



Appendix E – Summary of Abadee Recommendations

A Study into Judicial System under the Defence Force Discipline Act,
Abadee, Brigadier Hon A.R., August 1997¹

- 1 The standard of military justice should not vary according to whether is a time of peace or war. Because the Defence Force must constantly train for war, there should be no different approach for the conduct of tribunals in peace time to those conducted in war, overseas or during a period of civil disorder in Australia.

ADF Response - *This recommendation is fully supported by the ADF.*

- 2 There is a most powerful case for eliminating the multiple roles of the convening authority.

ADF Response - *The role of the Convening Authority to select membership of courts martial and DFM will be transferred to the JAG who will do so after consultation with the services.*

- 3 Prosecution guidelines similar to those in operation in the various States or the Commonwealth (with suitable modifications) should be introduced.

ADF Response - *Prosecution policy to guide Convening Authorities is to be introduced. DGDLO has been tasked with developing the policy.*

- 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.

ADF Response - *A DMP will not be established. Convening Authorities will make the decision to prosecute but DPP style guidelines will be developed. Commanders*

1 ADF responses are drawn from Department of Defence, Submission, p. 1179 – 1193.

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.

- 5 The matter of any such appointment, if at all, whether it should be tri-service, the role and duties of any Director and the matter of the responsibility of the prosecuting authority to any other authority and to whom should be dealt with any legislative change. At the same time the matter of whether the prosecutor should be organised as an independent unit under the Act should also be addressed.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. A DMP will not be established (See Recommendation 4)*

- 6 The present system of the JAG nominating officers to the JA's panel, appointing DFMs and recommending s.154(1)(a) reporting officers should be retained.

ADF Response - *In line with this recommendation, no change to the present procedure will be made.*

- 7 There should be no command or control (except of an administrative nature) exercised over JAs, DFMs and s.154(1)(a) reporting officers in the performance of their judicial duties. This would involve amendment to such provisions as AMR Reg 583 and even AMR Reg 585 (or their service equivalents, if any).

ADF Response - *These appointments will be assigned under the technical control of the JAG. In effect they will be managed by the JAG.*

- 8 On the assumption that by convention would continue to be a military officer, the JAA should remain under the command of the JAG.

ADF Response - *The JAA will be placed under command of the JAG.*

- 9 There should be no reporting on JAs, DFMs and s.154(1)(a) reporting officers in respect of their judicial duties.

ADF Response - *There will be no reporting on these appointments in respect of their judicial duties.*

- 10 There should be a separate administrative authority in respect of non-judicial duties of the JAs, DFMs and s.154(1)(a) reporting officers and reporting on such duties by their respective 'Head of Corps'.

ADF Response - *A separate administrative authority will be established with respect to non-judicial duties of these appointments.*

- 11 Duties of a judicial nature, including the appointment of JA or DFM to a particular trial be allocated to JAs, DFMs and s.154(1)(a) reporting officers by the JAG. This could be done through a Judge Advocate Administrator.

ADF Response - *Selection of these appointments for a particular trial will be transferred to the JAG to be undertaken in consultation with the services.*

- 12 The JAA should be under command of and reported on by the JAG and the DGDLO.

ADF Response - *The JAA will reside in the office of the JAG and consequently, in these circumstances the DGDLO will not command or report upon the JAA.*

- 13 Convening orders issued by convening authorities should include a request for the JAG to appoint a JA or DFM, or alternatively a statement (if it be the case) that a particular JA or DFM has been appointed by the JAG.

ADF Response - *Convening Authorities will continue to decide whether to prosecute and will hand appointment aspects to the JAG. Convening Authorities will no longer issue convening orders but will order a member to face a court martial or DFM and the JAG's office will then make the necessary appointments after consulting service authorities.*

- 14 The subject of fixed tenure (for JAs, DFMs and s.154(1)(a) reporting officers) should be further considered. Whilst I do not consider it essential, the notion of fixed tenure (with a virtual right of extension) is not opposed. It may provide a means of ensuring that appointees perform duties and should not hold office for the sake of it, whilst remaining inactive or unavailable for one reason or another.

ADF Response - *JAs, DFMs and s.154(1)(a) reporting officers will have a specified tenure.*

- 15 Subject to the constraints, inter alia, discussed, I do not see why those who are appointed as JAs, DFMs and s.154(1)(a) reporting officers should not generally be able to perform duties of a non-judicial or duties not inconsistent with the performance of the type of judicial duties or functions that they may be called upon to perform from time to time.

ADF Response - *These appointments should not be restricted from performing other tasks of a non-judicial nature not inconsistent with their judicial duties*

- 16 Consideration should be given to the establishment of the equivalent of a Court Administration Unit, independent of the convening authority and outside his chain of command or independent tri-service officer to perform the function of selecting members for a court martial. (This is said upon the assumption that there is not strong support for the U.K. scheme of a Court Administration officer who has taken over many of the convening authority's powers).

ADF Response - *The duty of selecting members of a court martial or DFM will be transferred to the JAG's office in consultation with the services.*

17 If the present system [of convening authorities] is to be retained, then:

- convening authority should wherever possible appoint, subject to service exigencies, persons from outside his command and at least outside the accused's unit. The matter of some members outside the convening authority's command being included is likewise a matter that could be considered.
- Such selection should be from a 'large pool' and as a desirable objective, as random as possible. The matter of the tri-service pool situation could even be considered for the few courts martial in fact held.

ADF Response - *The decision has been made that the JAG and not the convening authority will make appointment of members of courts martial. (See Recommendation 16)*

18 Reviews of court martial proceedings and DFM trials should be conducted by an authority other than the convening authority.

ADF Response - *Reviews of court martial proceedings and DFM trials will be conducted by authorities other than convening authorities.*

19 There should be a prohibition upon consideration of an Officer's performance as a member of a court martial being used determine qualifications for promotion or rate of pay or appointment. Further, that the officer reporting on efficiency of the president or members should not take into account the performance of duties of the president or members of any court martial. Section 193 protects such a member during performance of his / her duties as a member. There is a case for implementing the spirit of such a section generally.

ADF Response - *An officer's performance as a member of a court martial will not be reported upon for promotion or pay purposes.*

20 Whilst the matter of whether the JA should be involved in the imposition sentence, could be the subject of further study, it is not necessary presently to recommend a change in the current system. Indeed at the service level, in serious cases where a CM is justified, that there would be considerable opposition to taking powers of sentencing away from the court itself.

ADF Response - *The present system whereby the court and not the JA imposes sentence will be retained.*

21 Despite what I have said above, I do not consider that one should ignore the argument for the trial JA imposing sentence and giving reasons for such. I believe that support for his doing so would be strengthened where appeal rights in respect of a CM sentence to be conferred. The issue should thus be further considered.

ADF Response - *This has been noted. The decision has been taken, in line with the previous recommendation, that the present system whereby the court and not the JA imposes sentence will be retained.*

- 22 A good case should be established for now considering the conferring of rights of appeal (by leave) in relation to sentences imposed by court martial or DFM. There is no pressure for change from those interviewed or who had put in submissions. However, it is observed that were appellate rights given in relation to sentence, the justification for requiring stated reasons for particular sentence would be considerably increased. Amendments would also need to be made to s.20 of the DFD Appeals Act to deal with the rights of appeal in relation to sentence.

ADF Response - *The present system of reviews, appeals and petitions are comprehensive and far exceed what is available through the civil court system. Consequently, the introduction of further appeals (on sentence) is unnecessary and would cause administrative delays to the finalisation of disciplinary matters.*

- 23 No case is made for a prosecution appeal as of right or by leave appeal against sentence. Whether there should be a limited right of appeal in respect of sentence would be a highly controversial issue. The situation with a disciplinary tribunal exercising disciplinary power is not quite analogous with the position of the prosecution in relation to prosecution appeals against sentence on the grounds of manifest inadequacy in the ordinary criminal courts. The position in the civil courts is that the Crown may address on sentence at trial, and does in some cases, have a duty to do so.

ADF Response - *This recommendation was noted and agreed. No change to the present procedure is appropriate.*

- 24 That consideration be given to the inclusion of a 'no conviction' option in respect of an offence charged under the DFDA. Such would recognise that there may be good reasons for no conviction being recorded.

ADF Response - *Amendments to the relevant legislation are to be developed to provide for the recording of 'no conviction' under the DFDA.*

- 25 There is a good case for amending s.116 to make warrant officers eligible for membership of courts martial. Whether or not, after a period of time, lower ranks could / should be involved may depend upon experience involving the significant change proposed and how, if made, it works out in practice.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. It is considered important that the boundaries between commissioned and non-commissioned officers be preserved. Warrant officers firmly believe that their role is to administer and decide discipline. Consequently, warrant officers will not be eligible for membership of courts martial.*

- 26 Specifically that non-commissioned members of the rank of Warrant Officer be eligible to serve upon a General or Restricted Court Martial provided that the non-commissioned member is equal or senior in rank to the accused.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. This recommendation provides conditions under which warrant officers might serve on courts martial but the proposal that they do so was rejected in the outcome of the previous recommendation.*

- 27 That although arguments exist for a limited right of appeal in some cases from decisions of a commanding officer or other summary authorities, no action should be taken, at this stage, to introduce any such appeal rights.

ADF Response - *This recommendation was noted and agreed. No change to the present procedure is appropriate.*

- 28 In view of the arguments advanced during this study, the issue of conferring rights of appeal, if any, should be the subject of further consideration, particularly in the classes of cases which have been identified (eg elective punishments involving reduction in rank).

ADF Response - *The decision was made, in accordance with the previous recommendation, that no appeal system be introduced.*

- 29 The present review system has generally proved to be efficacious and provided appropriate protections for defence members and benefits to the Service in streamlining the administration of justice.

ADF Response - *This recommendation was noted and agreed.*

- 30 The advantages of any system of appeal from decisions at the summary authority level are outweighed by the disadvantages. The study lends support to the views of the senior officers who opposed the introduction of an appeal system.

ADF Response - *This recommendation was noted and agreed.*

- 31 Concern is felt regarding submissions that suggest that some s.154(1)(a) reporting officers may not have sufficient experience or training properly to report for the benefit of the reviewing authority. The difficulty could be addressed by training, exposure to criminal law eg by way of secondment to offices of the DPP, and / or by the employment of reserve officers. The Army particularly does well in this area, frequently using reserve legal officers to do reports under s.154(1)(b). Perhaps a certificate of qualification and suitability to be s.154(1)(b) reporting officer could be given by the newly established Military Law Centre.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

- 32 Subject to the exigencies of service s. 154(1)(b) reporting officers should be legal officers totally independent of the prosecution process and of the reviewing authority.

ADF Response - *Officers appointed as s.154(1)(b) reporting officers will be legal officers independent of the prosecution process and the reviewing authority.*

- 33 To assist particularly Commanding Officers, that increased formalised training and education be furnished to them before they take up their position as Commanding Officer and exercise service tribunal jurisdiction as a summary authority. Steps be taken to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them. The new Military Law Centre could play a significant ‘supportive’ role in this area of education, even awarding a ‘certificate’ on completion of a course.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation and resource issues.*

- 34 In respect of elective punishments, provision be made for the election to be in writing and for the summary authority to furnish the accused certain explanations about the election when giving him the opportunity to elect trial by DFM or court martial.

ADF Response - *This has been agreed and amendments to the relevant legislation will be developed.*

- 35 The punishment of reduction in rank should be removed as an elective punishment.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. Reduction in rank is a punishment essential to the maintenance of discipline especially at the lower rank levels and is of particular importance during operations. Consequently, it is to be retained as an elective punishment.*

- 36 In the absence of appeal rights, the range of elective punishments presently available should be reviewed.

ADF Response - *THIS RECOMMENDATION HAS NOT BEEN AGREED. Like reduction in rank, the full range of elective punishments is important in maintaining discipline especially at the lower rank levels and during operations. Consequently, in deciding to retain reduction in rank as an elective punishment, the need to review elective punishments as a whole has not been agreed.*

- 37 That provisions (probably by way of regulations) be introduced requiring that an election be in writing and further dealing with the obligations upon an officer to provide explanations to the accused when giving him the opportunity to elect.

ADF Response - *Amendments to legislation will be developed to require summary authorities to provide explanations in writing to an accused regarding the election.*

- 38 That a structured and in depth course of teaching and training in relation to the DFDA be implemented for all officers about to be appointed as commanding officers. That course should be the same irrespective of service.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation an resource issues.*

- 39 That ongoing education and instruction be given to those who act in the capacity of a summary authority.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation an resource issues.*

- 40 That sentencing statistics and guidelines in relation to summary punishments be prepared, published and made available from time to time.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

- 41 The legal principles discussed in reports of the JAG / DJAGs (and in s.154(1)(a) reports) should be the subject of reporting and dissemination to commanding officers.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

- 42 [This recommendation is identical to Recommendation 33].

- 43 That the Military Law Centre provide uniform training and education to commanding officers before such officers commence to sit as summary authorities, to ensure they are knowledgeable about their roles in the military justice system as a summary authority. The matter of certification by the Military Law Centre or some other body could be addressed.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation an resource issues.*

- 44 There is a case for providing some basic legal training and work materials to those [who] may be called upon to participate as a prosecuting or defending officer at a summary trial.

ADF Response - *It is accepted that there is a need to establish a training continuum, focuses on tri-service training for all members involved in the military justice system. A training needs analysis is to be conducted and will include in its scope, implementation an resource issues.*

- 45 That instructions be given, if necessary by statutory amendment, that any summary authority (including CO, SUPSA and SUBSA) who has been involved in the investigation or the preferring of a charge against an accused shall not hear or deal with any such charge against that accused.

ADF Response - *This will be included for study in a training needs analysis which is to be conducted.*

- 46 Absent a compelling need or legal requirement, there is no need to change the present system of reporting on commanding officers in relation to the performance of duties in maintaining and enforcing service discipline.

ADF Response - *It is agreed that no change to the present arrangements is necessary.*

- 47 There should be no reporting upon a commanding officer in respect of the performance of duties as a service tribunal in a particular case.

ADF Response - *A commanding officer's performance of duties as a service tribunal in a particular case will not be reported.*

- 48 Consideration should be given to extending the discipline officer jurisdiction (with appropriate modifications) to deal with officers holding the rank of major and below.

ADF Response - *The discipline officer scheme will be extended to apply to officers up to the rank of Captain (Army) equivalent undergoing initial training.*

