

The Evidence

Introduction

- 3.1 This chapter discusses the evidence available to the committee. It addresses the three themes that arise from the allegations, which are:
- The presence of extra-judicial procedures and punishments within 3 RAR.
 - The deficiencies within the ADF investigation and inquiry process.
 - The deficiencies within the ADF justice system.
- 3.2 The discussion of evidence provided below is focused on the issues of systemic failure. It is not an attempt to determine and fix individual guilt or innocence, and indeed, the investigation of individual cases is outside the scope of this report.

Evidence Relevant to the 3 RAR Allegations

- 3.3 As indicated in Chapter 1, there are a total of seven allegations that directly relate to incidents that are claimed to have occurred within 3 RAR. These allegations can be classified under the following headings:
- Extra-judicial discipline procedures
 - Illegal punishments (bashings and bastardisation)
 - The use of intimidation

- Complicity of key appointments
- Prevalence

Extra-judicial Discipline Procedures

- 3.4 From the testimony received, there is little doubt that incidents occurred within 3 RAR where guilt was assigned to individuals without use of formal military justice procedures. In effect, a key appointment would make a decision that a soldier had committed a misdemeanour.¹ The offences that particularly appeared to attract presumptions of guilt related to theft and drug use.² As explained in Chapter 2, these types of offences are seen to be particularly damaging as they corrode unit confidence and cohesiveness. Significant emphasis appeared to be placed on the offences by the battalion headquarters.³
- 3.5 The committee is concerned that there has been a significant series of allegations of harassment and violence in the Defence Force over the years. The events in 3 RAR, as revealed to the committee in this inquiry appeared to be of a different magnitude. There was no evidence presented to the committee to show that soldiers who had served in other army units experienced this circumvention of correct military justice procedures.⁴ While it was not within the scope of the inquiry to make a judgement about how widespread this problem might be, the Military Justice Audit being conducted by Mr Burchett QC may provide further information in this regard.
- 3.6 Its existence within 3 RAR may be partially explained as a reversion by some people in positions of authority to practices of previous decades. Although some ex-members of 3 RAR have stated that such practices have never existed in the unit,⁵ other evidence suggested they may have.⁶
- 3.7 It also appears that, within 3 RAR's more recent oral history, a time when 'rough justice' was still applied is remembered.⁷ These memories, either from personal experience or story telling, exist with some members of 3 RAR. A contributing cause to the recent behaviour may have been a decision to imitate old methods of solving problems.

1 In camera transcript, 6 October 2000. Also Exhibit No.1, p.3, paragraph 10.

2 In camera transcript, 6 October 2000. Also Exhibit No.1, p.3, paragraph 11.

3 In camera transcript, 6 October 2000.

4 In camera transcript, 6 October 2000.

5 Submission 22, Mr Bennett.

6 In camera transcript, 6 October 2000.

7 In camera transcript, 6 October 2000.

Illegal punishments (bashings and bastardisation)

- 3.8 The evidence received suggests that punishments were meted out to individuals for:
- suspicion of having committed an offence that, if proven, would be punishable under military law; and
 - for behaviour or attitudes that may have offended senior officers– for instance, speaking up for soldiers accused of a crime.
- 3.9 As already indicated a suspicion of theft or drug use could lead to an assumption of guilt. Once assumed guilty, it was clear that in extreme cases an individual would be subject to an assault. In other cases, an individual would be physically stressed in a seemingly legitimate activity. For instance, by being given physical exercises, the real intent of which appeared to be to punish.⁸
- 3.10 It appeared that some of the alleged perpetrators, when questioned about these incidents, felt that they were acting appropriately and within their authority.⁹ This suggests that the alleged perpetrators may have been acting in good faith but with ignorance of the law. Yet this position is undermined by the manner in which bashings and other forms of punishment were kept secret. It appeared that, at least on one occasion, officers in authority were intentionally deceived into thinking that due process of law was being applied.¹⁰ Attempts to hide the illegal punishment system appear to have been reinforced through a wider system of intimidation.

The Use of Intimidation

- 3.11 One of the most surprising aspects of the 3 RAR allegations has been the reluctance of soldiers to speak out about what was happening. There is no direct evidence to suggest that the battalion headquarters staff were aware of what was happening. There is evidence that the unit padre was informed of some aspects of the events, but testimony by previous unit equity officers and doctors indicates that the allegations now being made about 3 RAR were not raised with them.¹¹ This ‘wall of silence’ was

8 In camera transcript, 6 October 2000.

9 See testimonies in Exhibit 3 and In camera transcript, 6 October 2000.

10 In camera transcript, 6 October 2000.

11 In camera transcript, 6 October 2000.

maintained despite all key unit appointments having received briefings on ADF equity policy.¹²

3.12 Intimidation appeared to take a number of forms. It included:

- Threats and bullying of subordinates by key appointments in authority – including threats to affect a subordinate’s career advancement.
- The use of innuendo and character assassination as a way of discrediting and isolating an individual
- Destruction of an individual’s personal property by unknown perpetrators.¹³

3.13 To a large extent, the reluctance of individual soldiers to come forward and complain through formal channels, allowed the system of illegal punishments to perpetuate. This reluctance of individuals to report incidents appeared to have been one of three causes:

- A small number of key appointments within the chain of command condoned the system of illegal punishment.
- There was concern that where an allegation was brought to the attention of an appropriate superior, that superior would attempt to deal with the problem in-house.¹⁴
- There is a stigma, both within the military and wider society, attached to ‘dobbing’.

Complicity of Key Appointments

3.14 A small number of appointments in critical positions of authority were implicated within the system of illegal punishment. In some cases this was not through direct involvement but through turning a blind eye or simply a reluctance to probe too deeply.¹⁵ Other key appointments clearly were involved in at least inciting, and possibly carrying out, illegal punishments.

3.15 The most difficult, and still unresolved problem, relates to how far up the 3 RAR command chain acts of commission or omission by key appointments resulted in the situation that developed. No evidence was

12 *ibid.* p. 46.

13 In camera transcript, 6 October 2000.

14 In the instance being alluded to, the superior decided to talk to the alleged perpetrator rather than start formal investigative or legal process. In camera transcript, 6 October 2000, refers to the preference of keeping problems inside the unit.

15 In camera transcript, 6 October 2000.

presented to implicate personnel in authority outside of the company organisation. If anything the evidence would suggest that the Battalion Headquarters, at least during one period, was blissfully unaware of what was happening at the 'coal face'. This begs the question: Should the battalion headquarters been aware of what was happening? There is no doubt some witnesses thought so:

... so I find it difficult to believe that the CO does not know what is going on with his men and does not talk to his platoon commanders who are looking after them. If he does not, then the question needs to be raised: why doesn't he? This is his responsibility.¹⁶

- 3.16 This view on the responsibility of commanders, as previously noted, extended to ex-serving members of the battalion.¹⁷ However, the evidence on command complicity was not supported once by a statement based on personal knowledge. All suggestions that the commanding officers should have, or did, know are, in the final analysis, speculation. The committee is aware of one instance where a CO was directly informed of an incident, but decided not to act. This incident, although serious, did not relate to the mainstream of allegations concerning bashings and assault.¹⁸ Even when speculating on the knowledge that the hierarchy did have of the beatings within 3 RAR, one soldier noted that:

... They may have had a fair idea through general discussions as to what was going on but they would not know the details.¹⁹

- 3.17 In this respect the Military Police investigation focused on acts of commission, rather than omission, and therefore the issue of complicity was not addressed. Interviews were conducted by military police on suspicion of:

- Assault.
- Prejudicial behaviour.
- Failure to comply with a general order.
- Unlawful imprisonment.

- 3.18 The Chief of Army has advised the committee of his intention to initiate a thorough investigation into the collective events in 3 RAR at the time of these incidents. This investigation 'will include, but not be restricted to,

16 In camera transcript, 6 October 2000.

17 Mr J Bennett, Submission 22.

18 In camera transcript, 6 October 2000.

19 In camera transcript, 6 October 2000.

an examination of the “command climate”²⁰ at the time, and will address the issue of command responsibility. The committee is supportive of this investigation.

3.19 The committee initially had general concern that officers may have, in the past, been dealt with administratively rather than by use of the DFDA. The committee has subsequently noted the charging of at least one senior officer under the DFDA as a result of the 3 RAR investigations.

3.20 It was clear that, during one period, the Battalion Headquarters appeared keenly focused on identifying and prosecuting thieves and drug-takers. These offences appeared to assume such an importance that they simply eclipsed all others – including assault and battery. One soldier put it this way:

... the policy is very much established that it is all right to go and beat someone up and put them in hospital and scar them emotionally for life – so that is fine – and, by the way, in two years you will have a promotion again. However, it is not okay to be accused of something like theft, drug use, misuse of Army property ...²¹

Prevalence

3.21 As already indicated the committee had no evidence to indicate that the alleged incidents within 3 RAR were common within the ADF. In fact no incident of an equivalent nature has been brought to the committee’s attention despite widespread national advertising. The committee is confident in this statement because:

- Subsequent to formal advertisements, and widespread incidental media coverage, the committee received no contemporary complaints that bore a similarity to the allegations within 3 RAR.
- The committee did receive complaints about physical punishments/ bashings. However, these shared the following characteristics:
 - ⇒ They were not recent events.
 - ⇒ They involved individuals, not whole groups.
- It is unlikely that the 3 RAR situation could be occurring throughout the 50, 000 strong permanent forces, and:

20 Lieutenant General P Cosgrove, Chief of Army, Submission 50.

21 In camera transcript, 6 October 2000.

- ⇒ Verifiable complaints not be common knowledge within the community.
- ⇒ The ADF remains an operationally functional and cohesive force.

3.22 Based on the evidence available, it also appears that even within 3 RAR, the allegations centre on one area within the battalion – A Company. A number of witnesses asserted that key appointments outside of the company must have known what was going on but no direct first-hand evidence was provided. The involvement of personnel outside of the company associated with the assaults remains speculation. Despite extensive questioning of alleged victims, the committee received no evidence that the systemised use of illegal punishments involving violence existed outside of one particular company.²²

3.23 The committee, in coming to this conclusion, was mindful of Admiral Barrie’s announcement that he was going to appoint:

... a high level audit team to inquire into and report upon whether or not there exists within the ADF any evidence of a culture of systemic avoidance of due disciplinary processes. The audit will identify any irregularities in the administration of justice. It will be empowered to review existing investigations ... I am also mindful of the criticisms of the ADF investigating itself. ... I have invited a senior member of the judiciary who has had virtually no dealings with the Defence Force in the past to lead the audit team. I am pleased to advise the subcommittee that His Honour Justice Burchett ... has agreed to this role.

The conduct of an audit by the former Federal Court judge, Mr Burchett QC will, hopefully, support the committee’s conclusions. The committee welcomed the initiative.

Evidence Relevant to the ADF Inquiry Process

3.24 The deficiencies within the ADF inquiry process, pertinent to 3 RAR, relate to:

- Possible obfuscation by the Department that had the result of misleading the committee,

22 The suggestion was made to the committee by one witness that the system of illegal punishments extended to at least one other company within 3 RAR. This was not backed up by any other witness or by other evidence. In camera transcript, 6 October 2000.

- Apparent secrecy surrounding the inquiry process for two years (September 1998 – August 2000)
- The slow pace of the ADF to act when made aware of the allegations.

Obfuscation by the Department

3.25 The Department of Defence had two opportunities when it could have raised the issue of the allegations being made about 3 RAR. These opportunities were:

- During the committee's inquiry into military justice procedures in the previous Parliament - ie: anytime between November 1997 and May 1999.
- In response to a question in parliament.²³

3.26 Over the period September 1998 to April 1999 the military was actively investigating the 3 RAR allegations. On face value it would appear reasonable that the Department would have made members of the committee aware that a serious breakdown in military justice procedures was under investigation. In mitigation, however, the last public hearing attended by the Department was on 24 July 1998. In August 1998, about the time the investigations into 3 RAR were commencing, the Parliament was prorogued. It was not until March 1999 that the committee resumed the inquiry into military justice. This resumption of activity did not involve any further collection of evidence but the writing of the report. By the time the ADF had completed investigations the committee was involved in report consideration prior to tabling.

3.27 The response of the Minister Assisting the Minister for Defence to a question on the issue is less straight forward. On 12 May 1999 the Minister was asked in relation to a Holsworthy Correctional Centre:

... how many other claims of inappropriate disciplinary action (a) have been made and (b) are being investigated.²⁴

He responded:

... The only claims of inappropriate disciplinary action involve another Army unit in Holsworthy. The Military Police have been investigating these claims since September 1998.²⁵

23 House of Representatives, Hansard, 12 May 1999, p. 5321.

24 *ibid.* p. 5321.

25 *ibid.* p. 5321.

This response was less than forthcoming given that, by this time, an investigation had been completed. However, this question was not put to the Minister in the context of evidence collection for an inquiry into military justice. Had it been, the Minister may have responded with further detail. At the time he made his response the Military Police had completed their investigation and, without compromise to legal proceedings, a fuller account of the situation could have been provided to the Parliament.

- 3.28 On completion of the Military Police investigation into 3 RAR it was reasonable to assume that the findings would be reported to the responsible Minister.

Apparent Secrecy in the Inquiry Process

- 3.29 It was not until August 2000, nearly 16 months after the military police investigation into 3 RAR had been completed, that the wider public were made aware of the allegations. Given the seriousness and scope of the allegations this apparent secrecy only served to fuel suspicions that the ADF inquiry and investigative processes lack transparency. The committee compares this situation with matters being investigated by the civil police, whereby the police advise of investigations being conducted and charges laid.
- 3.30 It seems reasonable, while a matter is subject to investigation, that the amount of information provided to the public would be limited. However, once the investigation was complete, there should have been no need for secrecy about the number and type of charges that were to be laid.

The Speed of the Inquiry Process

- 3.31 There is a suggestion, but no proof, that the use of punishment beatings within 3 RAR extends back to 1996.²⁶ If this is true, it is possible, with the system of intimidation already discussed, that no one external to 3 RAR was aware of it. However, by May 1998, the issue had been raised by a mother of a soldier from 3 RAR:
- with a Minister,²⁷ and
 - through the Defence Equity telephone hotline.

²⁶ Submission 14, pp. 1-2.

²⁷ Submission 9, pp. 3-8.

- 3.32 These reports related to the treatment of an individual soldier within the battalion. An internal unit inquiry of this treatment by Captain Sheldon found that there was insufficient evidence to prove an assault had taken place. This inquiry concluded in May 1998. Subsequently, a superior headquarters to 3 RAR, the Deployable Joint Force Headquarters, also conducted an investigation.²⁸
- 3.33 The investigation concluded in September 1998, before the start of a military police investigation. It recommended that two key appointments be counselled. It could not find evidence to sustain the allegation that the soldier's charge had been 'trumped-up' to punish him. In both cases, it is possible, that the administrative investigations were unable to find witnesses to sustain some of the allegations being investigated. This was not the case during the military police investigation because, in
- ... August 1998 ... the apparent 'pattern' of behaviour came to light and a wider military police investigation commenced. This investigation started in September and led to 11 soldiers being charged. ... in July 1999 four personnel were referred to a higher authority and one charge was dealt with at unit level.²⁹
- 3.34 In early 1999 an audit of 3 RAR medical files was conducted. The audit found a number of injuries consistent with assault, and after contacting each individual one further potential victim was identified.
- 3.35 The military police investigation indicated that a 'culture of violence' existed within 3 RAR. Yet the investigation took eight months to come to this conclusion about very serious allegations. The military police investigation consists of four large A4 volumes. Sixteen individuals were investigated on suspicion of having committed an offence. Many more were interviewed in support of this investigative process.³⁰ There is no doubt that, given the seriousness of the allegations, that a quicker investigation would have been preferred.
- 3.36 But what is a reasonable time for an investigation of this nature? Lieutenant General Cosgrove explained the delay as follows:
- With hindsight, the eight month military police investigation might have been shortened by one month – that is an estimate – by knowing at the start that other allegations would be found and by using more people for the task. However, at the time the task

28 Submission 15, pp. 5-7.

29 Lieutenant General Cosgrove, Transcript, 6 October 2000, p. 17.

30 See Exhibit 1.

appeared straight forward, if serious, and the number of investigators assigned to it initially seemed appropriate.³¹

- 3.37 Another issue that must be considered when judging the 3 RAR investigation process is the relative success of the civil system. The 'clearance rate' for crime is a measure of the police forces ability to investigate an offence and bring it to charge or resolve it in some fashion. In the case of assault, approximately 20 cases in every 100 are not cleared.³² In other words, no one is charged, nor can it be determined if the allegation is false. This illustrates the difficulty experienced by police in 'running to ground' a suspected offence in which, by its nature, there have to be witnesses.

Evidence Relevant to the ADF Justice System

Introduction

- 3.38 This final section discusses the evidence for the military judicial system being:
- unwieldy,
 - subject to interference, and
 - too slow.

The Justice System is Unwieldy

- 3.39 In at least one media article, the claim was made that:

There is some sympathy within the services for the paratroopers predicament, particularly that of the senior NCO's. That they had to resort to such measures 'to get the job done' was evidence of a service wide malaise, a serving soldier says. Administrators run the Army now, hamstringing on-the-ground commanders. It was that kind of frustration That caused the breakdown in discipline in the Canadian forces, leading to a royal commission in

31 Lieutenant General Cosgrove, Transcript, 6 October 2000, p. 17.

32 Crime and Justice, p. 70. NB: This figure is derived from 1994-95 data for Australian society, excluding NSW.

1997 ... "What you have here is a failure of command: too many bureaucrats, too many lawyers, not enough commanders."³³

- 3.40 In the case of 3 RAR, no evidence was presented to suggest that SNCO's or officers find the system of military law unwieldy. As indicated in Chapter 2, the avenues for imposing discipline on a soldier are significant. But, most importantly, discipline should flow from a strong sense of professional pride, loyalty and mutual respect. In other words the operational performance of the best Australian units during war has rested on mutual respect – not on a formal system of imposed discipline intended to demand conformity.
- 3.41 This feeling is reflected in submissions to the committee. One of these submissions was from a past member of 3 RAR – both veterans of Korea. He wrote:
- ... I am writing as a very proud, though extremely concerned ex-member of 3 RAR. As a Korean Vet, 1953, I can attest to the Elite attitude of members of the Bn., long before it became a Para. Bn. ... This attitude & pride in the Bn was engendered in part by the Battalions conduct in the Battle of Kapyong ... [and] the fact the Bn. Remained in Korea as a Unit during the total time we had troops there.³⁴
- 3.42 Claims that the system is unwieldy must take into account that:
- There is no evidence to suggest that other units in the ADF are similarly driven to circumvent the existing system.
 - There is genuine surprise amongst retired war veterans, who have served in the battalion, that such behaviour could occur – or had to be resorted to.³⁵
 - The illegal punishments appeared to focus on two types of offence:
 - ⇒ suspicion of theft or drug taking, and
 - ⇒ occasions when an individual speaks out against the abuse or circumvention of the normal justice procedures.
- 3.43 The evidence for this allegation does not appear to exist. The suggestion is further undermined when a comparison is made between military and

33 Ware, M, 'Behind Closed Doors: Australia's Army covers up brutality in an elite unit – and undermines the military justice system', *Time*, 21 August 2000, pp. 53-54.

34 Mr J Bennett, Submission No. 22.

35 If veterans who have served under the immense pressures of combat did not resort to these measures there appears to be little reason for soldiers doing so during peace.

civil custodial offences. Table 3.1 compares the civil rate of imprisonment per 100,000 of the population compared to that of the three services.

Table 3.1 A Comparison of Incarceration Rates between the ADF and the Community

Community	Incarceration per 100,000
(a)	(b)
Australian Community 1994	118 ³⁶
Army	404
RAN	114
RAAF	7 ³⁷

3.44 While this comparison must be treated with some caution,³⁸ it suggests that, within the Army, the identification, trialing and punishment of offences is not experiencing any difficulty. In fact the Army enjoys an ability to achieve convictions and detentions at four times the community rate. In comparison to the RAN it is four times more likely to imprison a member for an offence.

The System is Subject to Interference by Senior Officers

3.45 The ADF acknowledges that a senior officer at one point, inappropriately interfered with the legal processing of the 3 RAR allegations. This interference was done on the basis of legal advice he had received. The interference involved a direction that a charge be moved out of 3 RAR and dealt with by another authority. This short-circuited the normal process that would require, in the first instance, the Commanding Officer of 3 RAR, to hear the charge.³⁹

3.46 The reason given for the interference appeared to be to remove any perception that the charges were being dealt with 'in-house'. This interference delayed the legal process but cannot be said to have been

36 Mukherjee, S and Graycar, A, *Crime and Justice in Australia, 1997*, 2nd Ed., Sydney, Australian Institute of Criminology, 1997, p. 86.

37 Derived from Department of Defence, 'Judge Advocate General Report for the period 1 January to 31 December 1999', AGPS, 2000. Derived from Annexes, B-3; C-3 and D-3. Based on permanent force staffing as indicated in the 1989–1999 Defence Annual Report.

38 Soldiers will receive detention for infractions of military law, which would not normally carry a custodial sentence in civil life. For example insubordination or absence without leave might attract a short term of imprisonment.

39 Lieutenant General Cosgrove, Transcript, 6 October 2000, pp. 17–18.

otherwise detrimental. Other than this incident, there was no other case of senior officer interference presented to the committee.

The System is too Slow

3.47 Lieutenant General Cosgrove conceded that the whole process has taken too long. He explained to the committee that:

It has taken some 2½ years to investigate and bring this matter to disciplinary hearings. This is too long. With hindsight the eight-month military police investigation might have been shortened by one month ... [also] with hindsight, the way in which I referred proceedings to a higher disciplinary authority delayed the process.⁴⁰

3.48 An assessment of the speed of the military justice system should at least consider the performance of the civil system. On completion of a civil police investigation, and after the laying of charges, it may take several months to obtain a court hearing. The median court delay in the NSW Local Courts was 83 days in 1999. If cases are referred on to the District or Supreme Courts the median delay, in 1999, was 360 and 507 days, respectively.⁴¹

3.49 The first hearings arising out of the military police investigation were conducted two months after the completion of the military police investigation. The last charges are expected to be dealt with by December 2001.⁴² If the period for 3 RAR's deployment to East Timor is considered, the total time for judicial procedures to run to completion will be 18 months or 540 days.

3.50 In summary, it is not clear, that the civil investigative and justice system operates with any greater speed than did the military in the case of 3 RAR. It must also be borne in mind that several characteristics of the 3 RAR system would hamper any justice or inquiry system. These factors were:

- The use of intimidation
- A general reluctance to talk or complain to proper authorities (No soldier who gave evidence to the committee used the equity officer system, or made a formal complaint.)

40 Lieutenant General Cosgrove, Transcript, 6 October 2000, p. 18.

41 Derived from the Bureau of Crime Statistics and Research, <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/local/processes>

42 Advice provided by the Department of Defence on 14 November 2000

- 3.51 However, the committee was not satisfied it had sufficient evidence to baseline the performance of the military justice system with that of the civil system. Further evidence on the performance of the civil and military systems would need to be obtained before that could be done.

Conclusion

- 3.52 From the evidence the committee is in no doubt that extra-judicial procedures and illegal punishments were employed within 3 RAR. The evidence available also suggests that the majority of other allegations surrounding the incidents within 3 RAR can only be partially supported or, in some cases, not be supported. However, all the allegations, whether supported by the evidence or not, point to systemic weaknesses within the army's system of military justice and equity.
- 3.53 These weaknesses will be discussed in Chapter 4.

