



Minority Report – Mr Robert Oakeshott MP

- 1.1 The Defence sub-committee of the Joint Committee on Foreign Affairs, Defence and Trade does not divide on partisan lines. Members have accepted that their participation on the Committee requires them to form judgments only after careful assessment of both public and confidential materials – and that this is a special responsibility.
- 1.2 Members put aside any issues of party advantage and bring their independent judgment to bear on all material issues.
- 1.3 Where possible the Joint Committee attempts to reach consensus. In the past that has resulted in unanimous conclusions on the various matters that have been the subjects of report.
- 1.4 However, in this rare instance, although not disagreeing with the Committee's report, I feel that it is important that I add to some sections of it.

Part 1: Defence Materiel Organisation – Personnel and employment issues

- 1.5 During the Defence sub-committee public hearing into the Review of the Defence Annual Report 2008-2009 (the Report) I asked several questions in relation to the action being taken by Ms Jane Wolfe, General Manager Commercial, SES band, against CEO of Defence Materiel Organisation (DMO) Dr Stephen Gumley as first respondent, Public Service Commissioner Lynelle Briggs as second respondent (now CEO of Medicare Australia), and the Commonwealth of

Australia as the third respondent in the Federal Court of Australia (FCA). The questions asked were in regard the termination of Ms Wolfe's employment, the processes involved, and the specific reference in the annual report which stated;

In March 2009, Ms Jane Wolfe's employment with the DMO ended.¹

- 1.6 The transcript of questioning between myself and Dr Gumley can be found on the Committee's website and is relevant to my final comments and recommendations to Government.²
- 1.7 At the time of the public hearing, the matter of Ms Wolfe vs Dr Gumley, Ms Briggs and the Commonwealth, was before the FCA and therefore, quite understandably, General Council Harry Dunstall was present and cautiously answered questions on Dr Gumley's behalf.
- 1.8 What he did indicate, which I believe to be of interest, was that he personally approved the use of the language in the report that stated Ms Wolfe's employment with DMO had 'ended' in 2008-2009.
- 1.9 Without having sought industrial relation or employment law advice, and now having the benefit of hindsight through a clear and exact ruling from the FCA, I am of the view the term 'ended' was inappropriate, is factually incorrect, deserves correction, and that a code of conduct inquiry is warranted into the actions of Dr Gumley and relevant, associated parties under the *Public Service Act 1999 (Cth)*, who participated in this highly questionable process of attempting to 'end' Ms Wolfe's employment.
- 1.10 The FCA ruling is also attached to the Report to emphasise that Ms Wolfe's employment has not 'ended' and indeed, certain decisions made by the CEO of DMO Dr Stephen Gumley, Ms Lynelle Briggs in her capacity at the time of Public Service Commissioner, and the Commonwealth through such agencies as the Australian Government Solicitor, have now been legally ruled upon under current public sector administrative law and have found to be without authority. My understanding is these matters as ruled by the FCA will not and have not been appealed, and therefore do have authority, exposing

1 Department of Defence, *Annual Report 2008-09*, Chapter Two
<http://www.defence.gov.au/budget/08-09/dar/vol2/ch02_01.htm> accessed at 30 June 2010.

2 *Transcript*, 30 March 2010, p. 59-65,
<http://www.aph.gov.au/house/committee/jfadt/defenceannualreport_2008_2009/hearings/Official%20Hansard%2030%20March%202010.pdf>

the decision-making process of the time, and exposing the above individuals and their agencies for poor decision-making processes.

- 1.11 Following the FCA ruling on 8th April 2010 and in light of the questions put to DMO on the 30th March 2010, I submitted further questions to the Department of Defence. They are:
- In light of the Federal Court of Australia ruling determined on the 8th April 2010 that led to the reinstatement of Ms Jane Wolfe to her previous role within the DMO, will the Department of Defence now agree that the 2008-2009 annual report is incorrect by referring to Ms Wolfe’s employment as having “ended”, and will they now be correcting the annual report to correctly reflect the truth of the matter?
 - Following evidence given by the DMO CEO Dr Stephen Gumley to the Defence sub-committee, as well as the subsequent Federal Court ruling on the Ms Wolfe matter, will a public service code of conduct inquiry be undertaken into the actions of Dr Gumley in relation to the termination of Ms Wolfe in 2008?
 - If so, when? If not, why not? And if not, what actions are being taken by the Department in relation to this matter and the decision of the Federal Court?
- 1.12 To date, the Department of Defence and DMO have not answered these questions. The fact the Department and DMO has failed to provide any answers to questions raised, particularly now the FCA has made a ruling in relation to this matter, and in light of the Department and DMO answering all other questions put to them by all other committee members on all other issues, is of grave concern.
- 1.13 The following issues remain unresolved due to a lack of transparency from this process:

The ruling of the FCA

- 1.14 This ruling leaves open many management-related questions regarding performance management processes within DMO. It also opens the question of a lack of understanding of administrative law processes from the CEO of DMO who is supposed to be one of Australia’s most senior public servants, if not its most senior (on pay/salary equivalence). And it clearly demonstrates, through the ruling, that the DMO CEO exposed himself, and therefore the Commonwealth and Minister, by not following due process, nor seemingly has a due process to adhere to.

- 1.15 At a broader level, this FCA ruling is therefore of grave concern regarding the existing culture within DMO and the Commonwealth SES Band public service, as well as having serious implications for the future of the DMO and the Commonwealth public service if left unaddressed.

Questions of timing in relation to the use, or misuse, of taxpayers' money

- 1.16 Under Part 7 of the *Financial Management and Accountability Act 1997 (Cth)* (FMA), there is an obligation that the CEO spend taxpayers money in an 'efficient, effective and ethical'³ way. These legal proceedings came at a cost of approximately \$2 million to the taxpayer in legal fees, and currently without clear evidence to suggest otherwise, there is a chronological argument that Dr Gumley and others continued spending money on a legal case they knew had no prospect of success.
- 1.17 It still remains unclear what was the exact cost of this matter (including disbursements, legal fees and cost orders and reinstatement costs for Ms Wolfe) to the tax payer and at what point were fees escalating when legal advice indicated it was a case without any prospects of success?
- 1.18 There is, based on the evidence before me, reasonable concern of a breach of s14 of the FMA for the misappropriation or improper use of public money.
- 1.19 This is of grave concern regarding the existing culture within DMO and the Commonwealth SES Band public service, as well as having serious implications for the future of DMO and the Commonwealth public service if left unaddressed.

Legal Council from AGS

- 1.20 The AGS, who represented Dr Gumley, have indicated in court documents they were providing advice as early as March 2008 in relation to Ms Wolfe's employment. This is as early as 4 months after Ms Wolfe's SES employment began.

3 *Financial Management and Accountability Act 1997 (Cth)* s44.

- 1.21 Without evidence to the contrary, this raises questions of why Dr Gumley was seeking legal advice so soon after her employment commenced, and whether any non-legal avenues were pursued prior to seeking legal advice, and why such a litigious approach to management was taken by Dr Gumley so quickly.
- 1.22 Given the early commencement of the AGS's advice, and based on court documents, this also raises the question of what advice AGS were providing to Dr Gumley, including the widely known cultural practice in the Australian public service of "performance managing" someone out of a position. This would be inappropriate legal advice from AGS to Dr Gumley, and would be inappropriate for Dr Gumley to have acted upon if provided, but based on the evidence both in the court and before the committee, no other conclusion can be drawn as to the events that saw Ms Wolfe's employment deemed 'ended'
- 1.23 Secondly, the legitimacy of the Affidavit of Mr Doug Galbraith used by the AGS was ruled hearsay by the FCA which continues to raise questions around the legitimacy of how this case was conducted by the AGS.

The Public Service Commissioner

- 1.24 The relationship between Dr Gumley and the then Public Service Commissioner Ms Lynelle Briggs is also left questioned based on the evidence before me. The reason behind why the Defence Annual Report 2008-2009 states that Ms Wolfe's employment has 'ended', is because Dr Gumley or an agent on his behalf sought from Ms Briggs a Section 34 certificate under Part 4 Division 2 The Senior Executive Service of the *Public Service Act 1999 (Cth)*.
- 1.25 For such a certificate to be issued, Ms Briggs must be confident that she has reasonable grounds to sign such a certificate. Based on the evidence before me, it looks to be a highly unusual practice that two sworn statements from former employers of up to twenty years ago were used as grounds for the certificate being signed. As the FCA ruling found, this was an incorrect decision, and therefore raises the question surrounding the material Ms Briggs used to authorise the termination certificate.
- 1.26 If such action by the Commissioner remains unaddressed we are left with the possibility that this may occur again in the future.

Ministerial Advice

- 1.27 It is imperative that the advice provided by the CEO of DMO and the Chief Audit Executive of DMO, Mr Tony Hindmarsh to the Minister be scrutinised to ensure impartial, transparent advice was provided to the Minister at all times between March 2008 and April 2010 concerning this matter.
- 1.28 On 8th April 2009 the *Canberra Times* quoted a spokeswoman for the then Defence Personnel Minister Warren Snowden saying “The Government is confident that the Public Service Commissioner [Lynelle Briggs], together with the CEO of DMO, have complied fully with their legislative responsibilities and acted with due regard to fairness, natural justice and privacy.”
- 1.29 The ruling of the FCA has indicated the both Dr Gumley and Ms Briggs did not act in this way and I therefore question the advice provided to the Minister at the time.
- 1.30 I am of the view that my questions that have been asked of the DMO that still remain unanswered is a breach of the Committee process and a matter for the full Joint Parliamentary Standing Committee of Foreign Affairs, Defence and Trade to consider separately.
- 1.31 The following documents are appended to this report:
- Appendix C: Federal Court ruling
 - Appendix D: Questions on notice of relevance and response from Ludwig of relevance.
- 1.32 Therefore, in light of all the above, I recommend that the Defence Department remove the reference to Ms Wolfe’s employment having ‘ended’ from their Annual Report.

Recommendation 1

I recommend that that the Defence Department remove the reference to Ms Wolfe’s employment having ‘ended’ from their Annual Report.

- 1.33 Further, in light of the above, and the FCA ruling that was delivered mid-way through the committee review of the Defence Annual Report 2008-2009, that a Code of Conduct inquiry should be held into the actions of Dr Gumley and any other party who failed to act in accordance with the *Public Service Act* and the *Financial Management and Accountability Act* in relation to this very costly, and very avoidable matter.

Recommendation 2

I recommend that a Code of Conduct inquiry be held into the action of Dr Stephen Gumley and any other party who failed to act in accordance with the *Public Service Act* and the *Financial Management and Accountability Act* in relation to this very costly, and very avoidable matter of the termination of Ms Jane Wolfe.

Part 2: Afghanistan

- 1.34 Neither the Prime Minister nor the Leader of the Opposition speaks for all members of the House of Representatives on the issue of Afghanistan, and it is for this reason in light of the 2008-2009 Defence Annual Report review, that I take the opportunity to put on the record my views.
- 1.35 It is now nine years since the Afghanistan War began in 2001, and I acknowledge much of the combat has been intense and comparable with the worst combat situations ever experienced in any war. Coalition forces on the ground, including Australian forces, have done an incredible job in surviving in what has been difficult combat in difficult terrain. They are to be congratulated for their strategic and operational combat work to date. Sadly, lives have been lost, and out of respect for those lives lost and for the existing troops on the ground, Australia needs a more explicit strategy on its mission in Afghanistan.
- 1.36 As a member of the Australian Parliament, the focus and obligation must be on the broader policy of Australian involvement. The broader policy questions include:
- After nine years, what exactly is our mission in Afghanistan?
 - In the interests of Afghanistan and Australia's sovereignty as nation-states, and with safety as a priority for Australian forces, when is the most appropriate exit point, and how do we reach this point as quickly and efficiently as possible?
- 1.37 According to language from the Chief of Defence Force (CDF), Ministers and others, our mission today seems to be focused on the democratisation of Afghanistan. This is a noble mission statement, so long as the expectation of the type of democracy within Afghanistan is not to be a mirror of democracies such as Australia's which has a long history of liberalism and an understanding by most within the

country of the rule of law and a general understanding of structures and institutions.

- 1.38 Democracy within Afghanistan will have to be different, and the Australian mission needs to both acknowledge this, and accept a different form of democracy as an end goal for any sort of success in an Afghan context. As Russian Lieutenant-General Ruslan Aushev, highly decorated for his nearly five years in Afghanistan during the Russian invasion from 1979 to 1989, has warned Coalition forces through his interviews with the British *Sunday Times Magazine*, the current occupation will be *“a doomed attempt to impose Western institutions on a country steeped in feudalism.”*
- 1.39 If a different type of democracy is accepted by Australia and the Coalition forces as an outcome, then I disagree that this is a doomed attempt at democracy. But Australia and the Coalition must be “eyes wide open” that feudalism, clan-based culture, and regional and religious diversity are all known parts of Afghan life and culture, and therefore accepting a vastly different democracy structure than our own is the only outcome we can realistically expect.
- 1.40 The reference to a key Russian military lieutenant-general is not done lightly. I refer to Mark Franchetti’s *“Unlearned lessons from Afghanistan”*,⁴ where Russian and British military leaders are brought together, and through discussion, identify the fact that most tactics currently being used by the Taliban are resembling those used by the Mujahadin against the Soviets throughout the eighties. Indeed, through reading of books such as Mullah Zaeff’s *“My Life in the Taliban”*, it is easy to see why this is, as the Taliban culture grew from Soviet invasion and departure, and the success and then subsequent failure of the Mujahadin to move from defenders of their land to democratic rulers of their land. A void was arguably filled, rightly or wrongly, by the Taliban in Afghan civil and political society following the Russian departure due largely to the inability of the Mujahidin to move into leadership within Afghanistan following their ten years of bitter and costly struggle with the Russian forces.
- 1.41 The conversations between Brigadier Ed Butler, the original mastermind of Britain’s strategy to fight the Taliban in the southern province of Helmand, and Lieut-General Aushev in the Franchetti article, is therefore an important comparison for policy makers to reflect on and holds many a cautionary tale for involvement as well as proposing a sensible strategic way forward for consideration.
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4 Mark Franchetti, ‘Unlearned Lessons from Afghanistan’, *Sunday Times*, article reprinted in *Weekend Australian* 9 January 2010.

1.42 Amongst these conversations, considerations for Australian policy makers include:

- Supporting one element of Afghan society against another was and is a mistake. Like it or not, the Taliban as a people are part of the Afghan population. There is an element of terror amongst them, but it is wrong to assume most Afghans are opposed to the Taliban and want to get rid of them, as can be demonstrated by the way they are fed and harboured by the locals.
- Most Soviet veterans now view the 1979 invasion as ill-judged. At the height of the conflict there were 120,000 Soviet troops in Afghanistan, nearly the equivalent of present numbers of Coalition forces. About 15,000 Soviets and 1.3 million Afghans were killed from 1979-89.
- Importantly, the Mujahidin could never defeat the Russians in military terms, but the Russians could never keep control of the areas seized, a problem with which the current Coalition has become painfully familiar, and a problem that will remain after Coalition forces have departed.
- Importantly, through the conversations between these two distinguished military strategists, both with an intimate knowledge of Afghanistan, neither comprehends a military solution. Aushev is adamant that any troop increase like 40,000 is doomed to fail, saying “You’d need a million to control it, and you’d still have terrorist attacks”.
- Nation-building alone has been identified as not enough. The Russians built roads, factories, hospitals and schools and trained the Afghan elites, but this is over-shadowed by the fundamental mistake made by both the Russians and the Coalition of getting bogged down in the pursuit of unattainable goals. The Russians sent in troops to stage a coup and stabilise the situation but then sought to ‘sovietise’ Afghan society. By comparison, the Coalition wanted to remove Osama bin Laden and the Taliban, but is now trying to ‘democratise’ the country. As Aushev says “now, you (the Coalition) are trying to stage western-style elections in a country where most people can’t read. You dispersed the Taliban and had some local support. That’s when you should have gone home, leaving the Afghans in charge”.

1.43 And the key strategic considerations include;

- Afghanistan should be ruled by a council made up of respected tribal elders and ethnic leaders.

- The Karzai Government should take responsibility for the country.
- The President of the United States should state his plan for achieving his goals and be given a specific time to make progress. Australia should not be afraid to take a position of holding the Coalition forces, and the US leadership in particular, to account on this issue of an explicit progress-based timeframe.
- The Coalition and Australian forces in particular, must help build a strong Afghan army, police and intelligence agency capable of tackling the security problems the country will inevitably face whenever the Coalition departs.
- The Coalition must focus on a long-term program to develop Afghanistan's economy, through direct investment and aid, and to concentrate on generating income for local communities. Engagement with tribal elders on this point is an important starting point for a more secure nation-state.
- And finally, and the most difficult "pill" for us all to swallow after nine years in Afghanistan, is that no viable political solution can fail to include the Taliban, even if they insist on imposing Sharia law in areas where they are strongest. As Aushev finally points out; "it's the same law used in Saudi Arabia but you (the Coalition) are not seeking to impose democratic elections there".
- Therefore, it is hard to form a view different from Aushev and Butler on the above strategy through and out of this war for Australia.

1.44 I recommend that both these policy and strategy options be deeply considered by Government, and done so with recognition that the most 'controversial' of these is the inclusion of the Taliban in discussions about the future of Afghanistan as a democratic country.

Recommendation 3

I recommend that the policy and strategy options contained in my minority report at paragraphs 1.43 and 1.44 of my minority report be deeply considered by Government, and done so with recognition that the most ‘controversial’ of these is the inclusion of the Taliban in discussions about the future of Afghanistan as a democratic country.

**Mr Robert Oakeshott MP
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