

**AUSTRALIAN DEFENCE FORCE**

**REPORT TO THE SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE**

**ON**

**PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM**

**APRIL 2007**

**LEGEND:**

	Complete, no outstanding action is required.
	Problematic, requires attention to ensure implementation is on track and/or significant risks to implementation are emerging.
	Highly problematic, requires urgent and decisive attention to get implementation on track and/or major risks are emerging.
	Underway or has not yet started (awaiting precursor actions), no significant risks foreseen.

**COMMITTEE-IN-CONFIDENCE**

Committee Recommendations	Government Response/Action Directed by Government	Planned Completion	Status
1, 2, 3, 7, 8 and 9	<p>In response to Recommendations 1, 2, 3, 7, 8 and 9, the Government agreed that:</p> <ul style="list-style-type: none"> <li>• Defence would work to improve the management and effectiveness of the relationship between the military and civilian authorities on referral issues. This would include: <ul style="list-style-type: none"> <li>• reviewing and clarifying the guidelines, and examining the need for, and implementing as necessary, formal arrangements with the States and Territories for referral of offences; and</li> <li>• establishing a common database for tracking referrals.</li> </ul> </li> </ul>	<p>Oct 2007</p> <p>Oct 2007</p>	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• An ADF policy (based on the Government response to recommendations 1, 2, 3, 7, 8 and 9) is being finalised. The policy will be used as the basis for clarifying the referral and retention of offences with the civilian authorities.</li> <li>• A major upgrade (Stage 2) to the Defence Policing and Security Management System (DPSMS) is currently underway, with user testing planned to commence in May 07 and roll out planned for Jul/Aug 07.</li> </ul>
4	<p>The Government agreed in part, noting that the ADF made an initial determination on whether offences of a suspected criminal nature should be retained for investigation and prosecution; and that:</p> <ul style="list-style-type: none"> <li>• Defence would .... as for Recommendations 1, 2 and 3 above.</li> </ul>	<p>As for Rec 1</p>	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• Action as per Recommendation 1.</li> </ul>
5	<p>The Government agreed in part that all Service police would act upon accepted recommendations of the Ernst and Young Report, as appropriate to each Service.</p> <p>The Government [also] agreed to:</p> <ul style="list-style-type: none"> <li>• encourage military personnel secondments and exchanges with civilian police authorities;</li> <li>• undertake a reserve recruitment drive to attract civilian police into the Defence Forces;</li> </ul>	<p>Jun 2006</p> <p>Jun 2007</p> <p>Oct 2007</p>	<p><b>INCORPORATED IN RECOMMENDATION 6</b></p> <ul style="list-style-type: none"> <li>• The outcomes of the Audit of ADF Investigative Capability and its implementation plan have overtaken Ernst and Young (Recommendation 6). As such, the planned completion dates have been revised to reflect the Audit report.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• Secondments have been undertaken with the Victorian and NSW homicide squads, NSW Forensic Officers Branch and the QLD Police Criminal Investigations Branch. Now that the ADF Investigative Service has been established, stronger links between Service police and civilian police are being put in place to allow for a more comprehensive program of secondments and training.</li> <li>• The workforce requirements for Service Police investigators have been updated to inform recruiting targets, and work is underway to inform the best recruiting methods for each of the Services.</li> </ul>

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5 contd	<ul style="list-style-type: none"> <li>increase participation in civilian investigative training courses; and</li> <li>design clearer career paths and development goals for military police personnel</li> </ul>	<p>Jun 2007</p> <p>Oct 2007</p>	<ul style="list-style-type: none"> <li>Service police personnel attend a range of civilian investigative training courses in areas such as the management of serious crimes, sexual assault, forensic documents, DNA recovery, defensive tactics, and fingerprint and ballistics procedures.</li> <li>With the implementation of the ADF Investigative Service (some 140 personnel under the central oversight of the PM ADF), the career paths and development goals for Service police can now be clarified.</li> </ul>
6	<p>The Government agreed:</p> <ul style="list-style-type: none"> <li>To conduct a Tri-Service audit of Service police to establish the best means for developing investigative capability.</li> <li>That Defence would establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations.</li> <li>The [investigative] unit would be headed by a new ADF Provost Marshal outside single Service chains of command.</li> <li>The unit would deliver central oversight and control of ADF investigations and develop common professional standards through improved and consistent training. Service police may be supplemented by civilian investigators.</li> </ul>	<p>Jun 2006</p> <p>Dec 2006</p> <p>Jun 2006</p> <p>Oct 2007</p>	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>The Audit Report into the ADF's Investigative Capability and the Defence action plan to implement the agreed recommendations were released by the CDF on 4 Dec 06.</li> <li>The initial joint ADF investigative capability was formed with the posting of six Service police investigators (including the PM ADF) to complement the Office of the PM ADF. The PM ADF has now assumed control (vide CDF Directive dated 21 Mar 07) of some 140 qualified investigators and direct support personnel, giving him central oversight and control of ADF investigations.</li> <li>The initial Provost Marshal ADF (Colonel Tim Grutzner, AM) was appointed on 14 May 06 and heads up the new ADF Investigative Service.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The ongoing requirement for secondment of an AFP officer has been informed by the outcome of the audit. Former Deputy Commissioner (AFP), Mr Adrien Whiddett is being re-engaged by Defence. The requirement to supplement service police with civilian investigative skills in particular circumstances, is being determined in consultation with the AFP.</li> </ul>
10	<p>The Government agreed to legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions (DMP).</p>	<p>Jun 2006</p>	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>The statutory position of DMP was established under the <i>Defence Legislation Amendment Bill (No.2) 2005</i> which was assented on 12 Dec 05 and the position has been filled.</li> </ul>

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11	The Government agreed that it is timely to review the Office of the DMP to ensure that it had sufficient resources to meet current and future work loads and was able to respond to operational requirements.	Dec 2006	<b>COMPLETED (NOV 06)</b> <ul style="list-style-type: none"> <li>• Eleven additional positions, required to implement the enhancements to the military justice system, have been established, albeit not yet filled.</li> <li>• Additional resources such as IT and accommodation have been reviewed and the DMP will relocate to permanent accommodation in Canberra in mid 2007.</li> <li>• Resource requirements will be further reviewed as part of the review of the system at the end of the two year implementation period (as per Recommendation 35).</li> </ul>
12	The Government agreed to review the training requirements for permanent legal officers assigned to the Office of the DMP (ODMP). The review would be extended to include the training requirements for reserve legal officers who may be assigned prosecution duties by the DMP.	Jun 2007	<b>UNDERWAY</b> <ul style="list-style-type: none"> <li>• Two new training positions have been established in the ODMP to facilitate the training of newly assigned officers.</li> <li>• The Commonwealth DPP is also providing assistance in the training of newly assigned officers to the ODMP.</li> </ul>
13	The Government noted that the ODMP has been actively engaged in increasing its profile over the last 18 months, and agreed that action should continue to raise the awareness and profile of the Office.	Jun 2007	<b>UNDERWAY</b> <ul style="list-style-type: none"> <li>• The DMP has commenced a range of briefs to the Services and various command and staff courses to raise the awareness of the ODMP.</li> <li>• A web page has also been developed to further assist in raising the awareness and profile of the DMP.</li> </ul>
14	The Government agreed to the statutory appointment of DMP at one star rank	Dec 2005	<b>COMPLETED (MAR 06)</b> <ul style="list-style-type: none"> <li>• DMP has been established at one star rank and the position has been filled.</li> </ul>
15	The Government agreed to appropriate remuneration for the appointment of the DMP, the remuneration to be determined by the Commonwealth Remuneration Tribunal.	Jun 2006	<b>COMPLETED (DEC 05)</b> <ul style="list-style-type: none"> <li>• The Commonwealth Remuneration Tribunal made a determination on remuneration for the DMP, effective 12 Dec 05. <i>(The determination also covered the Inspector General ADF (IGADF), Chief Judge Advocate (CJA) and Registrar of Military Justice (RMJ).</i></li> </ul>

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16	<p>The Government agreed in-principle that:</p> <ul style="list-style-type: none"> <li>• legal officers in the Office of the DMP would be required to hold Practising Certificates, and other permanent legal officers would be encouraged to take them out; and that</li> <li>• the matter of their independence would be established through amendment of the Defence Act, and commitment to professional ethical standards (ACT Law Society).</li> </ul>	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• All legal officers in the Office of the DMP now hold Practising Certificates.</li> <li>• Permanent legal officers are being encouraged to take out practicing certificates.</li> <li>• An amendment to the Defence Act is being developed to address the matter of legal officer's independence and professional ethical stands. It is planned to include this amendment in legislation expected to be introduced into Parliament in 2007.</li> </ul>
17	<p>The Government agreed to establish a Director of Defence Counsel Services (DDCS) as a military staff position within the Defence Legal Division, to coordinate and manage the access to and availability of Defence counsel services by identifying and promulgating a Defence panel of legal officers, permanent and reserve.</p>	Jun 2006	<p><b>COMPLETED (APR 06)</b></p> <ul style="list-style-type: none"> <li>• The position of Director of Defence Counsel Services has been established and filled. ADF members requiring Defence Counsel Services have the right to select their legal representatives from the Defence Counsel Services panel. When they select an ADF legal officer (permanent or reserve), their services are provided at Commonwealth expense. Defence counsel discharge their duties at trial or during Inquiries in accordance with their professional duties to the service member who is their client, and their independence is legislated in the <i>Defence Force Discipline Act 1982</i> (section 193(2)) and regulation 61(2) of the <i>Defence (Inquiry) Regulations 1985</i>.</li> </ul>
18, 19 and 20	<p>The Government agreed to create a permanent military court – the Australian Military Court (AMC), to replace the current system of individually convened trials by Court Martial and Defence Force Magistrate. The AMC would be established under appropriate Defence legislation.</p>	Oct 2007	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>• Legislation (the <i>Defence Legislation Amendment Act 2006</i>) to create the AMC was passed by Parliament on 5 Dec 06.</li> <li>• The Bill received Royal Assent on 11 Dec 06.</li> <li>• Procedural and administrative matters are now being progressed to allow the AMC to commence in Oct 07, under Recommendation 21.</li> </ul>
21	<p>The Government:</p> <ul style="list-style-type: none"> <li>• agreed in principle that judge advocates appointed to the Australian Military Court should have appropriate experience, and that appointments should be based on the same professional qualifications and experience that apply to other judicial appointments; and</li> </ul>	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>• The establishment of a panel of military judges, within the Australian Military Court is being progressed. A Commonwealth Remuneration determination was made on 13 Feb 07.</li> </ul>

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21 contd	<ul style="list-style-type: none"> <li>noted that military judge advocates would predominantly be drawn from the Reserve and would have adequate civilian and military experience, nevertheless, qualified military legal practitioners should not be automatically excluded on the basis that they do not have civilian practice experience.</li> </ul>		<ul style="list-style-type: none"> <li>The selection process for the Chief Military Judge is underway. Applications for the positions of permanent military judges have been sought in advertisement.</li> </ul>
22	The Government agreed in principle with the concept of a right to elect trial. The form of that right and appropriate thresholds would be determined once the structure of the Australian Military Court was established, but would be based on existing determinations that certain classes of serious offence must be tried by a court incorporating a military jury.	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The form of the right to elect trial from summary procedures to the Australian Military Court will be included in legislation to revise summary procedures. Drafting instructions have been received by the Office of Parliamentary Counsel and the Bill has category A status for the 2007 Winter sitting of Parliament.</li> </ul>
23	The Government agreed the concept of an automatic right of appeal, on conviction or punishment, from summary authorities to a judge advocate of the Australian Military Court. The current process of review would be discontinued. The existing right of appeal from Court Martial and Defence Force Magistrate to the Defence Force Discipline Appeals Tribunal (DFDAT) would be retained. Currently, the DFDAT may only hear appeals on conviction on points of law, and may quash a conviction or substitute a conviction on an alternative offence. This would be amended to include appeals on punishment, noting that such an appeal might result in an increased punishment.	Oct 2007	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>Amendment to the right of appeal to the DFDAT was included in the Bill to create the Australian Military Court.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>The right of appeal from summary authorities to a military judge of the Australian Military Court will be included in legislation to revise summary procedures (as per Recommendation 22).</li> </ul>
24	<p>The Government:</p> <ul style="list-style-type: none"> <li>Agreed to continue the regular reviews of the Defence Whistleblower Scheme that have been undertaken since its inception. The current comprehensive review and its implementation would emphasise the present provisions against reprisals in the current Defence Whistleblower instruction.</li> <li>Supported annual reporting of the operation of the scheme against documented performance standards.</li> </ul>	<p>Dec 2005</p> <p>Jun 2006</p>	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>The first of a series of regular reviews was completed into the Defence Whistleblower Scheme and the operation of the Scheme is to be reported annually in the Defence Annual Report (<i>This internal review indicates that the scheme is operating satisfactorily</i>).</li> </ul>
25	The Government noted that Defence already reported statistics on reporting unacceptable behaviour in its annual report. The Government agreed in part that Defence would continue to include this data in the Defence Annual Report.	Jun 2006	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>Reporting of wrong-doing was included in the 2004-05 Defence Annual Report and will continue to be reported. (<i>Wrong-doing is generally accepted as being inappropriate behaviour</i>).</li> </ul>

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29 contd			<ul style="list-style-type: none"> <li>The final draft of Defence Instruction (G) Personnel 34-1 ROG Tri-Services Procedures is being prepared for endorsement within Defence.</li> <li>Amendments to the <i>Defence (Inquiry) Regulations 1985</i> are currently being prepared for drafting by the Office of Legislative Drafting.</li> <li>The IGADF has been established as a statutory position, remuneration has been determined, &amp; Mr Earley appointed to the position. IGADF provides CDF with internal audit &amp; review of the military justice system independent of the ordinary chain of command. This includes both Defence Force discipline and the Defence Inquiries system.</li> </ul>
30	The Government has taken action to clear the backlog of grievances in line with recommendations from the DFO/CDF Redress of Grievance Review 2004. This is scheduled to be completed by the end 2005, with no requirement for additional funding or a task force.	Dec 2005	<p><b>COMPLETED (DEC 05)</b></p> <ul style="list-style-type: none"> <li>The backlog of Redresses of Grievance cases has been cleared (<i>There is no longer a backlog of cases which previously caused undue pressure on the complaints resolution system</i>).</li> </ul>
31	The Government agreed to amend the Administrative Inquiries Manual to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It would be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.	Jun 2006	<p><b>COMPLETED (APR 06)</b></p> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
32	The Government agreed to amend the Administrative Inquiries Manual as recommended, noting that the matter of what constitutes a reasonable opportunity for familiarisation is a matter for the decision of the President of the Board of Inquiry having regard to the circumstances of each case.	Jun 2006	<p><b>COMPLETED (APR06)</b></p> <ul style="list-style-type: none"> <li>As for Recommendation 26.</li> </ul>
33	<p>The Government noted that the substance of this recommendation was agreed to following the 1999 Senate Inquiry into the Military Justice System, and Defence is finalising changes to Defence [Inquiry] Regulations 33. The Government agreed in part that:</p> <ul style="list-style-type: none"> <li>In cases where either the appointing authority, before the inquiry starts, or the President of a BOI makes a written determination that persons may be adversely affected by the Board's inquiry or its likely findings, that persons would be entitled to appear before the Board &amp; would have a right to appoint a legal practitioner to appear to represent them before the Board, if they wish.</li> </ul>	<p>Dec 2006</p> <p>Dec 2006</p>	<p><b>COMPLETED (MAR 06)</b></p> <ul style="list-style-type: none"> <li>Amendments to the Defence (Inquiry) Regulations 1985 (D(IR) 33 were completed as at 31 Mar 06.</li> </ul>

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33 contd	<ul style="list-style-type: none"> <li>Where such persons are represented by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements.</li> <li>The representatives of the estate of deceased persons who had died as a result of an incident and may be adversely affected by the Board's inquiry or its likely findings, would be entitled to be legally represented before the BOI into that incident. Where the representative of the estate of such persons choose to be represented before the Inquiry by an ADF legal officer, or some other Defence legal officer, such representation would be provided at Commonwealth expense, in accordance with standing arrangements.</li> </ul>	Dec 2006	
34	<p>In response to Recommendation 34, the Government agreed that there is a need to demonstrate that ADF inquiries into notifiable incidents including suicide, accidental death or serious injury are independent and impartial. To meet this principle, the Government would:</p> <ul style="list-style-type: none"> <li>propose amendments to legislation to create a Chief of Defence Force Commission of Inquiry.</li> <li>CDF should appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in Service.</li> <li>The commission may consist of one or more persons, with one being a civilian with judicial experience. Where the commission consists of more than one person, the civilian with judicial experience would be the President.</li> <li>This form of inquiry would be in addition to the existing arrangements for appointment of Investigating Officers and Boards of Inquiry.</li> <li>External independent legislative oversight by Comcare would continue in relation to the conduct of all ADF inquiries into notifiable incidents. This includes arrangements for consultation with Comcare on the terms of reference, as well as options for attendance or participation in the inquiry process.</li> <li>State and Territory Coroners would continue to review the outcomes of ADF inquiries into deaths of personnel. The ADF would work towards completing a Memorandum of Understanding with State and Territory Coroners.</li> <li>The Defence Force Ombudsman would continue to provide external independent legislative review of the conduct of ADF inquiries. This may occur as a consequence of a complaint or by own motion independently of the ADF.</li> </ul>	<p>Dec 2006</p> <p>Oct 2007</p>	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>Legislation (the <i>Defence Legislation Amendment Bill 2006</i>) was passed by Parliament on 5 Dec 06 to facilitate the creation of a CDF Commission of Inquiry (CDF COI). The provisions for the CDF COI commenced on Royal Assent on 11 Dec 06.</li> </ul> <p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Amendments to the <i>Defence (Inquiry) Regulations 1985</i> are currently being developed to support the conduct of a CDF COI, and are expected to be considered by the Federal Executive Council in April 07.</li> <li>In the interim, Boards of Inquiry were appointed under the amended (31 Mar 06) provisions of the <i>Defence (Inquiry) Regulations 1985</i>. The amended Regulations allow a civilian to preside at a Board of Inquiry, to overcome perceptions of bias in the administrative inquiry process.</li> <li>An initial panel of suitably qualified persons with judicial experience to preside over/sit on a CDF COI has been establishment. The panel consists of six persons, and is expected to increase this year.</li> <li>To date, three Boards of Inquiry have been run under interim arrangements, with a civilian president from this panel.</li> <li>A CDF COI coordination and support cell has been establishment within the Office of the CDF.</li> </ul>

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34 contd			<ul style="list-style-type: none"> <li>The ADF is also consulting with State and Territory Coroners to establish protocols regarding the review of outcomes of ADF inquires into deaths of personnel. Two State Coroners have already signed protocols, and one has agreed to establish liaison arrangements.</li> </ul>
35	<p>The Government agreed in principle that, in addition to ongoing internal monitoring and review, Defence would commission regular independent reviews on the health of the military justice system. Such reviews would be headed by a qualified eminent Australian, with the first timed to assess the effectiveness of the overhauled military justice system proposed in this submission, at the conclusion of the two-year implementation period.</p>	Oct 2007	<p><b>UNDERWAY</b></p> <ul style="list-style-type: none"> <li>Arrangements for the conduct of a review of the effectiveness of the overhauled military justice system at the conclusion of the two-year implementation period will be made in 2007. This independent review will be conducted in an open and transparent manner, and include a more detailed review of the DFDA.</li> </ul> <p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>In addition to the Government response, as announced by the CDF in Oct 2005, an independent audit of the learning culture in ADF schools and training establishments was undertaken. The Learning Culture Inquiry report into ADF Schools and Training Establishments and Defence's action plan for implementing the agreed recommendations were released by the CDF on 6 Dec 06. Implementation is being reported separately.</li> </ul>
36	<p>The Government agreed in principle to examine the combination of criminal law and administrative action in terms of best-practice military justice, noting that such a review would also satisfy a recommendation from the Burchett Report to review the nature of the punishments that may be imposed in the light of contemporary standards. This review would be undertaken outside the broad review proposed at recommendation 35, and would be completed within the two-year implementation period.</p>	Oct 2007	<p><b>COMPLETE</b></p> <ul style="list-style-type: none"> <li>Examination of the combination of criminal and administrative law was completed by obtaining independent external advice on double jeopardy from the Australian Government Solicitor. The advice has been incorporated into a revised Defence Instruction (General) 35-6, which deals with Formal Warnings and Censures in the ADF.</li> <li>An internal review of offences and punishments has been conducted as part of the process for enhancing summary procedures, and is now being progressed under Recommendations 22 and 23.</li> <li>Offences and punishments will also be further reviewed as part of the review of the effectiveness of the overhauled military justice system to be conducted in accordance with Recommendation 35.</li> </ul>

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