



Government Response  
to the  
Senate Foreign Affairs, Defence and Trade  
References Committee

*'Report on The Effectiveness of Australia's  
Military Justice System'*

**Department of Defence**

**October 2005**

## BACKGROUND

In 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 inquiry was the latest in a series of inquiries into military justice spanning a decade. The Committee tabled its report on 16 June 2005.

The ADF is committed to improving the system to address the concerns of Defence personnel, the Parliament and the community. The Chief of the Defence Force has assured us that he will drive this reform personally.

The Government proposes significant enhancements to the military justice system. These changes balance the maintenance of effective discipline with protection of individuals and their rights. Key features include an Australian military court independent of ADF chains of command that will replace the current Courts Martial and Defence Force Magistrates, a new CDF-authorized Commission of Inquiry for complex or sensitive incidents with an independent civilian president, a joint ADF investigation unit and a streamlined complaints system. The Government has asked Defence to implement these recommendations and enhancements within two years, and to report to the Senate Committee twice a year throughout the implementation period.

In all, 30 of the Senate Committee's 40 recommendations are accepted in whole, in part or in principle. Alternative solutions will be adopted to achieve the intent of the Report's recommendations, including those concerning the referral of offences to civil authorities, the legislative basis of a permanent military court and the establishment of an ADF Administrative Review Board.

## GOVERNMENT RESPONSE

### AGREED RECOMMENDATIONS

#### **Recommendation 6**

**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 service. This audit should be conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.**

#### **Government Response: Agreed**

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 Ernst and Young review into Army military police, including the establishment of the Provost Marshal - 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.

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.

#### **Recommendation 10**

**The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.**

#### **Government Response: Agreed**

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.

#### **Recommendation 11**

**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.**

#### **Government Response: Agreed**

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.

#### **Recommendation 12**

**The committee recommends that the 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.**

#### **Government Response: Agreed**

The Government notes that the Committee recognized 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.

### **Recommendation 13**

**The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within the Army, Navy and Air Force.**

#### **Government Response: Agreed**

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.

### **Recommendation 14**

**The committee recommends that the Director of Military Prosecutions be appointed at one star rank.**

#### **Government Response: Agreed**

The Government agrees to the statutory appointment of the Director of Military Prosecutions at the one star rank.

### **Recommendation 15**

**The committee recommends that 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.**

#### **Government Response: Agreed**

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).

### **Recommendation 17**

**The committee recommends that the ADF establish a Director of Defence Counsel Services.**

#### **Government Response: Agreed**

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.

### **Recommendation 18**

**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.**

#### **Government Response: Agreed**

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 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.

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.

### **Recommendation 23**

**The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.**

#### **Government Response: Agreed**

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 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 will be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.

### **Recommendation 24**

**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 recommendation 25).

**Government Response: Agreed**

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.

**Recommendation 26**

**The committee recommends that the Defence (Inquires) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.**

**Government Response: Agreed**

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.

**Recommendation 27**

**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.**

**Government Response: Agreed**

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.

**Recommendation 30**

**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.**

**Government Response: Agreed**

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.

### **Recommendation 31**

**The committee recommends that the language used in paragraph 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.**

#### **Government Response: Agreed**

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.

### **Recommendation 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 will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.**

#### **Government Response: Agreed**

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.

### **Recommendation 37**

**The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):**

- a. The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.**
- b. The workload and effectiveness of various bodies within the military justice system, such as but not limited to;**
  - Director of Military Prosecutions
  - Inspector General of the ADF
  - The Service Military Police Branches
  - RMJ/CJA
  - Head of Trial Counsel
  - Head of ADR.

#### **Government Response: Agreed**

The Government supports the need for transparency and parliamentary oversight of the military justice system and will provide, 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.

### **Recommendation 38**

**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.**

#### **Government Response: Agreed**

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:

- 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 processes in line with State and Territory legislation;
- a review of screening processes for new staff; and
- production of a youth development guide for adult cadet staff.

### **Recommendation 39**

**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 defined.**

#### **Government Response: Agreed**

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.

### **Recommendation 40**

**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.**

#### **Government Response: Agreed**

The Government agrees and notes that the Service Chiefs have already provided additional resources to the ADF Cadets to improve administrative support.



## **AGREED IN PART**

### **Recommendation 4**

**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 be regarded as substantially serving the purpose of maintaining and enforcing Service discipline.**

### **Government Response: Agreed in part**

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 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.

### **Recommendation 5**

**The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:**

- **Fully implementing the recommendations contained in the Ernst & Young Report;**
- **Encouraging military personnel secondments and exchanges with civilian police authorities;**
- **Undertaking a reserve recruiting 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.**

### **Government Response: Agreed in part**

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.

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.

### **Recommendation 25**

**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 wrong doing in the ADF. This section is 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.**

#### **Government Response: Agreed in part**

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.

### **Recommendation 28**

**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 and 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 to be made available to all participants in the inquiry.**

#### **Government Response: Agreed in part**

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.

### **Recommendation 33**

**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 will be authorised to appear before the Board and will have the right to appoint a legal practitioner to represent them. Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.**

#### **Government Response: Agreed in part**

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 witness or has some other interest in the inquiry.

### **AGREED IN PRINCIPLE**

#### **Recommendation 16**

**The committee recommends that all Permanent Legal Officers be required to hold current practising certificates.**

#### **Government Response: Agreed in principle**

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.

The independence of the ADF permanent legal officers was criticised in the ACT Supreme Court in

*Vance v The Commonwealth (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.

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).

### **Recommendation 21**

**The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.**

#### **Government Response: Agreed in principle**

The Government agrees 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, such as those applicable to a Federal Magistrate as set out in the *Federal Magistrates Act 1999* (Cth) Schedule 1 clause 1 (2).

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.

### **Recommendation 22**

**The committee recommends the introduction of a right to elect trial before the Permanent Military Court for summary offences.**

#### **Government Response: Agreed in principle**

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.

### **Recommendation 35**

**Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.**

#### **Government Response: Agreed in principle**

The report of the Australian Law Reform Commission *Principled Regulation: Federal Civil and*

*Administrative Penalties in Federal Jurisdiction* 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.

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.

### **Recommendation 36**

**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.**

### **Government Response: Agreed in principle**

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.

## **NOT AGREED**

### **REFERRAL OF OFFENCES TO CIVILIAN AUTHORITIES**

#### **Recommendation 1**

**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.**

#### **Recommendation 2**

**The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.**

#### **Recommendation 3**

**The committee recommends that the Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.**

#### **Recommendation 7**

**The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.**

#### **Recommendation 8**

**The committee recommends that the Director of Military Prosecutions should only initiate a**

**prosecution in the first instance 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 purposes served by pursuing the change.**

#### **Recommendation 9**

**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.**

#### **Government Response: Not agreed**

The Government does not agree to the recommendations (1,2,3,7,8,9) 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

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.

### **Recommendation 19**

**The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.**

- **Judges should be appointed by the Governor-General in Council;**
- **Judges should have tenure until retirement age.**

### **Government Response: Not agreed**

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 raised by the proposal to use existing courts for military justice purposes. Chapter III of the Constitution imposes real constraints in this regard.

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.

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.

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.

The Government will instead establish 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 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.

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.

#### **Recommendation 20**

**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.**

#### **Government Response: Not agreed**

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 *Federal Magistrates Act 1999* (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.



## **Recommendation 29**

**The committee makes the following recommendation –**

- a The committee recommends that:**
- **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 the 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.**
- b The committee recommends that this report**
- **contain information that will allow effective scrutiny of the performance of the ADFARB;**
  - **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 year 2000-01 and 2001-02 provides a suitable model; and**
  - **comment on the legal and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.**
- 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 National 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:**
- **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.**
- d. The committee further recommends that to prevent delays in the grievance 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.**

- e. **The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:**
- **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 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.**
- f. **The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:**
- **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.**
- 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:**
- **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.**
- 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.**

#### **Government Response: Not Agreed**

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.

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.

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.

The Government proposes instead to reform and streamline the complaints and redress of 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.

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.

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.

In its expanded role, the CRA will have three major functions.

- 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 maker.

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.

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.

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.

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.

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 appointment in order to further strengthen its independence.

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.

#### **Recommendation 34**

**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.**

#### **Government Response: Not agreed**

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.

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.

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.

■ 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 injury to an ADFARB for investigation/inquiry.