

Report into the effectiveness of Australia's military justice system

Summary of key issues

On 30 October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The Committee received 71 public submissions, 63 confidential submissions, and many supplementary submissions. It held eleven public hearings and seven *in-camera* hearings.

The evidence before the Committee ranged across many aspects of the military justice system and covered both disciplinary and administrative processes. This preface contains a summary of the key aspects of the report.

Australia's military justice system

Despite several attempts to reform the military justice system, Australian Defence Force (ADF) personnel continue to operate under a system that, for too many, is seemingly incapable of effectively addressing its own weaknesses. This inquiry has received evidence detailing flawed investigations, prosecutions, tribunal structures and administrative procedures.

A decade of rolling inquiries has not met with the broad-based change required to protect the rights of Service personnel. The committee considers that major change is required to ensure independence and impartiality in the military justice system and believes it is time to consider another approach to military justice.

The Disciplinary System

After extensive consideration and significant evidence, the committee considers that the ADF has proven itself manifestly incapable of adequately performing its investigatory function.

Evidence from those subject to investigation and prosecution under the military justice system, personnel with decades of experience in the military police, and the ADF-commissioned Ernst & Young Report highlight fundamental shortcomings. These include inadequately trained investigators, equipment shortages, outdated manuals, low morale, inability to attract and retain high quality personnel, inordinate delays and inadequate resourcing. Service police members describe an organization in crisis, complaining of poor morale, being overworked and under-resourced, loss of confidence, lack of direction and a sense of confusion about their role and purpose.

The committee considers that all criminal activity should be referred to civilian authorities for investigation and prosecution. Outsourcing criminal investigations in peacetime will allow Service police to concentrate on their key military functions in support of the forces in the field and focus their resources on training and developing

their core business. On overseas operations, criminal activity should be investigated by the Australian Federal Police. The military police should only act where civilian authorities decline to do so. Where this happens, the committee has commented on the need for a radical improvement to Service police training and resourcing

The committee has also examined disciplinary tribunals. Evidence to the committee cast considerable doubt over the impartiality of current structures, and argued that Service personnel's rights to access fair and independent tribunals are under threat. The Special Air Service soldier's case perhaps most comprehensively illustrates the inherent flaws in both investigation and tribunal processes. His experiences, however, were echoed by many submitters to this inquiry. It is apparent that Australia's disciplinary system is not striking the right balance between the needs of a functional Defence Force and Service members' rights, to the detriment of both.

It also considers that a well-resourced, statutorily independent Director of Military Prosecutions is a vital element of an impartial, rigorous and fair military justice system. Until the promised legislation is passed, decisions to initiate prosecutions may not be seen to be impartial, the Director of Military Prosecutions is not independent and, fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.

The committee considers that establishing an independent Permanent Military Court, staffed by independently appointed judges possessing extensive civilian and military experience, would extend and protect a Service member's inherent rights and freedoms, leading to impartial, rigorous and fair outcomes.

The committee considers that reform is also needed to impart greater independence and impartiality into summary proceedings. Summary proceedings affect the highest proportion of military personnel. The current system for prosecuting summary offences, however, suffers from a greater lack of independence than courts martial and Defence Force Magistrate processes. The committee therefore recommends an expansion of the right to elect trial by court martial before the permanent military court, and the introduction of the right to appeal summary decisions before the independent permanent military court.

The inadequacies of the disciplinary process have important consequences for the mental health and well-being of service members, their families and friends. Evidence to the committee illustrates that the stresses placed on individuals under investigation in many cases appear to have had longer term effects, including loss of confidence, loss of employment, suicidal thoughts, attempted and actual suicide. These effects are unacceptable.

The Administrative system

The committee also identified serious problems with the administrative component of the military justice system.

Witnesses appearing before this committee who have been the victims of abuse or are relatives of people who have suffered ill-treatment recount their unwillingness to report wrongdoing. In some instances, worried and sometimes frightened parents felt that they had no other option but to contact the ADF directly about their concerns of mistreatment. They did not take this step lightly and, in some instances, even this significant step was still not enough to put a stop to mistreatment or for the ADF to provide the necessary support for the ADF member struggling to cope in the military environment. Some of these ADF members suffered severe psychological breakdowns and in the most extreme cases took their lives.

The very fact that two young soldiers at Singleton were not prepared to pursue their right to make a complaint about cruel and abusive treatment, and that the wrongdoing came to light only through the determined efforts of their parents, speaks volumes about the inadequacies of the administrative system. They were not alone in their experiences. This failure to expose such abuse means the system stumbles at its most elementary stage—the reporting of wrongdoing.

The committee also found the next stage in the administrative system—investigations—seriously flawed. There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.

Conflict of interest and the lack of independence of the investigator and the decision-maker was one of the most corrosive influences eroding the principles of natural justice and one of the most commonly cited concerns. Many witnesses called for an independent adjudicator so that a neutral and unbiased investigation could take place free from contamination by self-interest or third party influence.

The appeal and review processes underpin accountability and are an essential guarantee against injustice. Yet, evidence clearly showed that the problems evident in administrative inquiries flow into the review processes—lapses in procedural fairness, poorly conducted investigations, conflicts of interest and inordinate delays. In other words, the current review and appeal processes did not remedy the shortcomings in administrative inquiries but rather perpetuated them.

A number of witnesses to this inquiry attributed the onset or aggravation of health problems, particularly psychological, to the difficulties they encountered with the military justice system. Others spoke of a work place where safe and responsible work

practices were not always promoted and which, in some instances, placed the physical or psychological well-being of ADF personnel at risk.

The committee has made a number of recommendations but the key one is designed to establish a statutorily independent grievance and complaint review body.

This initiative is intended to remove from the system the main negative factors that presently undermine its integrity and credibility. It hopes to encourage ADF members to report wrongdoing or to make a complaint. It will enable those who feel unable to pursue a matter through the chain of command to seek redress through an independent and impartial body. Furthermore, this independent review body will take on the important oversight role to ensure that investigators are better trained, that inquiries observe the principles of procedural fairness, and that delays are kept to a minimum. It will be in a better position to take account of the needs and well-being of those caught up in the military justice system.

Overall, the recommendations are designed to put in place a justice system that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable for all ADF personnel.

The committee made the following recommendations which are divided into two parts covering the disciplinary system and administrative system. The two parts are further divided into major recommendations and other recommendations. The major recommendations are intended to make comprehensive reforms of the military justice system.

Recommendations

The committee made a number of major recommendations designed to restructure Australia's military justice system giving particular emphasis to ensuring the objectivity and independence of disciplinary processes and tribunals and administrative investigations and decision making. It has also made a number of additional recommendations intended to improve other aspects of the military justice system concerned mainly with raising the standards of investigations and decision making taken in the chain of command.

The discipline system

The major disciplinary recommendations provide for the referral of all civilian equivalent and Jervis Bay Territory Offences to the civilian authorities. The additional recommendations provide for the reform of current structures, in order to protect service personnel's rights in the event that the civilian authorities refer criminal activity back to the military for prosecution. The additional recommendations cover the prosecution, defence and adjudication functions, recommending the creation of a Director of Military Prosecutions, Director of Defence Counsel Service and a new tribunal system. **All recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.**

Major recommendations

Recommendation 1

3.119 The committee recommends that all suspected criminal activity in Australia be referred to the appropriate State/Territory civilian police for investigation and prosecution before the civilian courts.

Recommendation 2

3.121 The committee recommends that the investigation of all suspected criminal activity committed outside Australia be conducted by the Australian Federal Police.

Additional recommendations

Recommendation 3

3.124 The committee recommends that Service police should only investigate a suspected offence in the first instance where there is no equivalent offence in the civilian criminal law.

Recommendation 4

3.125 The committee recommends that, where the civilian police do not pursue a matter, current arrangements for referral back to the service police should be retained. The service police should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

Recommendation 5

3.130 The committee recommends that the ADF increase the capacity of the Service police to perform their investigative function by:

- Fully implementing the recommendations contained in the Ernst & Young Report;
- Encouraging military personnel secondments and exchanges with civilian police authorities;
- Undertaking a reserve recruitment drive to attract civilian police into the Defence Forces;
- Increasing participation in civilian investigative training courses; and
- Designing clearer career paths and development goals for military police personnel

Recommendation 6

3.134 The committee recommends that the ADF conduct a tri-service audit of current military police staffing, equipment, training and resources to determine the current capacity of the criminal investigations services. This audit should be

conducted in conjunction with a scoping exercise to examine the benefit of creating a tri-service criminal investigation unit.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

Recommendation 18

5.94 The committee recommends the Government amend the DFDA to create a Permanent Military Court capable of trying offences under the DFDA currently tried at the Court Martial or Defence Force Magistrate Level.

Recommendation 19

5.95 The Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality.

- Judges should be appointed by the Governor-General in Council;
- Judges should have tenure until retirement age.

Recommendation 20

5.97 The committee recommends that Judges appointed to the Permanent Military Court should be required to have a minimum of five years recent experience in civilian courts at the time of appointment.

Recommendation 21

5.100 The committee recommends that the bench of the Permanent Military Court include judges whose experience combines both civilian legal and military practice.

Recommendation 22

5.104 The committee recommends the introduction of a right to elect trial by court martial before the Permanent Military Court for summary offences.

Recommendation 23

5.106 The committee recommends the introduction of a right of appeal from summary authorities to the Permanent Military Court.

The administrative system

This report has also identified serious problems with the administrative component of the military justice system. The problems emerge at the very earliest stage of reporting a complaint or lodging a grievance and carry through into the final stages of review or appeal. The problems are not new—they have dogged the system for many years—nor are they confined to specific ranks or areas of the Forces. Young recruits and senior officers, female and male members across the three services engaged in the full range of military activities have given evidence before the committee raising their concerns about the military justice system.

The committee accepts that, on face value, there is 'a system of internal checks and balances, of review and counter review'. The overall lack of rigour to adhere to the rules, regulations and written guidelines, the inadequate training of investigators, the potential and real conflicts of interest, the failure to protect the most basic rights of those caught up in the system and the inordinate delays in the system rob it of its very integrity. The committee believes that measures must be taken to build greater confidence in the system and most importantly to combat the perception that the system is corrupted by its lack of independence. The committee is recommending a major restructuring of the administrative system, in particular the establishment of a statutorily independent grievance review board.

Major recommendations

Recommendation 29

11.67 The committee makes the following recommendations—

- a) The committee recommends that:
- the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
 - the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
 - the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
 - the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
 - all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
 - the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;

- the CDF be required to give a written response to ADFARB findings/recommendations;
 - if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
 - the ADFARB be required to make an annual report to Parliament.
- b) The committee recommends that this report
- contain information that will allow effective scrutiny of the performance of the ADFARB;
 - provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
 - comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.
- c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:
- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
 - where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.
- d) The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.
- e) The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:
- the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers

necessary to the full investigation and consideration of matters before it; and

- although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.
- f) The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:
- improving the training of investigating officers;
 - maintaining a register of investigating officers, and
 - developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.
- g) To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:
- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
 - the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
 - the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.
- h) The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Recommendation 34

12.120 The committee recommends that:

- all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;
- the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);
- the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;

- the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and
- the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.

Additional recommendations

Recommendation 24

7.98 In line with Australian Standard AS 8004–203, Whistleblower Protection Programs for Entities, the committee recommends that:

- the ADF's program designed to protect those reporting wrongdoing from reprisals be reviewed regularly to ensure its effectiveness; and
- there be appropriate reporting on the operation of the ADF's program dealing with the reporting of wrongdoing against documented performance standards (see following recommendation).¹

Recommendation 25

7.103 The committee recommends that, in its Annual Report, the Department of Defence include a separate and discrete section on matters dealing with the reporting of wrongdoing in the ADF. This section to provide statistics on such reporting including a discussion on the possible under reporting of unacceptable behaviour. The purpose is to provide the public, members of the ADF and parliamentarians with sufficient information to obtain an accurate appreciation of the effectiveness of the reporting system in the ADF.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the

1 Standards Australia, Australian Standard AS 8004–2003, paras 2.4.3 and 2.4.4.

complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.

- A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.
- The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.
- The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.

Recommendation 30

11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

12.45 Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.

Recommendation 35

13.19 Building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the

committee recommends that the ADF commission a similar review of its disciplinary and administrative systems.

Recommendation 36

13.27 The committee recommends that the committee's proposal for a review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy.

Recommendation 37

13.29 The committee recommends that the ADF submit an annual report to the Parliament outlining (but not limited to):

- (a) The implementation and effectiveness of reforms to the military justice system, either in light of the recommendations of this report or via other initiatives.
- (b) The workload and effectiveness of various bodies within the military justice system, such as but not limited to;
 - Director of Military Prosecutions
 - Inspector General of the ADF
 - The Service Military Police Branches
 - RMJ/CJA
 - Head of Trial Counsel
 - Head of ADR.

Recommendation 38

14.46 To ensure that the further development and implementation of measures designed to improve the care and control and rights of minors in the cadets are consistent with the highest standards, the committee suggests that the ADF commission an expert in the human rights of children to monitor and advise the ADF on its training and education programs dealing with cadets.

Recommendation 39

14.62 The committee recommends that the ADF take steps immediately to draft and make regulations dealing with the Australian Defence Force Cadets to ensure that the rights and responsibilities of Defence and cadet staff are clearly defined.

Recommendation 40

14.63 The committee recommends that further resources be allocated to the Australian Defence Force Cadets to provide for an increased number of full-time, fully remunerated administrative positions across all three cadet organisations. These positions could provide a combination of coordinated administrative and complaint handling support.