



Dissenting Report

Introduction

- 7.1 It is unusual for either of the major parties to dissent from a report of the Defence Sub Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The sub committee has had a significant history of bipartisanship. To provide such a report is not done lightly. The dissent is limited to the areas of a Director of Military Prosecutions and the lack of Ministerial accountability.
- 7.2 **As disturbing as the incidents involved in the 3RAR affair are, the most critical responsibility of the committee is to frame appropriate recommendations to restore confidence in the Military Justice System, to ensure all members of the ADF are treated equally, fairly and in a timely manner.**
- 7.3 There have not been any specific complaints to the committee about the operation of Courts-Martial and those matters under the purview of the Judge Advocate General. The dissenting report considers that those elements of the justice system are working well.

Ministerial Accountability

- 7.4 There appears to be evidence of a disturbing pattern of Ministerial silence in military justice matters. Minister Bishop was first informed of problems in 3 RAR in March 1998, by Mrs Nishimura, but made no statement.

- 7.5 Minister Scott subsequently failed to inform the committee of problems in 3 RAR or even make a statement on the Government's attitude to bastardisation.
- 7.6 There have been three years of ministerial silence and apparent inertia. This has been damaging to the reputation of ADF and limited the committee's two inquiries into military justice matters.
- 7.7 The committee's earlier Report "Military Justice Procedures in the Australian Defence Force"¹ was tabled in June 1999, nearly 2 years ago.
- 7.8 It is extremely disappointing that the government has yet to formally respond. Nor has it provided any explanation for such a delay.
- 7.9 **It is hard for the members of the ADF and public to believe the Government is taking the issues of military justice seriously if the responsible Ministers remain silent, and by their silence appear dismissive of these issues.**

Director of Military Prosecutions

- 7.10 In the committee's first report into Military Justice Procedures in the Australian Defence Force, there was considerable discussion regarding the establishment of a Director of Military Prosecutions (DMP).
- 7.11 This was because Justice Abadee in his "Study into Judicial System under the Defence Force Discipline Act" in 1997, recommended (recommendation 4):
- Careful consideration should be given to examining the question of the appointment of an "independent" Director of Military Prosecutions upon a tri-service basis.²
- 7.12 The ADF response at the time was:
- That a DMP will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders must retain the power to prosecute. This is vital especially during operations and when forces are deployed overseas. Moreover the establishment of a DMP would place limitations on commanders and would result in unacceptable delays in the administration of discipline.³

1 Joint Standing Committee on Foreign Affairs Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, Canberra, June 1999.

2 Abadee, Brigadier Hon A R, *A Study into Judicial System under the DFDA*, 1997, p. 46.

3 *Military Justice Procedures in the Australian Defence Force*, op cit, p. 203.

- 7.13 After discussing whether to recommend the establishment of a Director of Military Prosecutions over several meetings the Committee finally compromised and recommended (recommendation 46) in its first report that:
- ...After the proposed post-Abadee arrangements have been in operation for three years, the issue of the institutional independence in relation to prosecution in Courts-Martial and DFM (Defence Force Magistrate) trials be reviewed.⁴
- 7.14 Had the committee, then chaired by Senator David MacGibbon, been given the information about 3 RAR, it is reasonable to believe the committee would have recommended the establishment of a Director of Military Prosecutions in its first report.
- 7.15 The general public is very comfortable with the independent operation of a Director of Public Prosecutions. The case for a Director of Military Prosecutions rests not only with the need to create the perception of independence, but the reality of actual independence.
- 7.16 The committee was advised in evidence taken on 2 March 2001 that the ADF Legal Office has established a Prosecution Team⁵ comprised of fulltime legal officers this year. The cell will comprise four members and each year officers will rotate through the cell. The cell appears to be aimed at developing advocacy skills amongst fulltime officers.
- 7.17 As Commodore Smith said in evidence, “they (the team) are directed towards building competence and they still do not take away from the convening authority, the key decision to refer matters”.⁶ So command or the convening authority still determines whether or not charges will be laid.
- 7.18 In 3 RAR there have been two instances to date of command interference in prosecution. The first involved General Cosgrove seeking to remove charges to a higher authority, which led to the aborting of two trials before a Defence Force Magistrate. Clearly this was done with the very best of intentions. The second is the subject of charges and presumably court martial. **Whilst the establishment of the Prosecution Team may prove to be beneficial, it is not free from the influence of the chain of command.**
- 7.19 Under current arrangements Military Police reports are provided to ADF Legal Officers or the new Prosecution Team. Whilst the committee has welcomed the changed structure of the Military Police instituted this year,

4 *ibid*, p. 136.

5 The Prosecution Team is sometimes referred to in submissions and hearings as the Prosecution Cell.

6 Commodore M Smith, Transcript, 2 March 2001, p. 85.

there does appear to have been inadequacies in the investigation, which one can reasonably assume that a Director of Military Prosecutions would have found to be exceptional.

- The eight month duration of the investigation, even allowing for the East Timor deployment.
- The truncating of the investigation at the time the Military Police believed they were dealing with a culture of violence.
- The withholding of a prior unit investigation from the Military Police.
- Recent allegations that the Military Police failed to keep running sheets.

7.20 A Director of Military Prosecutions would have had the authority to ensure that the Military Police address these issues and appropriately rectify them, free from the chain of command.

7.21 Dissenting members understand that the establishment of an ADF Prosecution Team attempts to go some way towards the recommendation in the Abadee report, but does not address the central issue of an independent Director of Military Prosecutions.

7.22 The majority of members in discussing this latest report were of the view that any recommendations should wait until the Burchett audit had been completed. The dissenting members expressed the strongly held view that an independent Director of Military Prosecution needs to be established now.

Recommendation

7.23 **In light of the recurrence of issues relating to brutality and military justice, and noting the recommendations of the committee's previous report into military justice procedures in the ADF, those dissenting members now strongly recommend that the ADF establish a statutory office of the Director of Military Prosecutions, for Defence Force Magistrate trials and Courts-Martial (for criminal and quasi criminal matters).**

Senator the Hon P Cook

Senator B Gibbs

Senator S Hutchins

Senator K O'Brien

Senator the Hon C Schacht

Hon L J Brereton, MP

Hon J A Crosio, MBE, MP

Mr L D T Ferguson, MP

Hon Dr S P Martin, MP

Hon N P O'Keefe, MP

Hon W E Snowdon, MP

