SENATE INQUIRY

INTO

THE EFFECTIVENESS OF

THE MILITARY JUSTICE SYSTEM

ISSUES PAPER

Military Justice is to Justice as Military Music is to Music[1]

1. This famous description of military justice attributed to Clemenceau should, of course, be considered in the context of his contemporary experience of the *Dreyfus* affair and the horrors of the First World War. However, the sentiment has continued to resonate over time[2] and the quality and application of military justice continues to be a matter of controversy, at least in the Western world.

2. The USA[3], Canada[4], the United Kingdom[5] and other European nations[6] as well as Australia[7], have throughout the past twenty years seen numerous court challenges to the legal validity of their respective military justice systems.

3. Several of these challenges have been successful and resulted in substantial legislative reform, particularly in Canada and the UK.

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1 Georges Clemenceau, World War One Premier of France
2 Professor Alan Dershowitz, *Assault on Liberty,* The Village Voice 21 November 2001
3 Weiss v US (1994) 510 US 1
4 R v Genereux (1992) 88 DLR 110
5 Grieves v United Kingdom (57067/00) [2003] ECHR 683 (16 December 2003)
6 See the Dutch, Turkish and Romanian cases cited by the European Court of Human Rights in Cooper v United Kingdom (48843/99) [2003] ECHR 681 (16 December 2003)
7 R v Tyler; ex parte Foley (1993-1994) 181 CLR 18

4. The trilogy of High Court challenges to the military justice system in Australia[8] achieved little success in terms of fundamentally changing the system.

5. However, the issues raised in the court challenges and other concerns voiced in the community in recent times, have resulted in several significant parliamentary, coronial and quasi-judicial inquiries into matters related to the military justice system in Australia, including:

- the 2002-2003 West Australian Coroner's investigation of the HMAS *Westralia* fire;
- the 2001 Burchett QC *Inquiry into Military Justice in the Australian Defence Force* (ADF);
- the 2001 Joint Standing Committee on Foreign Affairs and Trade (JSCFADT) *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* inquiry;
- the 1999 JSCFADT *Military Justice Procedures in the ADF* inquiry;
- the 1998 Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*; and
- the 1997 Abadee *Study into the Judicial System under the Defence Force Discipline Act* (DFDA), which Justice Abadee began in 1995.

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8 Re Tracey; ex parte Ryan (1989) 166 CLR 518; Re Nolan; ex parte Young (1991); R v Tyler op. cit

6. Each of these inquiries has identified, to a greater or lesser degree, shortcomings in the military justice system and its processes. Most of these inquiries made substantial recommendations for change in areas of legislation, policy and procedure. Many of the recommended changes, such as the establishment of an Inspector General of the ADF (IGADF), have been implemented. Some of the recommendations, such as the convening of a General Court of Inquiry into any ADF death, have not been implemented and a few of the recommendations, such as the establishment of a statutorily independent Director of Military Prosecutions (DMP), remain in limbo[9].

7. In parallel with this current Senate Committee inquiry, the Commonwealth Ombudsman is undertaking an *Own Motion Review of Matters of Administration Relating to Defence's Dealings with People Under the Age of 18 years*, which is yet to be completed.

8. Against this background of almost ten years of rolling inquiries into the military justice system, the Chief of the Defence Force (CDF) recently expressed his view that "The military justice system is sound, even if it has sometimes not been applied as well as we would like…I have every confidence that on the whole the military justice system is effective and serves the interests of the nation and of the Defence Force and its people"[10].

9. Notwithstanding this confident assertion about the effectiveness of the present system, the Senate Committee has received a significant volume of submissions describing a litany of systemic flaws in both law and policy under the current military justice system.

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9 Public submission P16 General P. Cosgrove para 2.83

10 Proof Committee Hansard, 1 March 2004, FAD&T 13

10. These various submissions, although canvassing a wide range of personal circumstances, contain a number of recurring themes which echo the complaints made in previous inquiries. Despite the six inquiries in the last ten years and the subsequent reforms described by CDF and the Service Chiefs[11], certain types of complaint continue to be made.

11. Mr. Burchett QC in his report referred to "...a small number of members and ex-members who presented lengthy submissions pressing complaints that had often been dealt with years ago. Many of the complainants had settled down to a fixed state of indiscriminate suspicion toward any person connected with the military"[12]. He also referred to "the problem of the "Whistleblower" ...complainants have a tendency to feel that they must *prove* the matters raised...That feeling transforms them into zealots...likely to be affronted by any finding that does not amount to total condemnation of the conduct reported".[13]

12. Those remarks by Mr Burchett might be construed as being somewhat dismissive of many of his complainants and the merits of their claims. This was certainly the interpretation placed upon his remarks by several of the persons who subsequently made submissions to the present inquiry.

13. Mr Burchett's comments were made in July 2001. Since then there has been no shortage of successors to those earlier complainants and "Whistleblowers". Numerous complaints were made to this inquiry about more recent events including suicides, major drug scandals, abuses of power in training schools and cadet units, flawed prosecutions and failed investigations.

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11 P16 op.cit

12 Burchett op. cit para 55.

13 Ibid para 57.

14. What is striking about the submissions is the variety of background and experience in their demographic. The complainants range from 15 year old female cadets to 50 year old male two-star general equivalents and include every single rank level in between those two extremes. They include serving and ex-serving personnel, general service and specialist officers and other ranks, legal officers and health professionals, police and convicted persons, civilian Defence employees and Equity officers, mental health and social workers, community and returned service groups and, most poignant of all, the next of kin of deceased members.

15. The Committee's reference is to inquire into "the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures" and "the handling by the ADF of" a variety of specific matters.

16. It is beyond the remit of the Committee to determine the veracity or otherwise of each and every claim, or to pursue individual remedies for all of the complainants. However, it is apparent to the Committee that in some areas of the military justice system, regardless of the accuracy of individual complaints, there is at least some degree of substance which allows the perception of non-effectiveness.

17. There are two streams in the military justice system, disciplinary action and administrative action[14]. This paper attempts to identify the principal issues raised by the submissions in respect of each of these streams, with particular reference to the recurring themes and, where possible, to suggest models and/or methods of change as a vehicle to stimulate debate for future reform.

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14 P16 op.cit 2.13

DISCIPLINARY ACTION

18. The discipline related issues and recurring themes raised in this inquiry include:

- Inordinate delay in investigation of alleged offences – in some cases investigations have gone on for several years
- Poor quality investigation of alleged offences – such as inappropriate questioning of civilian family members, failure to check easily obtainable exculpatory evidence, failure to liaise closely with civilian agencies
- Lack of independence in the investigation of alleged offences
- Failure to obtain and/or act on Australian Federal Police (AFP) and DPP advice
- Poor quality prosecution of alleged offences
- Inordinate delay in the decision to prosecute
- Lack of independence in the decision to prosecute
- Inordinate delay in the trial process
- Inordinate delay in the review of trial process
- Lack of independence in the trial process
- Lack of impartiality in the trial process

19. Complaints about disciplinary action and procedures were relatively few in number but they raised matters of very serious concern. CDF said, "We have got it wrong from time to time in the ADF but this does not make the entire system wrong or ineffective or our people chronically negligent"[15]. Two of the matters, in the past year, that ADF got wrong, it got spectacularly wrong. The degree of error and the ensuing damage caused, calls into question the validity of the system.

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15 Hansard op. cit FAD&T 10

20. In one case, an inept investigation and a flawed prosecution of a decorated officer for what amounted to allegations of war crimes, followed by an improper media statement on the trial and then the inappropriate initiation of adverse administrative action, eventually led to a public apology to the officer by the CDF and Chief of Army (CA). The officer told this Committee that other, more junior members may not have had the resources to fight against these injustices, as he had been able to do and could have been crushed by this system.

21. In another case, a field rank officer was prosecuted some seven years after the date of the alleged offence, on charges which the Federal Court later held should not have been preferred because the relevant service offences were time barred. At trial the Defence Force Magistrate (DFM) referred to this obvious delay, following the plea of guilty and recorded a conviction but without punishment. The submission from this officer's wife vividly describes the damage to his family and him from this protracted process. The costs to the public purse of the lengthy investigation and protracted prosecution and the multiple appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) and Federal Court are substantial.

22. These submissions and others, described extraordinary delays in the investigation of alleged offences, the failure of investigators to pursue exculpatory evidence, the failure of investigators to disclose relevant material to the accused, the failure of investigators and commanders to advise the accused of allegations at the appropriate time, the failure of investigators and prosecutors (legal officers) to obtain and/or act on specialist advice, the failure of prosecutors (legal officers) to adequately weigh and assess witnesses evidence.

Criminal Investigations

23. Such claims are not new or without substance. Three years ago Burchett QC wrote "Many of the problems the subject of submissions to the Inquiry had a strong link to a flawed investigation...With regard to Service Police investigations, complaints were commonly about the time taken"[16]. Four years ago, General Cosgrove told the *Rough Justice?* Inquiry that "It has taken some 21/2 years to investigate and bring this matter to disciplinary hearings. This is too long"[17]. In 2003 CA "commissioned external consultants Ernst and Young to conduct an independent study of the military police capability to evaluate their work and recommend improvements..."[18]. The Senate Committee has requested but has not yet received a copy of the Ernst and Young report. CA has not published the report or its recommendations.

24. The discipline process reaches its culmination in the trial of charges before a Service Tribunal. The Service Police investigative function is obviously critical to the effectiveness of the military justice system. As in the civilian environment, an efficient and effective police force is the cornerstone of a sound justice system. In many ways the present status of the Service Police is

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16 Burchett op.cit paras 191-192
17 JSCDFA&T Rough Justice Report para 3.47
18 Hansard op.cit FAD&T 32

a metaphor for the entire military justice system. The Burchett report and the CA's reference to Ernst and Young show that the organization is dysfunctional. This Committee has received submissions from Service Police members which describe an organization in crisis. Members complain of poor morale, of being over-worked and under-resourced, of loss of confidence, lack of direction and a sense of confusion about their role and purpose. It is time to consider another approach to military justice.

25. Not long ago, the ADF and Army in particular, was a totally self supporting entity, capable of being packed off to foreign shores where it could and did support and administer itself. It had its own Survey Corps, its own Education Corps, its own Pay Corps and its own Catering Corps and performed numerous other logistic functions from its own personnel resources. There were many reasons for this not least of which were the tyranny of distance and the complete absence of alternatives sources of support.

26. However, the modern ADF and the battlefields and operational theatres are very different. Civilian management principles of 'Core Business' and 'Outsourcing' did not pass by the military. Civilian contractors are everywhere, including Iraq and have played a significant role in most of the recent ADF operational deployments. It is time to consider the role of a criminal law system in the "Core Business" of the ADF and the appropriateness of "Outsourcing" what is essentially a duplication of an existing civilian system which has much greater expertise in the area.

27. This outsourcing action would allow the Service Police to concentrate on their key military functions in support of the forces in the field. In peace-time Australia they would refer all criminal activity to their civilian counterparts and focus their resources on training and developing their core business. Close liaison could be maintained with their State counterparts and the AFP in particular. Recruitment of Reservists from these organisations should be

encouraged. The AFP has been a conspicuous presence in many recent operational theatres. The high level forensic policing skills that the AFP possesses were evident to the world in the aftermath of the Bali bombing and were also used to great effect in the investigation of atrocities in East Timor and the Balkans. When overseas and on active service, these and other criminal law functions could readily be "outsourced" to the AFP.

28. Few would argue with the idea that the ADF needs to maintain its own disciplinary system. However, that may not extend to operating an entire criminal system in duplication of the civilian environment. Practical considerations and harsh reality call into question the continued maintenance out of the public purse of a small and under-skilled criminal investigation service. It is unlikely that the Ernst and Young study will find some way to resurrect this function without spending more public money. The question has to be asked: Why not keep the money and spend it on other ADF 'core business' requirements, relieve the commanders of having to decide which crimes they deal with and which they cannot and simply refer all suspected criminal activity to the civilian specialists located a few kilometres past the barracks gate?

Prosecutions and Trials

29. With respect to the quality of legal advice given to the Service Police in their investigations and the assessment of evidence and decisions on prosecution, Burchett QC suggested, "That the conduct of prosecutions would be undertaken by the office of the DMP using suitably trained and experienced Service Prosecutors…That an arrangement would be made with Federal and/or State DPPs to enable outplacement (I would suggest for significant periods) of Service lawyers for training and to gain experience on an on-going basis"[19].

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19 Burchett op.cit p.138

30. A DMP has been appointed but remains subject to command as the legislation creating the independent office has not yet been passed. The DMP is a barrister in Melbourne. The DMP office and staff are all in Sydney. The DMP works "on the basis of being in the office about one week a month as an overseer"[20]. The Chief Judge Advocate (CJA) by way of comparison is a full time permanent officer collocated with the executive in Canberra.

31. The DMP has described the office's workload as having "increased enormously simply because the ADF knows we are in existence"[21]. The proposed DMP role, of making the decision to prosecute charges, will take over that function from some thirty[22] or so one and two star General equivalent officers. However, the DMP's rank will apparently remain as a Colonel equivalent.

32. In the five year period 1998–2002, the ADF held 257 courts martial and DFM trials[23], a rough average of about one per week. Well over half of these trials (174) were Army matters. An analysis of the offences dealt with indicates a mix of military disobedience type offences and misdemeanour crime such as minor assault and simple dishonesty offences[24]. That is, the equivalent of the staple diet of the local civilian magistrate's court situated a few kilometres past the barracks gate in Darwin, Townsville, Brisbane and Sydney, where the major Army units are based.

33. Again, this situation calls into question the 'core business' suitability of military prosecutions and trials of criminal behaviour. Civilian prosecutors and magistrates are in court almost every day and the courts are always open.

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20 Hansard op.cit FAD&T 67

21 Ibid FAD&T 56

22 Burchett op.cit para 230

23 P16 op.cit p.101

24 ADF Senate Taskforce responses to questions on notice 29 April 2004; also Colonel Hevey "They will inevitably involve either physical violence or fraud" FAD&T 65

Dealing with crime is their core business. The DMP is part time and his office has a number of junior prosecutors who require outside training with the civilian DPPs and mentoring from Reserve practitioners[25]. The Service Tribunals are *ad hoc* and Summary Authorities and JA/DFMs may not deal with criminal matters for months at a time. Is the public interest well served by the expenditure involved in maintaining a prosecution service which duplicates and relies upon the civilian system which has greater skills and resources and is located a few kilometres past the barracks gate?

34. Several submissions from lawyers both military and civilian, invited the Committee to reconsider the role of the ADF in prosecuting and trying criminal offences. Aside from the core business question there are real concerns about the legal validity of the whole system. Despite the trilogy of High Court cases which have upheld the constitutional validity of this function, the JAG told this Committee of his "...view that the current structural arrangements under the DFDA do not fully reflect the considerable body of law that has developed in recent years in connection with the Canadian and United Kingdom military justice systems with regard to the perceived ability of service tribunals to provide a fair and impartial trial. Whether the High Court of Australia would ultimately find the existing structure wanting, to the point of striking all or part of it down, is an issue upon which it is inappropriate for me to express a conclusion. However, I think such a challenge would at least be arguable in light of these developments and it would be better, in my view, to take a proactive approach at this stage"[26].

35. It is likely the JAG's concern would be heightened by the comments of several members of the High Court in the recent matter of Alpert[27] which is yet to be decided by the Court. That matter involves a challenge to the DFDA

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25 Hansard op.cit, 1 March 2004 FAD&T 67

26 Hansard op.cit 21 June 2004 FAD&T 37

27 Re Aird et al; ex part Alpert B60 of 2003, High Court Transcripts

jurisdiction for a sexual assault offence allegedly committed by a soldier in Thailand while on leave from his unit based in Malaysia. Counsel for the soldier limited his appeal argument to the particular circumstances of service connection but several of the learned Judges made it plain that they were prepared to re-open the entirety of the constitutional validity question. In the light of the recent Canadian and UK developments on fairness and impartiality which were not fully addressed in the High Court trilogy of DFDA cases, the JAG's concerns about the potential for the system to be struck down appear well founded.

36. The current DFDA trial system and the ADF proposals for the future involve at least one permanent military officer judge advocate (JA) and possibly more (who could deal with all trials between them) and the panel of Reserve JA/DFMs in support. The trials are convened on an *ad hoc* basis. Despite the largest ADF concentrations being in Townsville and Darwin, there has not been a JA/DFM in Townsville for many years. There is only one Reserve JA/DFM in Darwin. However other JA/DFMs regularly travel from Canberra, Hobart and Melbourne to conduct trials in Darwin and Townsville.

37. The officer charged with war crimes type offences in East Timor gave a powerful description of the deleterious effects of this *ad hoc* trial system. The trial was conducted in Sydney. The prosecutor was located in Brisbane. The JA/DFM was located in Hobart. There were eight pre-trial hearings in the matter, several by telephone, over a period of months. The final proceedings took place on a Saturday. The absence of a central point of focus apparently made things very difficult for the accused and his counsel, who eventually had to threaten to seek a Federal Court writ before the prosecution was terminated and thrown out.

38. An independent Registrar of Military Justice is to be established as a means of streamlining this process. However, it appears this office will be purely

administrative and will not have power to deal with interlocutory matters and make interim orders, so that the problem of pre-trial telephone hearings with officials in various places will remain.

39. It appears that more permanent military officer JA/DFMs may be appointed. The JAG envisages a standing court and/or tenured appointments. Some submissions questioned the validity of limiting these appointments solely to military officers. The British system has traditionally had an independent civilian JAG (currently a High Court judge) and a panel of independent Judge Advocates appointed by the Lord Chancellor, who must be civilian legal practitioners with at least seven years' experience as a solicitor advocate or five years as a barrister.

40. The European Court of Human Rights has consistently described the civilian Judge Advocate as an "important safeguard" of the UK military justice system[28]. It is apparent from the tenor of those decisions that the Judge Advocate's independent civilian status and civilian trial experience was of major importance to the Court's recent approval of that system in Cooper v United Kingdom.

41. In Australia, the JAG is a Reserve officer and a civilian judge and the JA/DFMs have predominantly been Reserve officers with considerable experience of the civilian courts. The exceptions to this have been a number of permanent officers who were made JA/DFM when the DFDA was first introduced but never sat in that capacity and the office of the Judge Advocate Administrator (JAA) now known as the CJA. A series of permanent military officers have filled the JAA/CJA office.

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28 Grieve op.cit; Morris v United Kingdom (38784/97) ECHR 2002-I at para 71; Cooper v United Kingdom (48843/99) [2003] ECHR 681 at para 98

42. In his 1997 report Justice Abadee (a NSW Supreme Court judge and Reserve Brigadier) wrote "...that JAs like DFMs must be independent in the exercise of their powers. They must be independent to serve the Defence Force (and indeed the public). Confidence (indeed public confidence) in the system of military justice also requires an appearance of manifest impartiality on their part. The present system of appointment to the judge advocates' panel, as DFMs and as s 154(1)(a) reporting officers (all of which have an involvement of the JAG in the process of appointment), ensures that only those who have achieved sufficient experience and professional standing are so appointed. The requirement that only military officers may be so appointed, satisfies the need that trained military officers with military knowledge and experience are appointed to these roles. In practice, those appointed...have had considerable experience as civil practitioners in the ordinary trial courts. The present system furnishes men and women who have the qualifications and experience, both civilian and military for appointment to these positions"[29].

43. It is apparent that Justice Abadee, like the European Court, placed considerable importance on civilian trial experience and civilian practice for military judges. Indeed, he went on to state "I make these observations at this stage because there are those who argue that a greater degree of independence and impartiality might also be achieved by appointing full time judges, in effect, to a military division of the Federal Court of Australia[30] under Ch III of the Constitution with corresponding reduction in the role of the military in its military justice system. There is no compelling or persuasive view in support of such suggestion. Another alternative advanced is the establishment of what might be professional military judges selected from the military to become, in effect, a full time military judiciary[31]. As to this latter view, I do not consider

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29 Abadee op.cit paras 2.9-2.10

30 See the JAG's suggestion of a military bench of the Federal Magistrates Court, Hansard op.cit 21 June FAD&T 37

31 The likely effect of having two or more permanent JA/DFM given the proportion of trials done by the JAA/CJA in recent years

that, as the present situation stands, there are those in the regular services who would be qualified or trained for such position"[32].

44. In the current system, permanent military legal officers of the rank of senior Major and above are unlikely to have appeared as counsel in a civilian court for at least ten years and more likely fifteen years. Consequently, the civilian trial experience so highly valued by Justice Abadee and the European Court, is not and will not be present for some time, in the pool of permanent military legal officers available for judicial appointments.

45. On the other hand, there remains a large pool of Reserve officers with the necessary experience of the civilian courts to fill these positions. It is noteworthy that prior to the introduction of the DFDA in the mid-eighties, there were no DFMs, only courts martial with Reserve JAs. The JA then, as now, made rulings and advised on the law, the court martial President and the members of the court were the arbiters of fact and also decided on sentence. One of the principal arguments for retaining criminal offences in the military system is that all behaviour of the members of a disciplined force is germane to the control and effectiveness of that force. The argument asserts the need for trained military officers to assess such offences through the prism of their professional understanding of the military and its ethos and cultural needs. That is the classical British common law model which still operates in the UK.

46. The Australian Defence Association (ADA) submission[33] includes an extract from a recent House of Lords decision in which their Lordships quote with approval a statement by the Vice Chief of the Defence Staff about this requirement. There have been similar eloquent Australian statements in support of this principle[34]. It is not difficult to see the value and importance of having a court of military officers determining the charges against one of their

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32 Abadee op.cit para 2.11

33 P39

34 Re Tracey op.cit at 545; General Cosgrove op.cit 2.1-2.9

peers on a military offence such as desertion or mutiny or insubordination or disobedience.

47. In Australia, post-DFDA the dominance of the court martial in determining such matters has been substantially reduced and the function has shifted largely to the DFM who sits alone. Justice Abadee noted the "movement towards the use of DFM proceedings"[35] and recorded that for the 4 year period 1990-1993, there were 93 courts martial and 161 DFM trials. Five years later, for the 4 years 1998-2001, the trend had become even more marked, with 34 courts martial and 174 DFMs. Indeed by 2002 the DFM trial was by far the preferred forum with 46 DFMs and only 3 courts martial. It appears that in less than twenty years the DFDA has completely altered the approach to the administration of military justice with the once dominant court martial and its centuries of military tradition giving way completely to the single DFM sitting alone.

48. As previously recognized, one may readily accede to the arguments in favour of a court of military officers trying a military offence of insubordination etc. Some may have difficulty accepting the importance of having that court of officers decide a strictly criminal offence such as stealing Commonwealth property. Some may have greater difficulty recognizing the need for, say a Royal Australian Air Force (RAAF) Reserve DFM, to travel from Melbourne to Townsville to try a charge against an Army soldier for stealing that property. This is particularly the case if the trial has been delayed pending the availability of that RAAF officer. The Townsville magistrate's court dealt with 20,263 criminal charges involving 12,115 defendants in the financial year 2001-2002[36].

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35 Abadee op.cit para 2.37

36 Queensland Magistracy Annual Report 2002 Appendix 3, www.courts.qld.gov.au/pubs

49. In less than 20 years the Australian military justice system has moved from the application of discipline through the traditional method of trial by court martial to a system which has transferred the centre of gravity to legal officers, sometimes of a different service entirely and with little obvious connection to the service of the accused or the forum. The ADF is certainly more tri-Service in much of its approach today and officers in particular have greater exposure to the other services. However, when it comes to discipline the statistics reflect major differences between the Services. In 2002, Army held 1,990 summary proceedings whereas RAAF had 184.

50. Returning to the question of removing criminal offences from the military justice system, one must consider the argument that the ADF needs the capacity to deal with such offences on operations. One might reasonably respond by asking how often such offences are actually dealt with on operations. Since the DFDA was introduced the ADF has seen outstanding service on peacekeeping and warlike operations in many parts of the world. Some of these deployments have involved very large forces for extended periods of time, for example, Somalia, Cambodia and East Timor.

51. It appears that almost no criminal offences have been tried in any theatre of operations during this time. A few courts and DFM trials have been conducted but all have been for service offences such as desertion, dangerous behaviour or disobedience. Conversely some serious criminal matters have been committed in theatre but were only tried on return to Australia. The trials conducted in theatre have involved both permanent and Reserve JA/DFMs.

52. It is also argued that it is too difficult to draw a line dividing the strictly criminal offences from the purely military offences. However, the DFDA already restricts the disposition of certain offences in Australia, for example, possession of certain types and volumes of illicit drugs cannot be dealt with under the DFDA and serious crimes such as manslaughter and murder must be

referred to the civil authorities. Moreover, the service connection test was recognized by its authors, Brennan and Toohey JJ in *Re Tracey*, to present some difficulty in application. Nevertheless service authorities have been able to apply this distinction successfully for some 15 years.

53. The final matter raised in submissions is the position of those military officers who act as counsel representing the accused in a military trial. Following the Federal Court decision of Stuart v Sanderson, members are entitled to the counsel of their choice (at Commonwealth expense if the counsel is a military officer) if that officer is reasonably available. It has been submitted that those officers should form part of an organization similar to the US military Trial Defense Service headed by a senior officer with independent status similar to the DMP, so that they may be free of and be seen to be free of command influence.

Reform

54. The discipline system is clearly not effective in some areas and needs reform. Defence has taken steps to improve processes but arguably these initiatives treat the symptoms and not the cause. That is, the military justice system in its current form is an historic anachronism. It is a hangover from a time when the battlefield was so far removed from the normal world that the Defence Force needed to be self contained. The military imperative of a highly disciplined force necessitated an 'in-house' criminal justice system. However, this is no longer the situation and the civilian courts and civilian police are now readily available. Furthermore, the evidence is that this costly duplicate criminal law system is set to become even more costly, with an independent DMP with a permanent staff of eight, an independent RMJ and his staff and an independent permanent CJA (with more to come). Yet the evidence is that this system has not dealt with a significant criminal offence on operations in 20 years. There is no longer a requirement for the public purse to bear the cost of

maintaining a separate but parallel criminal law process, particularly one which involves extensive delays and the risk of inept investigations and prosecutions. Moreover the JAG has identified a serious potential for the whole system to be struck down for lack of fairness and impartiality.

55. It is twenty years since the last major overhaul of the military justice system which saw the introduction of the DFDA. It is now time to look again at radical reform. The Committee received submissions from many concerned parents, professional military officers and mental health professionals questioning the reliance on discipline as a substitute for leadership in the ADF. The military justice reform process and associated debate should not be limited to systems per se but should include a review of military philosophy, including the purpose and use of discipline in a technologically advanced and highly skilled volunteer fighting force.

56. Possible (and potentially mutually exclusive) reforms include:

- Remove criminal offences from the military justice system completely
- Remove criminal offences from the military justice system in peace-time Australia
- Refer all suspected criminal conduct in Australia to the local civilian police who will decide whether or not they or the military should deal with the matter
- Establish an ADF tri-service serious crime investigative capability with AFP and State/Territory assistance and Reserve recruits from those agencies
- Create a standing military court of judge advocates (JA) appointed by the Attorney general on the basis of suitable civilian court experience
- JA to sit only with a court martial of military officers selected by the JRMJ
- Appoint a permanent DMP at the one star Brigadier equivalent level
- Create an ADF Trial Defence Counsel Service consisting only of Reserve officers

- Appoint a Reserve part time Chief Trial Defence Counsel at one star rank level, with command and control of the officers posted to the Trial Defence Service
- Appoint a staff officer to assist the JAG
- Disestablish the office of CJA and use the position to create a Judicial Registrar of Military Justice (JRMJ)
- Relocate the JRMJ in Townsville or Darwin with the power to deal with all interlocutory matters and pre-trial dispositions, as well as to sit as a JA/DFM
- Appoint at least two JA/DFMs in Darwin and Townsville
- Appoint JA/DFMs as statutory office holders until compulsory retirement age
- Appoint JA/DFMs from the Reserve only and on the recommendation of the JAG
- Appoint the JRMJ (and any additional JRMJ) from DMP experienced staff on the recommendation of the JAG
- Create a right of appeal from summary proceedings
- Create a Summary Appeals Court (SAC) (recently introduced in the UK)
- Abolish the automatic review of courts martial and DFM trials
- Broaden appeal rights to DFDAT to include appeals against sentence (for both defence and prosecution)
- Abolish requirement for JA/DFM to certify trial transcripts (a cause of delay and not required in civilian practice)

57. In considering the likely effects of such changes on the continued maintenance of good order and military discipline, it is useful to look at the reaction of the commanders in the field to the introduction of the DMP. The DFDA places the commanding officer (CO) of a military unit at the centre of the administration of service discipline. The CO is the pivotal point of the system. The DMP has largely taken over this role for dealing with criminal conduct. This has not apparently been resisted by COs, in fact the DMP has

been swamped by the flow of matters referred to his office by the COs[37]. Moreover the DMP considers that "we were flooded with matters which really ought to have been dealt with at a lower level"[38]. This tends to indicate that those most concerned with the maintenance of service discipline are more than happy to refer even minor matters to another authority to deal with and allow them to get on with their 'core business' of training to fight.

ADMINISTRATIVE ACTION

58. The other component of the military justice system is the administrative action system, which is concerned with non-DFDA matters, such as boards of inquiry (BOI), administrative investigations, redress of grievance (ROG) and complaint handling, adverse administrative action and review of command decisions.

59. Whereas the discipline system is largely informed and controlled by the rules and principles of the criminal law, the administrative system is "subject to administrative law principles, especially the fundamental principles comprising natural justice (also called procedural fairness)"[39].

60. The majority of complaints made to this Committee were about the administrative component of the military justice system. Again there were common themes which echoed from the previous inquiries over the past ten years. The issues raised in the submissions received, largely mirror the disciplinary complaints and include:

- Untrained investigators,

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37 Hansard 2 August 2004 FAD&T p.53
38 ibid
39 P16 op.cit para 2.58

- Inordinate delay in investigation of complaints – in some cases investigations have gone on for several years and through various levels of review,

- Poor quality investigation of complaints – failure to identify and speak to relevant witnesses, failure to check with civilian family members, failure to check easily obtainable evidence, failure to liaise closely with civilian agencies, failure to disclose relevant evidence,

- Lack of independence in the investigation of complaints – investigators appointed from within the same unit/organisation, investigators of inappropriate rank or command relationship,

- Inordinate delay in the review of investigations – in some cases, several years between the investigation and the decision, by which time any favourable remedy is too late,

- Lack of independence in the review process – COs reviewing and upholding their own original decision,

- Lack of impartiality in the review process – "Caesar reviewing Caesar"

- Failure by investigators/commanders to follow and apply policy,

- Failure by commanders to keep members informed of developments in complaints/investigations,

- Failure by commanders to protect complainants,

- Breaches of privacy and confidence, and

- Abuse of power in schools/training units.

Investigations

61. Again, as is the case with the disciplinary issues raised, these complaints are not new or without substance. In respect of administrative inquiries, Burchett QC said, "The quality of the actual investigation, and also the problem of perceived command influence, were major problems…Procedural fairness was an issue, as well as competence". Mr Burchett referred to similar remarks

in the 1999 JSCFADT report and said "...the independence of an officer appointed to conduct an investigation is sometimes a matter of concern".

62. In response to these and other inquiries and the Ombudsman's 1998 own motion investigation, Defence introduced several initiatives including:

- the Complaint Resolution Agency
- the Defence Equity Organisation
- the Defence Community Organisation
- 1800 telephone complaint systems
- Defence Whistleblower scheme
- Directorate of Alternative Dispute Resolution and Conflict Management
- Inspector General of the ADF
- Directorate of Personnel Operations
- Fair Go Hotline
- Sudden Death Protocols
- Acumen Alliance Audit of BOI

63. However, despite this proliferation of agencies and mechanisms, the Commonwealth Ombudsman in his 16 February 2004 submission to this Committee stated:

"We have received several complaints where it appears Defence has had considerable difficulty in entertaining the notion of investigating a complaint in the first instance despite very clear concerns being expressed both by the individuals involved, as well as by other people in relatively senior positions in the ADF. It is axiomatic that if a complaint is not accepted as a complaint it cannot be resolved.

"We have also received some complaints which have revealed deficiencies in the investigative process. Some of the issues which have arisen include:

- Investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated,
- An investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker,
- An investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint,
- Investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority,
- An investigation where members of the public are questioned with little apparent thought for the potential consequences, and
- Investigations which have taken so long it renders any outcome favourable to the complainant virtually meaningless.

"A consistent theme is the need for better training for investigation staff...Regrettably we see a number of complaints from members of the ADF where the time taken for a decision on a redress of grievance seems inordinate"[40].

63. This submission by the Ombudsman is almost completely in accord with the tenor of the various submissions received by the Committee about the shortcomings of the ADF administrative system. Moreover it was made well after the implementation of 14 recommendations made in a review by the Australian National Audit Office in 1999 and four years after 24 recommendations made following another review done with the assistance of the Ombudsman's staff[41] in 2000. While the recommended changes have apparently had some effect in reducing delays, it appears that major problems

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40 P28, public submission by Professor John McMillan

41 Hansard, Ms Harris, 2 August 2004 FAD&T p.21

remain and even the reductions in delays are relative, as it still takes on average, some 280 days to resolve an "administration-type grievance"[42].

64. Furthermore, despite some nine months of this Inquiry and the establishment of the Directorate of Personnel Operations and the Sudden Death Protocols etc, the Committee was saddened to receive, in the week prior to its last sittings, a submission from the parents of another suicide victim who expressed grave concerns about the handling of their son's relatively recent disappearance and subsequent death.

Boards of Inquiry

65. In respect of Boards of Inquiry (BOI), the Committee received a number of complaints about the lack of transparency and independence in the appointment and processes of several BOI. Defence refers to a recent audit by a civilian firm Acumen Alliance which reported in December 2003 that "the board of inquiry process is generally sound and serves the purpose for which it was created"[43]. In written submissions and in oral evidence, Defence continually emphasized that the "purpose of an administrative inquiry is not to attribute any criminal or discipline liability as is the case under the DFDA"[44].

66. Nevertheless, BOI have historically been required to make findings as to whether or not any person(s) failed to follow or apply processes or procedures correctly and such findings may be directly related to a cause of death or serious injury, the consequences of which may be of the highest degree of seriousness for the individual concerned. It is a necessary concomitant of such deliberative processes that ADF member's (including deceased members) interests may be put at risk of adverse comment. Whether DFDA or

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42 Supplementary Defence submission para 3.2
43 CDF, Hansard 1 March 2004, FAD&T 9
44 Supplementary Defence submission para 2.24

administrative, the potential consequences of such inquiries for individuals can be very serious indeed.

67. The Acumen Alliance audit examined eight BOI. Thirteen stakeholders were interviewed, only one of those persons was a Reserve legal officer (RLO) and none of those persons had been a participant in a BOI as counsel assisting or representing, or as a potentially affected person (PAP), except the Chief Judge Advocate (CJA) who was counsel assisting in two of the eight BOI. Acumen Alliance did not interview any RLO who had received the sessional fee for appearing in BOI or their clients. Nevertheless, Acumen Alliance was able to conclude that "The sessional fee determination is inequitable, does not provide value for money, is not commensurate with market rates and the purpose of its application-i.e. for urgent legal work-does not apply in the case of BOI"[45].

68. Acumen Alliance states "It was suggested [it is not revealed by whom] that the risk of an inquiry running over time is reduced when permanent officers, rather than reserve members, comprise the Board. The rationale behind this argument was that the imperative to complete the inquiry and return to work is greater for permanent officers…Counsel Representing may become adversarial as they understand their brief to be the protection of the interests of the PAP. There is a strong view [the source of the view is not named] and some evidence [again not stated] that Counsel Representing can focus a Board on blame apportionment…lawyers appear to treat BOI as a judicial rather than as an administrative process. This 'judicial approach' does not appear to have arisen, however, where judges or magistrates have been appointed as Presidents".

69. Of the eight BOI examined Acumen Alliance found only two to have been efficient and effective. Coincidentally these two BOI involved the CJA in the

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45 The Defence Legal Service BOI Management Audit, October 2003, 1.3

Counsel Assisting role and in one of these, only permanent legal officers appeared as counsel. The latter BOI was described by Acumen Alliance as "completed on time and well regarded [presumably by the small group of stakeholders]". It may be that the absence of Reserve legal officers concerning themselves with protecting the interests of the PAP had something to do with this assessment. In any event, the absence of any input whatsoever from PAP and the next of kin of deceased members and the counsel representing and assisting in these BOI calls into question the objectivity of this audit report. It is also noteworthy that the audit report's approval of judges and magistrates appearing as BOI President is directly opposed by the JAG[46].

70. This Committee received several submissions complaining, inter alia, about the manner in which members and counsel were appointed to BOI, about the conduct of counsel during BOI, about the delays in deciding to conduct a BOI, about the lack of adequate support given to BOI, about the inaccessibility of premises where BOI are held, about the lack of support to next of kin during BOI and about decisions not to hold BOI for certain matters. The Acumen Alliance audit was critical of six of the eight BOI it examined.

71. The 1999 JSCDFA&T report recommended that a General Court of Inquiry should be mandatory for all inquiries into the accidental death of an ADF member on an ADF activity. The recommendation was resisted by Defence.

72. The ADF Administrative Inquiries Manual provides (at para 1.17 et seq)

"the selection of the type of inquiry most appropriate to a specific situation is critical to the efficient management and effective control of an inquiry. Occasionally the choice may be obvious, mandated for example, by the significance of the incident, eg an accident involving loss of life…Where the subject of an inquiry involves the accidental death of ADF members involved

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46 Hansard 21 June 2004 FAD&T p.38

in ADF activities, the CDF and the Service Chiefs, as appropriate, will refer the matter to the Minister to determine whether the appointment of a General Court of Inquiry or a Board of Inquiry is appropriate".

73. Annex E to chapter 2 of the Manual indicates that a Court or Board of Inquiry (BOI) is appropriate for death and serious injury. It indicates that an investigating officer (IO) may be used in the case of a single death or serious injury "when the facts are not complex, when the member is not on duty or when it arises from a Motor vehicle accident but there are no suspicious or unusual circumstances". The annex notes that an IO is not appropriate for "serious systemic breakdown of Service discipline or morale" but a BOI is.

74. Despite this policy background, it was decided not to hold a BOI into any of the following recent serious incidents:

- major systemic problems involving brutality and harassment in at least two training schools,
- several suicides including the presence of disturbing ethnic undertones and systemic breakdown of morale,
- two cadet incidents involving female minors,
- major equity problems in a training unit,
- major drug problems in a unit,
- major systemic morale and security problems.

75. These various incidents amounted to some twenty separate matters which Defence elected to inquire into by appointing an investigating officer rather than by holding a public BOI in which evidence would be given under oath in public and be available for testing under cross-examination. By contrast the evidence given to the investigating officers was not on oath and not given in public, nor was it tested by cross-examination.

Review of Administrative Action

76. The Committee received a large number of complaints about the internal review processes in Defence. The recurrent themes were, again, lack of independence and impartiality, delay, failure to apply policy and poor quality of decision-making.

77. The review action taken by the IGADF was favourably commented on by the SAS officer who had administrative action taken against him after the failure of the prosecution for the same alleged conduct. However several other submissions were critical of the IGADF and his office. The complaints were that the IG is a former senior permanent military officer; that he is part of the ADF and is appointed on a contract, renewable at the discretion of the CDF. The head of the Complaints Resolution Agency is also a former senior permanent military officer.

78. It is a truism of the law that justice must not only be done, it must be seen to be done. Many submissions to the Committee were concerned that current review mechanisms such as CRA and IGADF could not be perceived as independent when they are part of Defence.

79. The number and variety of ADF agencies, policies and processes involved in the handling of complaints is itself problematic. In its supplementary submission ADF wrote, "Defence has a number of elements and organizations that manage certain types of complaints. Apart from the Complaint Resolution Agency, these organizations include the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution and Conflict Management. This can create some confusion for complainants and, to an extent, the organizations themselves, about their respective roles. This can result in the

duplication of effort and delays. Closer cooperation would provide more effective outcomes"[47].

80. Thus, Defence itself recognizes many of the problems raised in the submissions, which were observed and tested by the Committee in oral hearings and also confirmed by the Ombudsman. The system has been recognized for some ten years to be less than satisfactory. Money and resources have been thrown at the problems but not in a systematic way, as demonstrated by the plethora of agencies and processes. As with the discipline system, the suitability of these administrative review functions to the 'core business' of the ADF is doubtful. This gives rise to the same question asked about the criminal element of the discipline system, that is, is the public interest and the public purse best served by maintaining several layers of a review process conducted by non-specialists in a system lacking transparency and independence and giving rise to a perception of institutional bias? It appears that all reforms made to date have been reactive and piecemeal and this cannot continue. Future reform must be root and branch, with the entire function being scrutinized and updated to meet the requirements of operational effectiveness and the public interest.

Reform

81. The importance of actual and perceived independence in administrative review was recognized and incorporated into the reforms of the Canadian military justice system in the late 1990s. The Canadian Forces Grievance Board (CFGB) is an administrative tribunal with quasi-judicial powers, and is independent of both the Department of National Defence and the Canadian Forces. It has a statutory mandate to review military grievances and submit recommendations and findings to the Chief of Defence Staff (CDS). The CDS

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47 Supplementary Defence submission para 3.7

must give written reasons for not accepting the recommendations of the Board and the Board publishes an Annual Report on its activities.

82. The CFGB began operation in June 2000 and is designated as a department for the purposes of the Canadian *Financial Administration Act*. It consists of a chairperson (currently a senior civilian lawyer), a full-time vice-chairperson and several part-time members all appointed by the Governor in Council for terms of four years. All board members are civilians; two have had military service at some stage of their careers. The Board has a direct support staff including legal counsel.

83. A similar independent review authority in Australia would go a long way towards satisfying the concerns of those who made submissions to this Committee. A consistent refrain from Defence in both the discipline and administrative areas, is that the decision-makers have to have substantial military knowledge to properly perform their function. The CRA Director said, "…you need to understand the environment in which complaints are made to understand where people are coming from when they make a complaint, to understand what access they have to advice and what difficulty they might face in putting in a complaint"[48].

84. However, that argument is demonstrably wrong. The Defence Force Ombudsman and his staff have performed their administrative review function perfectly well for many years without this military background and the Canadian Grievance Board is now in its fourth year of very successful operation using similar expertise without significant military background. The review of administrative action in a myriad of specialized areas is conducted in many boards and tribunals at the State and Federal level in Australia, by

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48 Hansard, Harris 2 August 2004 FAD&T p.37

person with no particular knowledge of the subject under review but with expert skills in administrative law principles and practice[49].

85. The rationale for such a body was succinctly expressed before the Committee by Mr. Brent the Deputy Ombudsman who said, "In essence, the issue is: why yet another level of review? The first critical feature is that we are independent and impartial. That very significantly changes the character of the review not just because it gives us a capacity to view issues with a freshness and an independence that you just cannot get within the system but also because it presents to the complainant an impartial and dispassionate review so that, even if the outcome is that we uphold the original decision, the fact that we have come to that conclusion can be a significant factor in satisfying the complainant that they have been fairly treated…The second important point is that, while the rate at which we find complaints to be upheld is relatively low, often the complaints that we do find upheld are very significant…Often the issue will be a more significant problem because, were it is a simple problem, the internal grievance processes would have been able to deal with it"[50].

86. What is needed is a statutorily independent body, with appropriately qualified and trained staff and the necessary resources to instill public confidence and efficiently address and resolve administrative matters in the ADF. Set out below is a model of such an entity to provide a vehicle for debate and reasoned reform.

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49 NSW Administrative Decisions Tribunal, VCAT, Social Security Appeals Tribunal etc.

50 Hansard, 9 June 2004 FAD&T 9

ADF Administrative Review Board

87. This proposed organization, the ADFARB, would have statutory independence along the lines of the CFGB. The chairperson would be a senior lawyer with appropriate administrative law/policy experience. The organization would have administrative review as its core business. Its resources and skills could largely be obtained at neutral cost by subsuming the current staff positions and assets of the IGADF and the Defence Force Ombudsman, thereby eliminating the internal conflict in priority allocation, which the Commonwealth Ombudsman now faces[51] in addressing Defence matters.

88. The ADFARB would have two major areas of operation. One would be to deal with redresses of grievance (ROG) in a model similar to the Canadian Grievance Board. This could be done in several ways. One way would be to require all ROG to be sent immediately from the unit to the ADFARB with an information copy to CRA. Another way would be to specify only certain types of ROG to be referred to ADFARB, with discretion for CDF to refer them later to ADFARB. A third way would be to keep all ROG within Defence until finalized at the unit level and if not resolved there, or if the ROG involves the unit CO, or if it cannot be finalized within a set period, say 30 days from lodgement, it is referred to the ADFARB.

89. CRA statistics indicate that slightly more than half of ROG are resolved at unit level[52]. Consequently it may be best to provide the opportunity for COs to manage these administrative problems initially and keep the first level of review within the unit for a reasonable period, the suggested 30 days, before it is referred to ADFARB. However, the volume of complaints received by the Committee about the handling of ROG at the unit level and the degree of

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51 Submission P28

52 Hansard, Harris op.cit p.24

damage caused thereby suggests that some external accountability is required. Therefore, it may be necessary to require notification to ADFARB within 5 working days of the lodgement of every ROG at unit level, with 30 day progress reports to be provided to and progress monitored by ADFARB.

90. The program of training for investigators can be maintained within Defence with oversight by ADFARB and the panel of suitable investigators raised by the IGADF can be incorporated into this process (thereby preserving an asset for use on overseas operations as required). ADFARB can call upon such investigators as required or conduct its own investigations or formal hearings if necessary. Dr Nash the Director of the Ombudsman's Defence Team told the Committee her team rarely needs to travel to investigate complaints. She said "Most of the time we get information from Defence and we do it [the review] on the papers etc…On occasion we need to interview somebody formally under an oath or affirmation using the formal powers of the Ombudsman Act but that happens fairly infrequently"[53].

91. The second major area of operation for the ADFARB would be concerned with investigations and inquiries into major incidents. These matters would typically be the notifiable incidents which all ADF units are currently required to report to higher command, such as death, serious injury, loss of major equipment and matters likely to attract media interest, whether they occur inside or outside of Australia. The chairperson of the ADFARB would be empowered to decide on the manner and means of inquiring into the cause of such incidents. The legal aspects of the relationship with the State and Territory civil authorities could be settled by overriding Commonwealth legislation or by the putative Memorandum of Understanding (MOU) with the States/Territory Coroners[54].

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53 Hansard, 9 June 2004 FAD&T 18

54 Supplementary Defence submission para 2.86

92. The ADFARB legislation would include matters which the chairperson would take into consideration in determining the manner of inquiry. This might involve consultation with the relevant Ministers, State and Federal, the CDF and Service Chiefs, various civilian authorities and the families and next of kin of ADF members involved. The Minister of Defence would retain absolute authority to appoint a Court of Inquiry or Royal Commission should he deem such to be necessary. The chairperson would determine the appropriate vehicle for the inquiry and, subject to security considerations, publish written reasons for the choice of inquiry vehicle.

93. If satisfied that an investigation would suffice, the chairperson could select a suitably qualified person from the panel of investigators or from the civilian community. CDF would have the right to nominate a suitably qualified military officer to assist the investigator. The investigator could also come from or be assisted by the ADFARB staff from the ROG area with relevant expertise and experience.

94. If the chairperson decided that a more formal inquiry process was required, akin to the present Boards of Inquiry, then the chairperson could refer the matter to a military division of the Administrative Appeals Tribunal (AAT). The AAT is a Federal merits review tribunal which has a President who is a Federal Court Judge, several Presidential members who are Federal or Family Court judges, Deputy Presidential members both full and part time who are very senior lawyers and a large number of full and part time members who include several retired senior military officers of one and two star rank.

95. The AAT has very considerable administrative law expertise and regularly deals with Defence related matters in Veterans Affairs, Military Compensation Scheme, Comcare and Security issues, in its various divisions. It has offices and conducts public hearings in all major cities and can utilise Commonwealth facilities in other places. Its large number of experienced

administrative review members are appointed by the Governor General on fixed terms of appointment. There are sufficient part time members to cope with any surge capacity required for occasional military inquiries.

96. The cost effect of ultising this existing Federal agency and its state of the art infrastructure would be minimal in contrast to establishing a new agency or continuing with ad hoc BOI. The reputation of the AAT is impeccable and this would be of great importance for perceptions of independence. The members allocated to the military inquiry would be chosen by the AAT President in consultation with the ADFARB chairperson. CDF would have the right to nominate a suitably qualified military officer to sit as a member of the inquiry tribunal. The ADFARB chairperson would appoint the counsel assisting the inquiry from his standing panel of counsel or from the civilian bar. Potentially affected ADF personnel (PAP) would continue to have legal representation at Commonwealth expense, the counsel representing being nominated by the Chief of Defence Trial Counsel.

97. The AAT has the existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters at no additional cost and it could be established in this role almost immediately.

98. The results and findings of any AAT inquiry or other investigation undertaken by reference from the ADFARB would be returned in confidence to the chairperson for review. The chairperson if satisfied that the findings are correct will then determine the further disposition of the matter and if no further action is required, will provide his findings and recommendations to the Minister and CDF. CDF would be required to provide written reasons for declining to accept any recommendations made by ADFARB. The chairperson would publish an annual report of all matters dealt with by ADFARB, including matters referred to CDF and responses to them.

Conclusion

99. The military justice system has reached a watershed in its development. It has been some twenty years since the last wholesale review of the discipline system. During that same period, as described by the IGADF[55], the civilian administrative law has undergone enormous change. The military system has attempted to keep up with this pace of change and has done so quite well but it has the appearance of having been largely reactive and piecemeal. There have been numerous initiatives but they lack a coherent and an independent structure.

100. Given the pace of change in the civilian world over the last twenty years, it is perhaps not surprising that the series of rolling inquiries beginning with Justice Abadee, has been happening for the past ten years. Defence is by definition one of the most conservative elements of the community and thus quite understandably somewhat resistant to change. There is a celebrated history of social changes which were initially fiercely resisted by Defence but eventually became commonplace, for example, married servicewomen, working service mothers, same sex relationships, women in combat related positions etc.

101. Military command is in many ways defined by obedience and conformity. Traditionally, discipline has been, along with leadership, a crucial underpinning of command. It is to be expected that any interference, particularly external interference, with the means of administering command through the military justice system will be of great concern to the military.

102. Nevertheless, the military's sole reason for existence is the public good. It is in the public interest to have an efficient and effective military justice system.

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55 Hansard, Mr. Earley 5 August 2004 FAD&T 86 et seq

For ten years now, there have been increasing cries from the community that all is not well in the military justice system. Repeated inquiries have resulted in piecemeal change but some fundamental principles remain unchallenged. It may be that the use of discipline and administrative action as tools of leadership, and indeed the culture of military leadership itself, need to be reconsidered in the context of a technologically advanced volunteer fighting force. Modern management principles have been visited upon the military and 'core business' has become the guiding principle for most functions.

103. The serious issues raised in the approximately 150 submissions made to this Committee make it plain that wholesale review and reform of the principles underpinning the current system of military justice is now required. The Committee hopes that this paper will stimulate the informed debate needed to address the issues raised and to create an environment for useful reform to take the ADF into the twenty first century.