice is there. It could not be more stark. Terror. Brute force. And law. And we are for law."

The CDF has already made that commitment. As Defence Force lawyers and paralegals, we are uniquely placed to support the ADF and our Nation in maintaining it.