

The Weaknesses

Introduction

4.1 The survey of the evidence within Chapter 3 highlights a range of systemic issues that are of concern. The committee detected four areas of apparent weakness. When considered in combination, these weaknesses contributed to:

- The development and perpetuation of an illegal system of 'justice' and punishment.
- The failure by authorities to more rapidly identify and prosecute personnel responsible for permitting and enforcing an illegal system of 'justice' and punishment.

4.2 These weaknesses could be summarised as follows:

- **The Culture of Silence.** The failure of soldiers, despite victimisation, to use the various available means for initiating a formal complaint.
- **The Culture of Ignorance.** The failure of commanders to detect what was happening, and to act upon it.
- **Inadequacies within the Military Police Force.**
- **Inadequacies within the Military Justice System.**

The Culture of Silence

4.3 Within 3 RAR, it was obvious that there was a culture of silence that resulted in soldiers maintaining silence on issues of concern. While the committee did not look into the length of time this type of behaviour might have gone on, there is little doubt there were junior members of 3 RAR who were aware of this and did nothing to report it. In particular the culture of silence:

- Prevented people speaking out despite a plethora of means to do so (See Chapter 2, Table 2.1).
- Possibly starved the two administrative investigations, conducted within 3 RAR in 1998 of information critical to them drawing accurate conclusions.

4.4 This culture of silence may be partly explained by:

- An institutionalised system of loyalty to the organisation.
- A fear of further retribution if an individual complained.
- A feeling by individuals that if they ‘toughed it out’ the spotlight would move on to others.
- The possibility that individuals may not have known about other avenues for complaint.

Loyalty to the Organisation

4.5 Units such as 3 RAR have their own culture as explained in Chapter 2, and engender feelings of great loyalty in many individuals. In many ways, within this type of organisation the prevailing culture is that the institution is greater and more important than the individual. The decision by many soldiers to accept brutality and not seek redress or support from outside 3 RAR can largely be attributed to this culture. As described by one witness, the attitude was ‘Let’s keep this in house, fellows’ and that ‘we were told many a time, “Don’t go to the MP’s. Don’t take this outside.”¹

Fear of Retribution

4.6 As well as loyalty to the organisation there was also evidence presented to the committee of considerable fear of retribution should individuals raise

1 In camera transcript, 6 October 2000.

complaints and effectively 'air dirty laundry in public'. The retribution came either from individuals who were the subject of the allegations or from members of the unit who felt the unit (and therefore they themselves) was being denigrated by the raising of the allegations. There was evidence presented of death threats made to a number of members of 3 RAR, and physical damage being done to their property. One member's car was vandalised and the tyres slashed.

- 4.7 Retribution was not only limited to immediate physical action. Witnesses gave evidence that they felt that regardless of the outcome of the investigation their careers were effectively over. One witness stated 'I was not the person who came forward and started the actual investigation. If I had been, I would say that my career would be affected a lot more'.²

Toughing It Out

- 4.8 The witnesses who appeared before the committee gave evidence that they joined the Army with the intention of having long and successful careers in the organisation. A possible contributing reason to the code of silence was the feeling that the situation could be 'toughed out', and once an individual had in effect 'paid for his crime' with an informal punishment the matter would be put to rest. The individual could then get on with his career without any long term effect. Conversely, it would appear that it was assumed that complaints, even about legitimate grievances, were seen as adverse to career prospects.

Other Avenues of Complaint

- 4.9 There are a variety of avenues for complaint within the Defence Force for incidents such as those that occurred at 3 RAR. These were detailed in Chapter 2 Table 2.1. While there was evidence presented to the committee that soldiers were broadly aware of those avenues, there remains concern that further education is needed. In addition, the committee has concern regarding the equity officer system, whereby key appointments can have responsibility for aspects of the discipline system while being part of the unit equity and complaint system. The Stand Down Day on Military Justice instituted by the CDF on 5 February 2001 goes a substantial way towards addressing this issue, and Defence should consider making this a regular activity.

2 In camera transcript, 6 October 2000.

The Culture of Ignorance

- 4.10 There was some evidence presented to the committee indicating that the senior leadership of 3 RAR, in particular the Commanding Officer either knew, or should have known about the level of violence in the unit he was responsible for commanding.
- 4.11 The issue of whether Commanding Officers knew about the level of violence and did nothing is vexed. There is evidence that on at least one occasion a CO was advised of a specific incident by a victim and took no action other than speaking to the perpetrator.³ While there is no further evidence that CO's were specifically aware of the scope of brutality, the committee is not convinced that this was so. But in any event, all CO's had a responsibility to be aware.
- 4.12 The next question is whether or not the CO's should have been aware of what was happening in their unit. A number of submissions claimed that, in their experience, there was no doubt that any CO should have known what was occurring if they were effective leaders. The fact that they may not have known suggests that there were serious problems in the command processes of a succession of Commanding Officers of 3 RAR.
- 4.13 This culture of ignorance lead to Commanding Officers either:
- not knowing about incidents they had a responsibility to know about, or
 - Turning a blind eye to illegal acts being perpetrated by their subordinates, on other subordinates.
- 4.14 Some of the contributing causes of this culture of ignorance may be:
- Information being withheld or hidden from senior appointments in the organisation.
 - Careerism, with CO's not wanting anything to happen while they were in command.
 - Weak leadership.

Withholding Information

- 4.15 The ability of all senior staff in a unit, and in particular the Commanding Officer, to run a unit effectively relies heavily on an unrestricted flow of accurate information from subordinates. Strong evidence has been
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3 In camera transcript, 6 October 2000.

presented to the committee that on least one occasion details of what was really happening was concealed from unit officers. In this specific instance a Company Sergeant Major waited until after officers had left a parade before giving instructions regarding the bashing of soldiers. Such instructions are illegal, and would likely have been identified as such should officers have been present. The witnesses stated that “The officers were on parade when the CSM stood out in front and said, “These men are not to be touched”. He dismissed the officers and then came back to the boys and said “Rightio, now that I have had my spiel in front of the officers, here is what I really want”.’⁴

Weak Leadership

- 4.16 In Chapter 2 there is some detail on the executive and administrative chains of command. Effectively it states that officers make the executive decisions relating to the unit but the NCO’s run the unit administratively on a daily basis. The committee was concerned by the evidence that decisions may have been made by the NCO chain in relation to the discipline system without regard to the legality of the issue. In particular there was evidence that there were older, more experienced soldiers who felt that the new system of discipline did not act quickly enough to address issues of discipline.
- 4.17 As detailed by one of the witnesses ‘there were those that were brought up under the ‘olds and bolds’ of years gone by – and there were only one or two of them – who were of the view that justice must be quick, and when the system does not necessarily respond quickly enough then things will happen’.⁵
- 4.18 Similarly, there was evidence that ‘the officer command structure that was in place was not effective. The senior NCO [sic] structure was strong and all the senior NCO’s were good NCO’s, but there were times when things happened that should not have happened’.⁶ The committee believed that at times inappropriate decisions were made by SNCO’s without the approval of senior officers.

Careerism

- 4.19 For Army officers the command of a unit such as 3 RAR is seen as one of the major achievements of a career. Selection is highly competitive,

4 In camera transcript, 6 October 2000.

5 In camera transcript, 6 October 2000.

6 In camera transcript, 6 October 2000.

command is strongly aspired for, and selection is often an indication that the officer in question has potential for further promotion. Conversely, however is the fact that it is well known within the Army that failure in unit command can mean the end of a career.

- 4.20 One of the potential causes therefore of the failure of several Commanding Officers to identify and report violence being carried out within the unit was the concern regarding the damage any perceived blemish would have on their career. The quote by one Commanding Officer that ‘To be honest, I can’t let one of these incidents get outside the unit’⁷ leads the committee to believe that the Commanding Officer was concerned about adverse comment should senior headquarters be aware of what was going on in 3 RAR.

Inadequacies within the Military Police Force.

- 4.21 It became readily apparent throughout the committee inquiry that there were serious issues regarding the competency of Army Military Police to carry out their policing and investigative functions. The Military Police investigation of the incidents at 3 RAR started in September 1998, and was completed in April 1999, a total of eight months. The committee was concerned to find out whether this was indicative of the time normally taken to complete investigations of this type and whether this was acceptable. Issues of resourcing, management, priority assignment and training required investigation.
- 4.22 The committee also heard evidence at the public hearing on 2 March 2000 that the structure of the Army Military Police organisation had changed, in part due to the 3 RAR investigation and the subsequent committee scrutiny. In this section the following areas of Military Police performance are highlighted:
- MP management – including assignment of priorities
 - Resourcing
 - Investigation/offence clearance times
 - Training/competency vs. civil police norms
 - Use of Reserve MP’s.

7 In camera transcript, 6 October 2000.

MP Management

- 4.23 At the time of the 3 RAR investigation, command of Military Police was de-centralised around Australia. The command of MP's was assigned to various Army formations and commands, and in the case of investigators most were assigned outside Army to regional elements of the Defence Corporate Support Program. These assigned MP's could deal with ongoing policing issues in their area of responsibility but there was no centrally controlled pool of MP's to address larger investigations. While this gave local authorities control over policing assets it did not appear to get the best out of a relatively scarce asset, and allowed no flexibility to deal with large cases. The Provost Marshall of the Army, a Military Police Lieutenant Colonel had technical control of the Military Police.⁸
- 4.24 When a large investigation of the type of 3 RAR arose, there was difficulty getting an investigative team together. Organisations requiring major investigations did not have the capability to address them, and other units were loath to part with their MP's as it shelved investigations under way in their area. In the words of the Provost Marshall of the Army, 'it sometimes became a matter of begging and borrowing investigators from other commands'.⁹
- 4.25 A new unit, the 1st Military Police Battalion, was raised on 15 January 2001. This unit commands all Army Military Police personnel Australia wide, with the Commanding Officer of the unit also being the Provost Marshall of the Army. This has the following advantages:
- It allows regionally based investigators to be more easily pooled to address large investigations.
 - It puts control and supervision of investigations with the Provost Marshall rather than in regions and enables more immediate and effective access to senior Army leadership.
 - It allows for better training and career management of individual Military Police.
- 4.26 The committee acknowledges this change as a significant step forward in the management of MP's. The formation and operation of 1 MP Battalion should alleviate some of the procedural inadequacies identified by the committee in this inquiry.

8 Technical control denotes control of detailed procedure and policy, but not resourcing, work allocation or prioritisation.

9 Lieutenant Colonel T Grutzner, Transcript, 2 March 2001, p. 58.

Military Police Resourcing

- 4.27 The committee has a level of concern with the financial and personnel resourcing of the Military Police.
- Finance. Prior to the raising of the new unit funding was controlled by each formation and commands with MP's. The drawing together of investigators for major incidents was subsequently problematic. The new system of financing whereby the Commanding Officer will be allocated funds seems to the committee to be a far better way of managing the resource. While appreciating that allocations of funds are yet to be made for the next financial year the committee will be keen to ensure that Army adequately resources the 1st Military Police Battalion.
 - Personnel. Despite the change in structure and management of the Military Police, there appears to be no major increase in the numbers of Military Police, particularly investigators. The Provost Marshall gave evidence that the force had been cut from approximately 400 to 300 in 1993 as a result of the Force Structure review.¹⁰ This resulted in the loss of approximately 10 investigators and 90 uniformed police. In the new structure there is currently no central pool of investigators available for major investigations. While the committee notes that there will be an automatic review of the unit establishment after 12 months, consideration should be given to the establishment of a central pool of investigators, in order to handle major investigations adequately without drawing in large numbers of investigators from outlying areas.

Investigation/Offence Clearing Times

- 4.28 The question of appropriate investigation clearing times, and benchmarking in relation to civil police were areas where the committee felt it did not have enough information to make an informed comment. In particular there was considerable debate as to whether eight months was too long a period of time for the MP investigation of 3 RAR to take. Some factors put forward to suggest that this timeframe was not incongruously long were:
- It was a complicated and large scale investigation.
 - The eight months included a six week block leave period where personnel were unavailable.

10 Lieutenant Colonel T Grutzner, Transcript, 2 March 2001, p. 57.

- At the start of the investigation it appeared to be a simple case of assault. As the extent of the investigation grew the numbers allocated to investigate it increased, to a team of 10 personnel in February 1999.¹¹
- The movement of personnel around the country as part of the normal posting cycle.

4.29 An attempt was made to benchmark Military Police performance with their civil counterparts. While there is considerable value in doing this there are also some issues that preclude accurate comparison. These include:

- The military justice system is designed to support the maintenance of discipline in the Defence Force. Many offences that the Army considers important to investigate would simply not attract effort by civilian police, who concentrate on more serious offences. This is explained in the following quote regarding the Australian Federal Police:

The number of offences reported or identified, however, far exceeds the AFP's ability to investigate. The AFP must ensure that its resources are directed to the matters of highest priority and the decision to accept or reject matters for investigation is based on this precept.¹²

This was further supported in the public hearing on 2 March 2001 when a witness stated, referring to the assaults in 3 RAR

Normally if an assault like that was reported to civil police, unless there were witnesses there and then and it was not a one on one assault, they would just record it. The civil police, because of their workload, probably would not do any further investigative action.¹³

Any statistics must therefore take this inherent difference into account.

- Service police can only investigate service officers in accordance with the Defence Force Discipline Act. A number of more serious offences are handed over to State or Federal police counterparts.
- State Police investigate, apprehend and prosecute offenders, while Army Military Police are limited to providing briefs of evidence to relevant authorities, for their further action.

11 Lieutenant Colonel T Grutzner, Transcript, 2 March 2001, p. 57.

12 AFP Annual Report 1999/2000, p. 13.

13 Warrant Officer Smith, Transcript, 2 March 2001, pp. 68-69.

- 4.30 The Military Police have an unofficial aim of completing a report within 28 days of notification of an incident. The annual average time for completion of reports over the last four years is detailed in Table 4.1 below.

Table 4.1 Average time for completion of Military Police reports

Year	1996-97	1997-98	1998-99	1999-2000
Days to complete report	29	31	38	45

- 4.31 The committee notes that the average time taken for completion of reports has increased over the previous four years. Evidence was presented to the committee that the recent establishment of the Battalion should result in this figure decreasing.

Military Police Training

- 4.32 The committee found no evidence to suggest that Military Police training is in any way deficient. Details of Military Police training were detailed in Submission 30, which states in part:

The training standard for MP Special Investigation Branch (SIB) personnel exceeds the requirement of the Certificate 4 (Commonwealth) standard for Investigators, as it includes photographic, forensic and crime scene examination modules. Selected Investigators attend external Police courses such as the Victoria Police Detective Training School as well as complementary attachments to local Homicide, Major Crime and Fraud squads. All General Duty (no-SIB) MP personnel are required to attend an Initial Investigators Course, which allows them to conduct minor criminal investigations and assist SIB with more serious matters.¹⁴

Use of Reserve Military Police

- 4.33 Throughout the Army, Reserve personnel are used to fill shortfalls in permanent military capability. The committee was interested to know whether there was scope to increase further the contribution of Reservists, in order to make up any shortfall in permanent manning.

¹⁴ Department of Defence, Submission 30, p. 5.

- 4.34 MP reservists are often highly qualified, with important positions in various areas of state and federal law enforcement. They provide expert support in a variety of areas but cannot be easily used on large investigations because of both the limited time they can be available (several weeks on average), and the reading in time required to be of value.¹⁵ While the committee takes note of these facts, it considers that Army should explore ways of better using this valuable and highly skilled resource.

Inadequacies within the Military Justice System.

- 4.35 In the course of the committee investigation serious concerns were raised regarding the military justice system. The fact that the Military Police report was completed in April 1999 and legal proceedings are still yet to be finalised is seen as an indication of problems. There was also some doubt raised over the standard of training and performance of permanent legal officers and the possible requirement for a Director of Military Prosecution.
- 4.36 In the public hearings there was a significant amount of conflicting evidence regarding the relative merits of permanent and reserve practitioners, and the requirement for a permanent prosecution cell. While some of this can be attributed to the normal feelings and biases between reserve and permanent forces, the committee was unable to reach a firm conclusion in this regard.

The Defence Legal Office

- 4.37 The Defence Legal Office, an integrated joint nationwide organisation, provides legal services in Defence.¹⁶ These services primarily involve the provision of legal advice to commanders through the attachment of legal officers to commands, formations units and detachments. The DLO is also responsible for the provision of legal assistance to individual members in accordance with Defence Instructions, and for the provision of high level legal advice on issues within Defence.¹⁷

15 Lieutenant Colonel T Grutzner, Transcript, 2 March 2001, pp. 59-60.

16 Since establishment in October 1998. See Commodore M Smith, Transcript, 2 March 2001, p. 73.

17 Exhibit 20, Department of Defence.

4.38 The DLO includes permanent and reserve uniform lawyers, defence civilians and legal officer positions, paralegal and other legal support and APS positions.¹⁸ The numbers of permanent and reserve ADF lawyers are detailed in Table 4.2 below.

Table 4.2 Numbers of permanent and reserve ADF lawyers¹⁹

	Navy	Army	Air Force
Permanent Force	23	38	29
Reserve Force	116	104	100

The Lengthy 3 RAR Case

4.39 There has been no evidence provided to the committee that justifies why the prosecution of the 3 RAR cases took the time they did. While the preparation for and subsequent deployment to Timor understandably delayed proceedings, this was not the sole reason for the unnecessary delay. Eighteen months is far too long to wait for justice.

Reserve versus Permanent Legal Officers

4.40 There are three core legal fields in Defence:

- Discipline Law,
- Military Administrative Law, and
- Operations Law.

4.41 Both Military Administrative Law and Operations Law are primarily military fields, with experience being primarily gained acting as a lawyer in Defence. Discipline law however, relies more heavily on advocacy skills,²⁰ which are not widely used in Defence, and are more often used by reserve officers in their civilian practice. It is very hard, perhaps impossible, for a single officer to gain the experience necessary to be an expert in all three areas.

18 Commodore M Smith, Transcript, 2 March 2001, p. 73.

19 Department of Defence, Submission 41, p. 6.

20 Advocacy is the art of persuasion and includes prosecuting and defending cases in a court and the preparation of submissions.

4.42 It was put to the committee that one of the reasons for the delay in the institution of legal proceedings in the 3 RAR case was that permanent legal officers did not have the day to day legal experience to cope with a case of this type. Commander Vickridge, an experienced Naval Reserve lawyer stated in his evidence that

Until about 1996, the only input that permanent lawyers in the Navy had in military discipline was of an administrative nature only. They did not prosecute and they did not defend. Frankly, everything ran fairly smoothly. I do not recall any great problems that we had because we were used to dealing – I can prosecute one day and I can defend the next.²¹

4.43 The committee is aware that the Defence Legal Office is establishing an ADF Prosecution Team to conduct military prosecutions of all matters referred to trial by Defence Force Magistrate or Courts Martial. The team will be independent of commands, convening authorities and service police and will respond when matters are referred to it by one of these authorities. The team is planned to consist of four permanent legal officers, assisted by members of the legal reserve force who are prosecutors with the Commonwealth or State Directors of Public Prosecutions, or who hold an appointment as a Crown Prosecutor.

4.44 The committee is not convinced that this fully addresses the level of concern regarding the Defence legal system. There is no doubt that, at least initially, the ADF Prosecution Team will lack expertise in prosecuting cases. Having said that, there appears only one way for them to get that experience, and that is to prosecute. The major concern for the committee is whether Defence can retain and build on that experience or whether it will continually be lost, with new officers being posted in each year. This is a situation that will need further review in due course.

4.45 The committee feels that permanent legal officers should also be encouraged to undertake civilian work to develop trial skills, even if this may not be required as part of any military law specialisation.

The Director of Military Prosecutions

4.46 In the previous committee report on Military Justice Procedures in the Australian Defence Force the committee discussed the establishment of an independent Director of Military Prosecutions.²² Justice Abadee in his

21 Commander Vickridge, Transcript, 9 March 2000, p. 101.

22 Joint Standing Committee on Foreign Affairs Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, Canberra, June 1999, pp. 126-136.

1997 report²³ recommended that ‘careful consideration should be given to examining the question of the appointment of an “independent” Director of Military Prosecutions upon a tri-service basis’.²⁴ Given the strong objections of the ADF to the proposal at the time, the committee did not recommend the establishment of such an office. It did however recommend that ‘after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts martial and DFM trials be reviewed’.²⁵

4.47 The major issues discussed in the previous report in relation to the establishment of the position were:

- The improved perceptions of independence and impartiality
- The increased independence of the process
- Concerns regarding the level of operation of the DMP²⁶ and the effect on command.

4.48 Since the start of this inquiry the committee has seen a significant response from Defence, including:

- The ADF Standdown Day, and address by CDF and Service Chiefs to the Defence Force.
- The establishment of the Burchett Military Justice Audit.
- The proposed establishment of an ADF Inspector General.
- An investigation into the command responsibility surrounding the events at 3 RAR.
- The laying of charges against a number of senior individuals involved in the 3 RAR investigation.
- The re-organisation of the Army Military Police.
- The introduction of an ADF Prosecution team.
- An internal review of the Defence Legal Office.

23 Abadee, Brigadier Hon A R, *A Study into Judicial System under the DFDA*, 1997.

24 *ibid*, p. 46.

25 *Military Justice Procedures in the Australian Defence Force*, *op cit*, p. 136.

26 The DMP was proposed to be used in cases of trials by Defence Force Magistrate/Courts-Martial, and at the summary level. There was considerable concern expressed that the use of the DMP at the summary level would take a vital decision making capability away from Commanding Officers and impose a massive cost in time and resources on the summary system.

- 4.49 The timing of consideration of the introduction of a Director of Military Prosecution would seem to hinge on the outcomes of these initiatives, including the Burchett audit. Accordingly the committee does not wish to recommend the establishment of a Director of Military Prosecutions at this stage.
- 4.50 One issue apparent to the committee is that there is a level of discontent and concern amongst at least some of the Reserve legal officers. The Defence Legal Office needs to address the root causes of this concern.

Selection of Legal Officers

- 4.51 Two areas of concern were raised in manner of selection of Defence legal officers. In some cases legal officers were selected by boards consisting of three personnel, none with legal expertise. It was put to the committee that legal representation was needed on the board to ensure an officer with adequate legal expertise was selected. Comment was also made that if a Reserve legal officer in that region was used on the board then something may be known regarding their level of legal experience and talent.²⁷
- 4.52 The second area of concern regarded the process whereby an officer from a non-legal specialisation obtained a legal degree and then moved to the legal field without relinquishing any rank. Examples were given of both a senior Navy (Captain) and Army officer (Colonel) who have done this.²⁸ The concern arises because of the disparity between the rank of the officer and his/her experience. People expect a senior officer in a legal job to be an experienced practitioner. This is not necessarily the case with officers that have followed this course. Evidence was given that the RAAF does not allow this to occur and expects officers to relinquish rank in order to transfer to the legal area.²⁹

27 Commander Vickridge, Transcript, 9 March 2000, p. 106.

28 Commodore Smith, Transcript, 2 March 2000, pp. 87-88.

29 Wing Commander Cronan, Transcript, 2 March 2000, p. 88.

