

House of Representatives, Monday 21 June 1999

COMMITTEES: Foreign Affairs, Defence and Trade Committee: Report

Dr THEOPHANOUS (Calwell)(12.31 p.m.) —On behalf of the Joint Standing Committee on Foreign Affairs, Defence and Trade, I have great pleasure in presenting the committee's report entitled *Military justice procedures in the Australian Defence Force*, together with the minutes of proceedings and evidence received by the committee.

Ordered that the report be printed.

Dr THEOPHANOUS —The Senate referred this inquiry on 25 November 1997 and, following the federal election, re-referred the matter on 10 March 1999. The committee was asked to examine the existing legislative framework and procedures for the conduct of military inquiries and ADF military processes. In addition to military inquiries and military discipline, the committee identified a further third interrelated component of the military justice system—administrative action. The report addresses each of these three quite distinct components of the military justice system. Each of these components—military inquiries, military discipline and administrative action—is expansive and the committee has not attempted a comprehensive examination of every detail of the military justice system. Rather, the committee has sought to examine the avenues for investigative and punitive action within the ADF to determine if current procedures are unfair, inappropriate or open to misuse. A sound framework of procedures, policy and legislation underpins the current military inquiry and discipline systems of the ADF. Existing arrangements have been in place for several years and have proven effective. However, in recent times a number of military inquiries and disciplinary matters conducted by the ADF have become the subject of considerable public interest. Many of these cases involved the loss of lives of service personnel and perceived injustices to members of the ADF in their dealings with the military disciplinary system.

The considerable public attention focused on such cases has included questions regarding the effectiveness and independence of the current military inquiry system. In addition, there has been considerable public support behind calls for external inquiries—or, at the very least, external reviews of inquiries—in cases involving the death of an ADF member. The systems of discipline and administrative action employed by the ADF have attracted considerably less public attention, although aspects of the Defence Force Discipline Act have been challenged on several occasions in the High Court of Australia in recent years.

The committee acknowledged the considerable changes made to the military justice system during the course of the inquiry as the ADF moved to address the recommendations of Brigadier the Hon. A.R. Abadee's 1007 report, A Study into Judicial System under the Defence Force Discipline Act, and the Ombudsman's 1998 investigation into how the ADF responds to allegations of serious incidents and offences. However, the committee was not convinced that these ADF initiated changes will fully address both the perceived and the actual independence and impartiality of the military justice system.

Independence and impartiality in the military justice system was a strong theme throughout the conduct of the inquiry. The committee was aware that in cases involving the death of an ADF member many of those involved, particularly family members of the deceased, harbour strong feelings that the military justice system lacks independence. While the inquiry received no evidence to support an allegation of a lack of independence, there is no doubt that a strong perception exists that the military justice system lacks independence and impartiality. While acknowledging the need to address issues of independence and impartiality in the military justice system, the committee had a preference to do so without impeding the workings of the ADF. To this end, the committee retained a focus on the need for the system of military

justice to function effectively across the whole spectrum of conflict in which the ADF can be expected to operate.

The committee acknowledged that the ADF has unique requirements for the administration of justice commensurate with its role in the defence of the nation. Moreover, these unique requirements exist as constraints and standards additional to the justice system that pertains to all citizens of Australia. Notwithstanding that members of the ADF voluntarily accept the imposition of an additional layer of justice when they choose to serve their country, the committee was firmly of the view that the military justice system must, so far as possible, conform with community norms and be demonstrably independent, impartial and fair.

The report tabled today contains 59 recommendations. Forty-five of these recommendations relate to the military inquiry system, seven recommendations relate to the system of military discipline and a further seven recommendations relate to the administrative action process employed by the ADF. While I do not have time to go through the key principal recommendations, I hope that the other speakers will do so. While the committee is of the view that these proposals will serve to improve the independence, impartiality and overall operation of the system, it is acknowledged that this report will be disappointing for some who saw the inquiry as an avenue of review for individual cases. (Time expired)

Mr HAWKER (Wannon)(12.37 p.m.) —In joining this tabling statement by the Joint Standing Committee on Foreign Affairs, Defence and Trade with its report entitled *Military justice procedures in the Australian Defence Force*, I too would like to say a few brief words in the short time available. The principal recommendations of the report will serve to improve the independence, impartiality, fairness and overall operation of the system. In addition, the changes proposed by the committee will address the perceived view of independence, impartiality and fairness in the system of military justice employed within the Australian Defence Force.

In arriving at this report, the committee considered, inter alia, two fundamental issues that underpin the framework of the military justice system: firstly, the requirement for military justice as a system additional to and quite distinct from the justice system that pertains to all citizens of Australia; and, secondly, who should be responsible for the enforcement of military justice. Throughout its deliberations, the committee was cognisant of the Australian Defence Force's unique requirements for the administration of justice commensurate with its role in the defence of the nation and, moreover, that the operation of the military justice system should not impede the workings of the Australian Defence Force. In short, the system of military justice must function effectively across the whole spectrum of conflict in which the Australian Defence Force can be expected to operate.

With regard to the conduct of the military justice system, the committee concluded that the current arrangements for conduct of internal inquiries meet the need of the Australian Defence Force for a rapid review of potential hazards. Moreover, the committee accepted that the factors militating against the use of an external authority to conduct a military inquiry are sufficient to justify the retention of the current practice for matters not involving the loss of life. However, in cases involving the accidental death of an ADF member, the committee was of the view that the need to demonstrate the independence of the inquiry outweighs concerns about the conduct of the inquiry by an external authority. The committee has therefore recommended that the convening of a general court of inquiry be mandatory for all inquiries into matters involving the accidental death of an Australian Defence Force member during an Australian Defence Force activity. This action will serve to remove the ADF from the investigative process and negate any issues of independence or conflict of interest.

On the issue of military discipline, the committee agreed that during deployments and on operations the ADF must have access to a discipline system that can be applied expeditiously and in such a way that service discipline is maintained, operations are not impeded and

command authority is supported. Moreover, the standard of military discipline should not vary, regardless of whether it is applied in peace or in a time of conflict. The committee concluded that the current system of military discipline, coupled with the Australian Defence Force's acceptance of most of the Abadee recommendations, provides for an independent and impartial framework. With these changes incorporated, the committee saw no compelling argument to amend the present arrangement and supported the continuation of the present system with minor amendment.

With regard to administrative action, the committee accepted that where behaviour, actions or performance falls short of the high standards of professionalism required by the Australian Defence Force, a commander needs the wherewithal to take action to prevent recurrence. The committee acknowledged that the Defence Force Discipline Act was framed to deal with breaches of discipline and that administrative action provides a suitable avenue for a commander to deal with matters of professional failure. Moreover, the formality of the system allows certain safeguards to ensure that the procedural fairness provisions of administrative law are met.

The recommendations of the Joint Standing Committee on Foreign Affairs, Defence and Trade's report on military justice procedures in the Australian Defence Force will serve to improve the independence, impartiality, fairness and overall operation of the system. Moreover, they will do so without impeding the workings of the Australian Defence Force, allowing the military justice system to function effectively across the whole spectrum of conflict in which the Australian Defence Force can be expected to operate. I would like to especially mention the contributions of Joanne Towner and particularly Michael Ward to this report. (Time expired)

Mr PRICE (Chifley)(12.42 p.m.) —I would like to acknowledge that this inquiry came about through the efforts of the Hon. Arch Bevis in the last parliament, when he was shadow minister for Defence, and the Senate, which passed the motion to provide the reference. Honourable members know that when an inquiry goes over two parliaments, it presents some difficulties. Nevertheless I trust that members will be well pleased with the report and its recommendations. I want to acknowledge the contributions of Wing Commander Paul Hislop and in particular Lieutenant Colonel Michael Ward, who were seconded from the ADF to assist with the inquiry.

The parliament and the people of Australia expect a lot from our serving men and women, and they deliver in full measure. The military justice system is integral to the effective command and administration of the Defence Force, yet it must, so far as possible, conform with community norms in peace and war. There is no doubt that the ADF has unique requirements for the administration of justice, commensurate with its role in the defence of the nation; however, the system must be demonstrably independent, impartial and fair. These three areas—independence, impartiality and fairness—and, perhaps more significantly, demonstrating the adherence to these principles, were the prominent themes of the inquiry. There is a need for the system of military justice to address both the perceived and the actual independence, impartiality and fairness of the process. The process must be seen to be free from any corrupting influence.

The committee has proposed a number of significant changes. Perhaps the most important of these proposals is that there be a mandatory general court of inquiry into matters involving the accidental death of an Australian Defence Force member during an Australian Defence Force activity. This will serve to remove the department from the investigative process, thus negating any conflict of interest and ensuring independence in the inquiry. Whilst the minister has always had this power within the Defence (Inquiry) Regulations, it has never been exercised. The committee accepted that the conduct of an inquiry by an authority external to the Defence Force will involve some costs in time, resources and perhaps capability.

However, the committee felt that the need to demonstrate the independence of the inquiry outweighs reservations regarding the conduct of the inquiry by an external authority.

The committee accepted that in most cases a board of inquiry would provide a suitable avenue to investigate major capital loss. Nevertheless, the committee believes that general courts of inquiry should not be confined to loss of life. The committee was of the view that the Department of Defence should publicly account for its decisions in discharging the recommendations of general courts of inquiry and boards of inquiry. It recommended that the Australian Defence Force should publicly account for the operation of the military justice system by the provision of an annual report to the Minister for Defence and, furthermore, that the annual report be tabled in parliament by the minister.

The committee has recommended that, following the conduct of a general court of inquiry, within the limitations of privacy and national security and at the conclusion of all resultant disciplinary and administrative action, the Minister for Defence should table in the parliament the inquiry report; the recommendations of the investigating body; details of the action to be taken to adopt the recommendations; and, where recommendations are rejected, the reasons for such rejection. The committee did not believe that the public accountability requirements for boards of inquiry should be any less than those for general courts of inquiry discharging the recommendations of the board.

The committee accepted that the post-Abadee arrangements will significantly improve the impartiality and independence of the military discipline system. While the alternative of an independent director of military prosecutions was examined in detail, the committee concluded that the option for the creation of such a body should be re-examined after the impact of the post-Abadee arrangements were effectively assessed in three years time.

The committee has also proposed some changes to the administrative action process employed within the Australian Defence Force. Perhaps of most significance, the committee recommended that the Australian Defence Force consider the implementation of a revised framework of administrative censure and formal warning that makes the process applicable to all members of the Australian Defence Force and incorporates a separation between the roles of initiating officer and decision maker. These proposals will serve to improve the independence, impartiality, fairness and overall operation of the system. In addition, these proposals will strike at the perceived view of the system of military justice employed within the Australian Defence Force. I commend the report to all honourable members. (Time expired)

Mr SPEAKER —The time allotted for statements on this report has expired. Does the member for Calwell wish to move a motion in connection with the report to enable it to be debated on a future occasion?

Dr THEOPHANOUS (Calwell)(12.47 p.m.) —Yes, Mr Speaker. I move:
That the House take note of the report.

I seek your indulgence to say something about the conduct of the inquiry.

Mr SPEAKER —It is not necessary to get my indulgence. I understand that leave has been indicated from the government, so the member for Calwell may proceed.

Dr THEOPHANOUS —by leave—The inquiry created a lot of public interest. I would like to thank all the many people who took the time to write submissions, appear before public hearings or simply make contact with the secretariat about this very important national issue. I would also like to take this opportunity to commend the work of Senator David MacGibbon, chairman of the committee, who is retiring shortly. His comprehensive knowledge of defence issues, his interest and his role as chairman of the Defence Subcommittee were crucial in the conduct of the inquiry and have raised a lot of national issues. I also acknowledge the hard work of the other members of the Defence Subcommittee in this parliament and in the 38th Parliament, especially the member for Chifley, the deputy chairman. I commend this report to

everyone in the community who is interested in these issues. I thank the other members for pointing out some of the key issues in the report. I seek leave to continue my remarks later. Leave granted; debate adjourned.