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CANBERRA ACT 2600

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Senator Mark Bishop
Chair
Senate Standing Committee on Foreign Affairs, Defence and Trade
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Bishop

REPORT ON THE PROGRESS OF REFORMS TO THE MILITARY JUSTICE SYSTEM

I refer to your letter of 3 April 2008 to the Honourable Joel Fitzgibbon, Minister for Defence, in which you advised of the Committee's intention to hold a further hearing into, and seek information on, progress with the implementation of reforms to the ADF military justice system.

I am pleased to provide you with the following update on progress with the implementation of measures to enhance our military justice system, arising from the Government Response to the 2005 Senate Foreign Affairs, Defence and Trade References Committee Report, 'The Effectiveness of Australia's Military Justice System'.

In December 2007, the projected two year implementation period concluded and the dedicated Military Justice Implementation Team disbanded. The Inspector General ADF now has oversight of completion of the outstanding implementation actions. Almost all of the agreed responses to the 2005 Senate Inquiry have been completed and while most of the new mechanisms and arrangements are now in place some of these will need time to bed down in practice before optimal effectiveness can be achieved.

Implementation update

The task of implementing the many important recommendations arising from the 2005 Senate Committee Inquiry has been, and remains, a considerable undertaking. Overall, I am pleased with the achievements to date. Substantial and commendable progress has been achieved and results are within realistic expectations.

Our fourth progress report to the Committee in October 2007, noted that there were nine recommendations then outstanding, including two proposed alternatives to Senate Committee recommendations which were not agreed. Since then, substantial work has been completed and a further three recommendations have now been closed. Attached to this submission at

Enclosure 1 is a schedule providing further detail. In the interests of simplicity the schedule addresses only those recommendations where implementation remains incomplete.

A major step forward was achieved when the Defence Legislation Amendment Act 2008 (DLAA 08) received Royal Assent on 20 March 2008. Importantly, among other things DLAA 08 introduces an updated summary justice system which is scheduled to take effect on 20 September 2008.

As the Committee would be aware, this is a particularly significant initiative for the ADF as the vast majority of disciplinary matters under the Defence Force Discipline Act (DFDA) are dealt with at the summary level on a day-to-day basis.

I am confidant that the new summary arrangements will not only update and simplify the current system for the benefit of commanders and those who administer military justice, but will also substantially enhance the rights of those who find themselves subject to the disciplinary system. The new system will, for example, provide accused persons with a right to elect to be tried before the Australian Military Court (AMC) for all but a limited number of less serious commonly occurring Service offences, as well as a right to appeal summary convictions and punishments to the AMC. The simplification of the rules of evidence before summary tribunals will address a long standing criticism of the current system that the requirement to apply the full law of evidence in summary proceedings was an unnecessary complexity. The simplified rules will however preserve members' rights by requiring summary authorities to have regard to basic evidentiary principles including relevance, reliability, weight, probative value and procedural fairness.

Although the passing of DLAA 2008 has established the legislative basis for the new summary system, much work remains to be completed before the commencement date of 20 September 2008. This includes rewriting relevant manuals, instructions and guidance, revising military justice training course contents, providing appropriate conversion training to practitioners and administrators, as well as general familiarity training to ADF members.

On present indications the necessary preliminary work will be completed in time to meet the commencement date.

The Committee has previously separately considered the provisions of DLAA 2008 which deal with a range of detailed issues. Apart from the new rights to elect trial by and appeal to the AMC, to which I have already referred, other significant changes to the military justice system introduced by this legislation include:

- Provision to ensure that legal officers are able to provide advice independently of potential undue command influence;
- Increased AMC and summary jurisdiction to try offences involving drugs, including cannabis, narcotic substances (amphetamine, cocaine, heroin, methamphetamine etc) and anabolic steroids;
- Extension of the summary system to cover members up to the rank of Rear Admiral/ Major General/ Air Vice Marshal;

- Provision to disqualify a summary authority from dealing with a charge where he or she was involved in the investigation of, issuing a warrant in relation to, or charging the accused person with the offence in question;
- Provision to require a summary authority trial to commence within three months of a charge being laid, unless, in certain circumstances, a longer period is allowed by a superior authority;
- Where an accused intends to plead guilty in a summary authority trial, provision to allow the accused to apply for the trial to be conducted in his or her absence if there are exceptional circumstances;
- AMC and summary authorities will be given increased flexibility in sentencing, namely, the ability to suspend part of a punishment or order;
- Standardisation of the powers of punishment of summary authorities regardless of the Service of the convicted person. The current differences in the punishments applicable to members of the Navy, from those applicable to Army and Air Force members, will be removed;
- Significant modification of the review process for summary convictions, punishments and orders; and
- Expansion of the discipline officer scheme to cover all ADF members up to the rank of Lieutenant/ Captain/ Flight Lieutenant.

In addition to the changes introduced by DLAA 08, recent amendments to the Defence Force Regulations have also come into effect. These provide an updated process for members of the ADF to submit complaints about certain matters relating to their service. The amended regulations provide for more practical limitations on who may submit a redress of grievance and the matters they contain. It introduces timeframes relating to the process for submission, inquiry into, and referral to higher authority of redresses of grievance. The amended regulations also allow commanding officers, service chiefs and myself (as appropriate) to accept applications for redresses of grievance submitted or referred outside of the timeframes, and provide powers to suspend consideration of grievances that are being inquired into by certain other bodies. The new instruction relating to redresses of grievance is undergoing final preparation before being released for clearance. Once the instruction is issued I fully expect that the revised arrangements will substantially improve ADF complaint handling process by streamlining the system, allowing for greater transparency and oversight, and more timely outcomes.

One of the final recommendations to be implemented in response to the Senate Inquiry Report, is the requirement to provide for periodic independent reviews of the military justice system by a suitably qualified eminent person or persons. I am pleased to advise that the first such independent review is now underway. Former Chief Justice of NSW, Sir Laurence Street, and a former Chief of the Air Force, Air Marshal Les Fisher (Retd) have been appointed to assess the effectiveness of the current reform program so far. The calibre of the review team reflects the importance I place on this task.

The team has been asked to provide its report to me by 10 February 2009. I expect that this report will be an important indicator as to whether the many reforms to the military justice system to which the ADF has committed have been, or are likely to be, appropriate and effective and whether any further changes are required.

Committee's Third Progress Report

Your letter of 3 April 2008 sought further information about a number of specific issues raised in the Committee's Third Progress Report. The following paragraphs address those issues.

Audit of ADF Investigative Capability

As required by the Senate Committee Report into 'The Effectiveness of Australia's Military Justice System' (Recommendation 6), I commissioned a tri-service audit of the ADF Service Police Investigative Capability (DICA) and released the report in December 2006. The report found that the ADF's investigative capability required extensive remediation and that this was likely to take at least five years. 99 recommendations for achieving best practice policing in the ADF were accepted and implementation began immediately.

As previously reported, the ADF Investigative Service (ADFIS) is now established and headed by a Provost Marshal ADF (PMADF). Following the closure of the Military Justice Implementation Team, the PMADF is responsible to me for implementation of the DICA recommendations. Steady progress is being made. To date, 45 recommendations have been completed, some 27 are close to completion and four recommendations will be ongoing activities.

Last month, I was pleased to attend the official opening of the new ADFIS headquarters in Canberra by the Parliamentary Secretary for Defence Support, the Hon Dr Mike Kelly, AM, MP in Canberra. Commissioning the new headquarters represented an important milestone for this new joint organisation. It was most encouraging to see the members of ADFIS, comprising investigators from all three Services, demonstrating their equipment and enthusiastically explaining measures that are being put in place to ensure the ADF will have the effective, professional investigative capability it requires into the future. In this respect, a memorandum of understanding is now in place with the Australian Federal Police (AFP). Although Defence has always had personnel undertake civil police courses, secondments and worked closely with the AFP on a number of fronts, the memorandum provides a foundation for further, more detailed agreements such as intelligence sharing and forensic capability development. Enhanced training opportunities are also being pursued with some State Police Services.

ADFIS now has investigators deployed with the major ADF deployed force elements overseas including Iraq, Afghanistan, Timor Leste and the Solomon Islands. The unit includes a major investigation team that is deployable at short notice to a serious incident in Australia or overseas.
ADFIS investigators have recently been directed to provide direct support to Commissions of Inquiry, as well as to Inquiry Officers appointed to inquire into the deaths of ADF members killed in combat.

The DICA report recognised that it would take time to establish and develop ADFIS to its optimum potential and the task at hand should not be underestimated. As with some of the

other critical areas of the ADF, recruitment and retention of suitable personnel remains a principal concern and it is likely to be some time before ADFIS will be able to achieve its full complement. A number of measures including direct and lateral recruitment and improvements to pay and conditions are being examined. Despite these difficulties, I remain convinced that ADF needs are best served by having a professional investigative capability that is not only effective, but is also organic and therefore able to quickly respond to incidents and matters requiring specialist policing skills across the entire range of ADF operations.

Learning Culture Inquiry Report

An independent inquiry into the learning culture in ADF schools and training establishments was completed in July 2006. I released the inquiry report and strategies for implementing agreed report recommendations in December 2006 and a two-year, phased implementation plan was endorsed by the Chiefs of Services Committee in March 2007. The implementation plan built on several initiatives already underway and, as part of the process of continuous improvement, is expected to continue to influence changes to ADF training well after achievement of the last of its endorsed milestones.

The first phase of the implementation plan (identification of the doctrinal, policy and procedural changes needed to give effect to Defence commitments, along with the courses requiring amendment) is almost complete. The second phase (amending courses and implementing amended policy, in particular at the training institution level) is underway.

Implementation of 46 of the 47 agreed recommendations from the report is progressing satisfactorily. 17 full recommendations have been completed to date. Some of the key milestones include:

- Defining the optimal learning culture (now pending incorporation into Australian Defence Doctrine);
- Defining the difference between tough training from bullying and providing principles for the conduct of tough training;
- Rules for the development of codes of conduct across ADF training;
- Aligning the ADF fraternisation policy, within ADF training, with contemporary standards; and
- The development of principles for the conduct of focus groups that promote open and honest communication while preserving command authority and discipline and ensuring accountability.

Given that some initiatives are evolutionary in nature, it is difficult to identify a date by which completion of the entire program might be said to be achieved. Most recommendations are on schedule for completion by the end of this year, although a small number now have modified timelines – the main reason for this is an ambitious initial timeline coupled with task complexity. These new timelines extend beyond 2008.

I am monitoring implementation progress on a quarterly basis and the achievements will be reported in a specifically commissioned section of the Defence Annual Report.

The operation of the Australian Military Court

Among the many important reforms being made to the ADF military justice system, the creation of the permanent Australian Military Court was probably the most significant in that it has radically changed the previous ad hoc system of trials by Courts Martial and Defence Force Magistrates and is statutorily independent of the chain of command. The court opened in October 2007. The introduction of the court was finalised by the passage of the Defence Legislation Amendment Act 2008 which, as previously mentioned, will introduce a right of appeal from summary proceedings and new rights to elect trial by the AMC in the first instance after 20 September 2008.

The AMC is presided over by a Chief Military Judge and two permanent Military Judges, all of whom are legal practitioners appointed by the Governor-General. The AMC conducts trials by military judge and military jury and in certain cases by military judge alone. The military judges are independent from the military chains of command and executive in the performance of their judicial functions. Provision is made for the appointment of part-time military judges, although none have yet been appointed.

Since the court opened, 83 matters have been referred for trial. 27 matters have been finalised, 22 are currently listed for trial, four matters have been withdrawn and 15 are not currently being actioned for reasons such as deployment of members. Matters before the AMC are prosecuted by the independent Director of Military Prosecutions who is required to report annually to Parliament on the operation of her office. Her first report is due to be tabled shortly. Defending officers are arranged by the Directorate of Defence Counsel Services.

The number of trials referred to the AMC is considerably greater than might have been expected from the numbers of matters proceeding before Court Martial and Defence Force Magistrate during the years immediately preceding the establishment of the AMC. Where appropriate, civilian criminal matters continue to be referred to the civilian jurisdictions.

On 19 June 2007, the High Court handed down its judgment in the case of White v Director of Military Prosecutions [2007] HCA 29, which dealt with a challenge the AMC's jurisdiction on grounds that it purported to exercise the judicial power of the Commonwealth, although not a court established under Chapter III of the Constitution. The challenge was unsuccessful with the High Court holding that the disciplinary powers of military tribunals did not involve an exercise of the judicial power of the Commonwealth but are to be exercised judicially for the purpose of maintaining or enforcing service discipline.

Since then a further issue with respect to the validity of the constitution of military juries has arisen, with a trial adjourned after the Military Judge upheld the Defending Officer's objection that the military jury had not been arrayed according to law. Resolution of this issue is being progressed through amendment to the *Australian Military Court Rules 2007.*

The Chief Military Judge is required to report annually to Parliament. His first report is to be tabled shortly.

The operation of CDF Commissions of Inquiry

Legislation to facilitate creation of Chief of the Defence Force Commissions of Inquiry (COI) received Royal Assent in December 2006 (the *Defence Legislation Amendment Act 2006*). Amendments to the *Defence (Inquiry) Regulations 1985* to enable the appointment of COIs were considered and passed by the Federal Executive Council on 21 June 2007 and commenced on 26 June 2007. With the introduction of these Regulations, COIs superseded Boards of Inquiry (BOIs) as the primary mechanism for inquiring into the deaths of ADF members.

A civilian with judicial experience now presides over each COI. COIs are required generally to be appointed into deaths of ADF members which arise out of, or in the course of, a member's service. The Minister for Defence may dispense with the requirement to appoint a COI where a death occurs in circumstances in which he determines that a COI is not required. COIs may also be appointed into incidents involving serious injuries or other matters as determined by me. The appointment of civilian presidents enhances COI impartiality and creates separation from the normal chain of command. A panel of suitably qualified civilians with judicial experience to preside over a COI has been established. There are currently 15 individuals on the panel. A COI coordination cell has been established within my office.

The principal aim of COIs is to inform internal military decision-making. COIs determine the facts and circumstances surrounding an incident so that an informed decision can be made about how, and if possible why, an incident occurred to help avoid a similar recurrence. The ability of ADF Commanders to appoint internal administrative inquiries and obtain timely information on incidents that affect personnel, assets, training and policy, is vital for the safety and reputation of our people and the maintenance of our capability. COIs are not carried out with the intention of meeting the requirements of any other organisation or person outside of Defence. Defence is nevertheless committed to supporting the families of deceased ADF members throughout the COI process, and beyond. COIs do not replace coronial inquests.

COIs are conducted separately from the normal chain of command and according to terms of reference determined by me as the appointing authority. COIs are required to apply procedural fairness but, as fact finding inquiries. They are not courts of law and do not exercise judicial power. While COIs do not conduct criminal or disciplinary investigations (or focus on the attribution of blame) they may however make comments or findings that are critical of the conduct of individuals.

Defence appreciates the importance of conducting COIs in a way that promotes public confidence in the integrity of its inquiry processes. It is now my general practice to appoint COIs as public inquiries, subject to considerations of security and the exercise of legal discretions by COI Presidents. The *Defence (Inquiry) Regulations* authorise COI Presidents to direct that all or part of the hearings be closed on grounds of security or out of fairness to a person affected by the inquiry. This discretion properly permits COI Presidents to determine on a case-by-case basis whether particular aspects of a COI should be held in public or in private.

13 CDF COIs and BOIs into service deaths have been completed since October 2005 and two more are currently underway. Another 25 cases are currently in preparatory phases or are still being analysed to determine whether a COI will be appointed.

Regrettably, the ADF has recently experienced a number of combat deaths. In such circumstances it will not necessarily follow that a COI will be appointed on each occasion. Sadly, the reality is that combat deaths must be expected when our soldiers, sailors and airmen and airwomen go in harms way and, in the normal course of such events, little would be achieved by the review of such matters in the environment of a formal COI. I nevertheless recognise that special circumstances can exist to warrant the appointment of a COI into combat deaths. I have therefore established a practice whereby a preliminary assessment by a specially appointed inquiry officer is made in the case of ADF combat deaths to determine what happened and identify whether any special circumstances exist to warrant further inquiry by a COI. This approach has worked well. The reports made by such inquiry officers into the deaths of Sergeant Matthew Locke MG, Private Luke Worsley and Trooper David Pearce who were killed in combat in Afghanistan were recently made public.

COI reports are submitted to me and, after consultation with relevant stakeholders, I issue directions concerning the implementation of agreed recommendations. I then make recommendations to the Minister concerning the report's release (noting that release of a COI report is not permitted without the authorisation of the Minister pursuant to reg. 63 of the *Defence (inquiry) Regulations 1985*). Approved release will normally involve a COI report being published on the Defence website.

Progress made between Defence and State coroners in formulating protocols for the relevant coroner to hold an inquest into an ADF sudden or unexplained death

Protocols with coroners from Victoria, Queensland and Tasmania have been concluded. While those with the ACT, NSW and NT remain outstanding, each of the relevant coroners has agreed to proceed with these protocols, and have been encouraged to have them in place as soon as possible. The South Australian and Western Australian State Coroners have declined to provide a protocol to Defence. However, contact details for an ADF Liaison Officer have been provided to the South Australian and Western Australian Coroners.

The protocols provide for agreed processes and actions to be observed and taken by ADF authorities and State and Territory coroners that have jurisdiction over deceased ADF members. The introduction of these protocols will help to clarify respective responsibilities where dual or joint jurisdictional issues arise. Interaction between the ADF and Coroners relating to recent ADF deaths on operations has been very positive.

Matters raised in the Commonwealth Ombudsman's report, Australian Defence Force: Management of Complaints about Unacceptable Behaviour, Report 04/2007, June 2007 especially fear of reprisal and record keeping

Three of the recommendations of the Ombudsman's report relate to record keeping. The Inspector General ADF undertakes monthly audits of selected units to assess the quality of quick assessments, inquiries and record keeping in incidents of complaints of unacceptable behaviour.

A series of performance reporting indicators have been agreed between the Fairness and Resolution Branch and the Inspector General ADF which are analysed at least annually. These indicators are being incorporated into a new complaint management, tracking and reporting database, ComTrack. The first phase of ComTrack was launched in December 2007. Phases two and three are scheduled to be launched in late September and November 2008 respectively.

Fear of reprisal by respondents is common to many complainants. Defence has introduced a training course for commanders, supervisors and managers which includes information on providing support to all parties to a complaint. The mandatory annual equity awareness presentations also include information on this issue, encourage early resolution at the lowest appropriate level and provide options to assist personnel to achieve this goal.

We now have an extensive program of alternative dispute resolution processes. Conflict Coaching is one process designed to enhance an individual's ability to manage and self-resolve conflict in the workplace and to build workplace resilience.

In May/June 2008, seven Fairness and Resolution Centres will be formally opened. Staffed by trained and experienced military and civilian staff, these centres offer a range of advisory and conflict resolution services to all Defence personnel.

The instruction on *Management and reporting of unacceptable behaviour* is being revised and will include increased emphasis on providing support to all parties to a complaint in the workplace.

Conclusion

The task of implementing the agreed recommendations arising from the Senate Committee's 2005 Report has been a considerable undertaking. The changes being made to the ADF military justice system are the most significant since introduction of the Defence Force Discipline Act in 1985. While implementation of most of the recommendations has been completed or is well advanced, it will be important that these reforms are given time to bed down. This will allow them to achieve their full potential benefits in practice. The ongoing development of the ADF Investigative Service and the introduction of the new summary justice system are examples of initiatives that will need time to mature.

Overall, I believe progress of the reform program has been commendable and within realistic expectations given the magnitude of the task. I remain confidant that the changes being made will substantially improve the capacity of the military justice system to achieve its purpose of ensuring that the correct balance is struck between the requirement to maintain a high standard of discipline within the ADF and the need to make sure that ADF members are treated fairly. In this respect I look forward to receiving the report of Sir Laurence Street and Air Marshal Fisher in February 2009 as to whether this balance is being achieved and whether the direction of the reform program is appropriate. I regard success in getting this balance right as one of the fundamentals of continuing operational effectiveness.

I would like to reassure the Committee that my personal commitment, and that of the Secretary and Service Chiefs, to drive the implementation of the agreed reforms arising out of the Committee's 2005 Report remains undiminished. We are also very much aware that maintaining the currency and health of the military justice system is a vital task that will not necessarily end once all the agreed recommendations have been finally implemented. It will be an ongoing requirement to continuously monitor the health and effectiveness of the system and to make changes as they are required. As a result of measures we have taken to increase visibility and central oversight of the military justice system in recent years I believe we are much better placed to do this than was the case in the past.

I hope the foregoing provides you with the information necessary to update the Committee on our progress with implementing reforms to the military justice system.

Yours sincerely

A.G. HOUSTON, AC, AFC
Air Chief Marshal
Chief of the Defence Force

5 June 2008

Enclosure:
1. Summary of Outstanding Military Justice Reforms as at June 2008

SUMMARY OF OUTSTANDING MILITARY JUSTICE REFORMS

AS AT JUNE 2008

	Potential risk area

IMPLEMENTATION OF AGREED RESPONSE TO THE 2005 SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE REPORT 'THE EFFECTIVENESS OF AUSTRALIA'S MILITARY JUSTICE SYSTEM' TOTAL RECOMMENDATIONS: 32			
Serial	**Recommendation**	**Planned completion**	**Status**
1	**Recommendation 4**: Requires the promulgation of revised DI(G) PERS 45-1 - Exercise of jurisdiction under DFDA - Guidance for military commanders and the roll out of the Defence Policing and Security Management System (DPSMS) for use by Service police.	Jul 08	DI(G) PERS 45-1 - Exercise of Jurisdiction under the Defence Force Discipline Act - Guidance for Commanders is being finalised and the Defence Policing and Security Management System is currently being rolled out.
2	**Recommendation 5:** Finalise secondments and exchanges with civilian police, increase participation in civilian investigation training courses, make use of civilian police services, design clearer career paths and development goals for service police and initiate a reserve recruiting campaign to attract civilian police into the ADF.	Dec 08	Clearer career paths and development goals for Service Police have been enhanced by the creation of the ADF Investigative Service (ADFIS). This work, and revised recruiting targets, will be informed by the current review of Service Police functions and roles being undertaken by the Services.
3	**Recommendation 6:** Substantially complete. Outstanding items are to finalise and promulgate Investigative and Service Police Professional Standards.	Jun 08	Investigative Standards, based on the Australian Government Investigative Standards, are close to finalisation. The Service Police Professional Standards framework is based on the recently revised AFP Professional Standards. This recommendation will be complete when these standards are promulgated.
4	**Recommendation 29 (additional agreed recommendation):** Requires amendments to the Defence Force Regulations to be considered and assented to by the Federal Executive Committee and then promulgate DI(G) PERS 34-1 - ROG Tri-Service Procedures.	Jun 08	The Defence Force Regulations came into affect on 3 May 2008. The revised DI(G) PERS 34-1 Redress of Grievance – Tri Service Procedures is undergoing final preparation before being cleared and then distributed. This recommendation will be complete once DI(G) PERS 34-1 is issued.

5	**Recommendation 34 (additional agreed recommendation):** Put in place protocols with State and Territory coroners regarding the review of outcomes of ADF inquiries into deaths of personnel	Dec 08	Protocols with coroners from the ACT, NSW and NT remain outstanding. These remaining coroners have each agreed to proceed with these protocols, and have been encouraged to have them in place as soon as possible. The South Australian and Western Australian State Coroners have declined to provide a protocol to Defence. However they have been provided with contact details for ADF Liaison Officers.
6	**Recommendation 35:** Conduct first independent review on the health of the military justice system at the conclusion of the two-year implementation plan.	Feb 09	The first independent review of military justice reforms is underway. Former Chief Justice of NSW Sir Laurence Street and a former Chief of the Air Force AIRMSHL Les Fisher (Retd) will lead the review. The Terms of Reference were signed by the Chief of the Defence Force on 6 March 2008. The review team will report by February 2009.
	Total Number of Outstanding Recommendations at June 2008: 6		