

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

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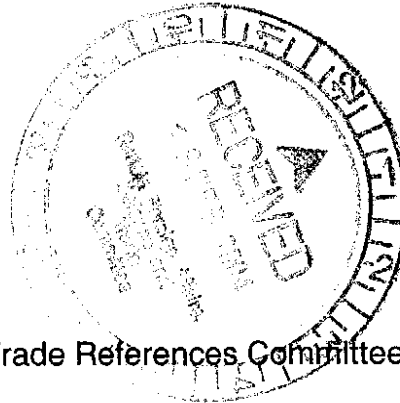
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16 February 2004

The Secretary
Senate Foreign Affairs, Defence and Trade References Committee
Suite S1.57
Parliament House
CANBERRA ACT 2600

Dear Mr Holmes

Inquiry into the effectiveness of Australia's military justice system

Introduction

I make this submission to the inquiry being conducted by the Senate Foreign Affairs, Defence and Trade References Committee. I would be most happy to discuss issues with the Committee in a hearing.

In 1998 Ms Philippa Smith, a former Defence Force Ombudsman, made a submission to the Inquiry into Military Justice Procedures in the Australian Defence Force then being conducted by the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. Shortly before making that submission, the Ombudsman had completed a major own motion investigation into how the ADF responds to allegations of serious incidents and offences. Unlike that submission, this one reflects our experiences in handling a range of complaints over the past several years, rather than one comprehensive investigation.

I am also undertaking an own motion investigation into matters of administration relating to Defence's dealings with people under the age of eighteen years. This investigation commenced in response to several serious complaints made to my office in the last few years that have raised concerns about the adequacy of Defence's administration of people under the age of eighteen years, including one person mentioned specifically in the Inquiry's Terms of Reference.

The investigation covers both service personnel and Defence Force Cadets. It is not my intention to consider in any detail the handling of individual complaints, but rather to identify the key issues raised in those complaints and consider these on a systemic level. The focus of my investigation is to determine whether there are:

- procedures in place which take appropriate account of the lesser maturity and experience of young people and their consequence capacity to deal less

- effectively with major issues and stresses which can arise as a consequence of defence related activities; and
- o mechanisms in place to ensure staff understand, implement and monitor these policies effectively, including dealing with any problems or complaints which might arise.

I expect to be in a position to finalise this investigation by mid-2004.

Background

Over the past ten years the number of complaints we have received in the Defence Force Ombudsman jurisdiction¹ increased to a peak of nearly 1,000 in 1996-97, and has since decreased to just over half that number in the last financial year. Complaints about the ADF account for 60-70% of the total complaints received in this jurisdiction. On current indications, the number of complaints about the ADF is increasing this financial year. Overall, complaints received in the Defence Force Ombudsman jurisdiction now account for slightly less than 3% of the total complaints received under the *Ombudsman Act 1976*.

In addressing the question of military justice, I have found it useful to refer to the three distinct components of the military justice system identified by the 1999 Senate Committee *Inquiry into Military Justice in the Australian Defence Force* – military discipline, military inquiries and administrative action. We have a role in the latter two components, but not in the first.

Under sub-section 19C(5) of the *Ombudsman Act 1976*, I am not authorised to investigate action taken in connection with proceedings against a member of the Australian Defence Force for an offence arising under any law relating to the discipline of the ADF or of an arm or part of the ADF. Hence, while we may receive a small number of complaints each year about disciplinary action being taken under the Defence Force Discipline Act, these complaints do not fall within my jurisdiction.

On the other hand, we do receive a number of complaints relating to military inquiries and administrative action which we may investigate. Complaints about administrative actions may arise directly from military justice issues. They may also, of course, arise from the very wide variety of administrative processes involved in managing and leading a complex organisation like Defence, and not have any direct relationship with military justice. Nevertheless, the principles of good administrative decision-making are common to both.

Many of these complaints come from serving members who have access to the redress of grievance process. The complainants may focus on claims of harassment, victimisation, or assault, or on investigative processes. They may also express their complaint in terms of administrative action such as pending discharge, the impact of formal warnings on performance assessments and promotion prospects, or denial of posting requests.

We also receive complaints from concerned parents, partners or friends of members. Unless there are very strong indications that the member is unable to pursue the issue on his or her own behalf, the person making the complaint is advised of the redress of grievance process open to the member, and the support that is available to members in seeking to use that process.

¹ That is, related to the service of a member of the ADF or arising as a consequence of a person serving or having served in the ADF.

We also receive a small number of complaints each year from people who have served in the ADF some years previously, and are still concerned about events which may have occurred a number of years ago. In such cases, it is almost impossible for us to investigate these complaints given the passage of time. If a complainant raises allegations of criminal action, such as sexual assault, we will advise the person to take the matter up with their local police force.

Issues

o Investigative practices

Over the past several years the following issues have arisen in some complaints by individuals. While we do not have information to suggest these issues are widespread, and I certainly do not suggest they are, they are indicative of the types of problems which can arise.

We have received several complaints where it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved, as well as by other people in relatively senior positions in the ADF. It is axiomatic that if a complaint is not accepted as a complaint, it cannot be resolved.

We have also received some complaints which have revealed deficiencies in the investigative process. Some of the issues which have arisen include:

- investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated,
- an investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker,
- an investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint,
- investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority,
- an investigation where members of the public are questioned with little apparent thought for the potential consequences, and
- investigations which have taken so long it renders any outcome favourable to the member virtually meaningless.

A consistent theme is the need for better training for investigation staff. While I appreciate that many people will only be required to undertake few, if any, investigations during their career, given the potential impact on complainants of the result of a poor investigation, this is an area I consider Defence may need to address further.

o Timeliness

Section 19E of the *Ombudsman Act 1976* provides that, where a member of the Defence Force who makes a complaint to me can seek redress in the manner provided by or under the *Defence Act 1903*², I cannot investigate that matter unless I am of the opinion that

² Under Defence Force Regulation 82, a member cannot make a complaint through the redress of grievance system where they are aggrieved by a decision, judgment or order made by a civil or criminal court, a service tribunal or the Defence Force Discipline Appeal Tribunal.

there are special circumstances justifying the member from refraining to seek redress. The Ombudsman Act provides for me to investigate where redress has been sought, but has not been granted in 28 days, even in the absence of special circumstances. However, it has been the long-standing policy of Ombudsmen not to investigate matters until the redress system has been exhausted, unless there are exceptional circumstances.

This provides the opportunity for Defence to deal with the complaints in the first instance. As with any organisation, it is crucial that Defence has the first opportunity to respond to, and learn from, complaints about its dealings with its own personnel. Some could argue that it is even more important for the ADF to deal with such complaints expeditiously and effectively, given the importance of a fair and transparent military justice system to maintaining discipline, cohesion, loyalty and morale.

However, where such complaints are not dealt with in a timely fashion, the cost to both the individual and the broader ADF in terms of morale, administrative costs and lost opportunities can be considerable. In addition, substantial legal costs may be incurred in some cases.

Regretably we see a number of complaints from members of the ADF where the time taken for a decision to be made on a redress of grievance seems inordinate. While Defence will usually suspend any executive action which is the subject of a redress of grievance – for example, a pending discharge or recovery of a debt – there may well still be an emotional and administrative cost for those involved. In addition, in some cases, such as where the subject of the complaint has bearing on the member's prospects for promotion, the time taken to finalise the redress of grievance can render any remedy largely ineffectual, even where the member's redress is upheld fully.

Of course, these issues can be compounded when the member has the right to take their complaint to two or three levels of review, depending on their rank.

While it is preferable for matters to be resolved quickly through administrative processes rather than through the formal grievance process, there is a sound rationale for the existence of a formal grievance system. However, the effectiveness of that system may be at question where the time taken to finalise matters seems excessive, and where that very concern may discourage members from using the system.

Given my concerns about delays in dealing with complaints through the redress of grievance system, I am giving consideration to the opportunities for us to obtain a more timely outcome for the complainant through judicious intervention at an earlier stage. As this approach has resource implications and raises the potential for overlap with Defence actions, we will work with Defence to clarify those complaints which appear most likely to benefit from our earlier involvement.

In addition, the effectiveness of the redress of grievance system is an area that we will continue to monitor and review as necessary.

Defence's Complaint Resolution Agency has been established to ensure independence in the investigation, review and handling of complaints made by members under the redress of grievance system. The CRA conducts an administrative review of redresses of grievance referred for consideration by CDF, the Service Chiefs, or their delegates. I consider there may be value in CRA having an enhanced role, including more vigorous monitoring of progress with applications for redress of grievance at unit level. I also refer to the CRA in the next section of this submission.

o *Learning from complaints*

There are a number of internal avenues of complaint for ADF members, where administrative action or alternative dispute resolution cannot resolve the problem. For example, complaints may be made to the Defence Equity Organisation, and the Inspector General of the ADF, as well as through the redress of grievance system. In addition, my office provides feedback to Defence on the range of issues we identify when investigating complaints.

I consider there is potential for Defence to take some steps to see that the opportunities for learning from complaints are maximised, and that potentially systemic issues are identified and dealt with expeditiously. In particular, there may be value in Defence examining how it might better integrate the information obtained through the various complaint systems, and using this information to see that systemic issues are recognised and handled, and identified problems referred expeditiously to those able to deal with them. One possibility might be to enhance the role of an organisation like the CRA. While outside the scope of this inquiry, I see no reason why this approach could not extend to dealing with complaints from members of the public.

Ombudsman interaction with IGADF

The inaugural Inspector-General of the ADF was appointed just over a year ago. We will draw to the attention of the IGADF issues which arise in complaints and are outside our jurisdiction, but which may warrant closer scrutiny by the ADF. To date my office has had limited interaction with the office of the IGADF.

Conclusion

On the whole the system of military justice throws up relatively few cases for us. However, the benefit of the Ombudsman's office is that we can identify broad issues which have an impact across a wide range of ADF activities, and can be of direct relevance to the military justice system. I consider that addressing the problems we have identified above will assist in improving the effectiveness of that system.

Yours sincerely



for

Prof. John McMillan
Defence Force Ombudsman