

## Chapter 3

### ADF's investigative service

3.1 In its 2005 report, the committee expressed grave concerns about the ADF's capacity to conduct rigorous and fair disciplinary investigations. Indeed, it was of the view that the ADF had 'proven itself manifestly incapable of adequately performing its investigatory function'.<sup>1</sup> Responding to the committee's finding, the government agreed that the then military police investigation capability had significant shortcomings and was inadequate for dealing with more serious offences not referred to civilian authorities. It accepted the committee's recommendation to conduct a tri-service audit of the service police to establish the best means for developing investigative capabilities.<sup>2</sup> In February 2006, the CDF commissioned an audit into the ADF's investigative capability.

3.2 On 31 July 2006, the *Report of the 2006 Audit of the ADF Investigative Capability* was presented to the CDF and made public in December 2006. This audit was not the first review of the ADF's investigative capability. Inquiries into such matters date back to 1998 with the Commonwealth Ombudsman's *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences*.<sup>3</sup> This report and numerous subsequent ones have been consistent in identifying similar problems including:

- lack of experience and inappropriate training of those undertaking the investigation;<sup>4</sup>
- inadequate education and training in DFDA operation, for both legally and non-legally qualified or educated users;<sup>5</sup>
- inadequate questioning techniques, recording of interviews and statement taking, for example, pursuit of irrelevant issues in witness

---

1 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 52.

2 Government response to recommendation 6 contained in Senate Foreign Affairs, Defence and Trade References Committee, *Effectiveness of Australia's military justice system*, June 2005. See appendix 3 of this report.

3 See also the 1999 Joint Standing Committee on Foreign Affairs, Defence and Trade Report *Military Justice Procedures in the Australian Defence Force*; the 2001 Joint Standing Committee on Foreign Affairs Defence and Trade report *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*; the 2001 'Report of an Inquiry into Military Justice in the Australian Defence Force' conducted by Mr J.C.S. Burchett QC.

4 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

5 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15.

interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response;<sup>6</sup>

- lack of guidance about evidence gathering and analysis;<sup>7</sup>
- absence of a structured process for supervising or monitoring the progress of investigations;<sup>8</sup>
- inadequate record keeping;<sup>9</sup>
- failure to accord procedural fairness to Service personnel, especially in relation to the conduct of secret investigations under the auspices of the DFDA;<sup>10</sup>
- secrecy in the investigation process, poor management practices, inadequate resourcing, and excessively long investigation and offence clearance times;<sup>11</sup>
- delayed investigations;<sup>12</sup>
- unreasonable exertion of influence from commanding officer during investigative processes;<sup>13</sup> and
- procedural fairness and competence issues in investigation conduct.<sup>14</sup>

3.3 Importantly, the more recent 2006 audit found that the ADF's investigative capability was in serious decline. It contended that despite being reviewed, re-organised, restructured and downsized over the last fifteen years, the service police still lacked 'clear purpose and direction, a senior "champion" or advocate to advance

---

6 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 3.12–13.

7 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12.

8 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.12. The Ombudsman noted at paragraph 6.34, that there was 'some monitoring of investigations undertaken by Army and the investigation of complaints of unacceptable sexual behaviour'.

9 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.13.

10 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.15.

11 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.19.

12 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

13 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

14 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 3.21.

their interests, adequate leadership, and modern policy, doctrine, training and tradecraft'. According to the audit, a higher tempo of operations, integrated military and civilian workforces, and new investigative challenges were deemed to exacerbate the 'plight of the investigative capability'.<sup>15</sup> It argued that from senior commanders down, and even among service police themselves, there was 'no shared view as to the *place, purpose and standing* of investigators in fulfilling the mission of the contemporary ADF'.<sup>16</sup> The audit report concluded that the service police investigative capability had:

...reached the point where fundamental questions could be asked whether the service it provides justifies the significant resources expended on it. However, given the Government's decision that the ADF will retain its investigative capability, remediation must not be further delayed. It is very likely that unless action is taken as a matter of priority, the capability's depleted condition will eventually be evidenced either by its collapse or by the inability of the ADF to respond appropriately to a serious, sensitive event.<sup>17</sup>

3.4 In the government's response to the committee's 2005 findings on investigative capability in the ADF, Defence decided to establish a joint ADF investigation unit to deal with more serious disciplinary and criminal investigations. The ADF Investigative Service (ADFIS) has since been established under the command of a Provost Marshal ADF (PMADF) who is also responsible for implementing the recommendations of the tri-service audit of the ADF Service Police Investigative capability. In June 2008, the CDF observed that steady progress was being made with 45 of the audit's 99 recommendations completed, 27 close to completion and 4 that would be continuing activities.<sup>18</sup>

3.5 Even so, the committee understands that building up the investigative section will take time. It was informed that the reform process and building the appropriate capacity in the ADFIS would take 'at least five years'.<sup>19</sup>

### ***Committee view***

3.6 The committee notes the anticipated 5-year timeframe for building up the capability of the ADFIS to a satisfactory standard.

---

15 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraphs 4 and 5.

16 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 6.

17 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 8.

18 Department of Defence, *Report on the progress of reforms to the military justice system*, 5 June 2008. See Appendix 5.

19 *Committee Hansard*, 20 June 2008, p. 22.

### ***Recruitment to the ADFIS***

3.7 In 2005, the committee reported that service police members were of the view that their organisation was in crisis. They complained of poor morale, being overworked and under-resourced, loss of confidence, lack of direction and a sense of confusion about their role and purpose.<sup>20</sup> The 2006 audit report described a military police service where 'investigator motivation and morale were suffering and capable people were considering leaving the ADF'.<sup>21</sup> It found that the viability of the investigative elements of the three services was seriously threatened on several fronts noting:

- all are experiencing problems related to allocated staff numbers and their quality and experience; and
- many investigators have high workloads, poor administrative support and outdated and inadequate information technology support systems.<sup>22</sup>

3.8 In June 2008, the CDF informed the committee that recruitment and retention of suitable personnel remained a principal concern and that it was likely to be some time before ADFIS would 'be able to achieve its full complement'. He acknowledged that this under resourcing was 'probably a major factor in our ability to deal with the workload'.<sup>23</sup> He explained progress to date:

The ADF Investigative Service has been in existence for just over a year now, and I am most encouraged by the measures being implemented to achieve best practice policing within the ADF. It will, however, take time to establish and develop the investigative capability to its optimum potential... Recruitment campaigns and improvements to pay and conditions are being examined to rectify this shortfall.<sup>24</sup>

3.9 The committee had before it correspondence from a person who stated that he had been identified as a suitable candidate for direct entry recruitment into the Army Reserve component of the ADFIS.<sup>25</sup> He informed the committee:

Within a two year period, despite a sustained and concerted effort by the Provost Marshal and his staff, a deadline for my appointment is still outstanding.<sup>26</sup>

---

20 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxi.

21 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.

22 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.

23 *Committee Hansard*, 20 June 2008, pp. 22 and 33.

24 *Committee Hansard*, 20 June 2008, p. 22.

25 Confidential correspondence dated 16 June 2008.

26 Confidential correspondence dated 16 June 2008 and *Committee Hansard*, 20 June 2008, p. 32.

3.10 When asked about this case, the Provost Marshal, Colonel Tim Grutzner, explained that currently the ADFIS was manned at 58 to 60 per cent strength.<sup>27</sup> He advised the committee:

There are outstanding policy issues, in terms of bringing qualified personnel, such as civilian police—serving or exofficers—into the Army, Navy or Air Force Reserves as direct entry officers. In this case, the individual wishes to join the Army, and the policy now does not provide for a direct entry officer to join the military police. So there are a number of policy issues that we need to overcome for that.<sup>28</sup>

3.11 The CDF reminded the committee of the five-year implementation time, but indicated that in this case, recruitment processes would be accelerated. He said:

I think it is absolutely imperative that we expedite this process and I will take that on board. We will come back to it next time we speak and let you know how it is going.<sup>29</sup>

### ***Committee view***

3.12 The committee notes the CDF's undertaking to expedite recruitment processes to the ADFIS and urges the ADF to do its utmost to ensure that any shortfall in staffing for the ADFIS is remedied promptly.

### ***Improvements in capability***

3.13 According to the Provost Marshal, there are positive signs of improvement in the investigative capability of the ADFIS. For example, he was of the view that the briefs of evidence were improving.<sup>30</sup> The DMP also noted that there had been a slight improvement in the standard and quality of briefs of evidence. She was of the view, however, that there was 'room for improvement.'<sup>31</sup> She expressed concern that her office was still receiving a brief of evidence that shows that the investigation had taken between six to twelve months to complete. The DMP also indicated that many briefs 'clearly disclose that no service offence could be successfully prosecuted.'<sup>32</sup> In evidence before the committee, she stated:

But over the last 12 months or so, particularly the last six months—and I think us being in Canberra has enhanced this, as well as ADFIS finally having got home and settled down some of their procedures—we have been able to form an extremely good liaison with them and a number of the other

---

27 *Committee Hansard*, 20 June 2008, p. 33.

28 *Committee Hansard*, 20 June 2008, p. 32.

29 *Committee Hansard*, 20 June 2008, p. 32.

30 *Committee Hansard*, 20 June 2008, p. 33.

31 *Committee Hansard*, 26 June 2008, p. 12.

32 Directory of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, paragraph 91.

service policemen throughout Australia. For instance, I have instructed my prosecutors that, irrespective of whether the trial will proceed by a not guilty or a guilty plea, they encourage the service policemen who investigated it to attend. I think that exposes them to the problems that you have with evidence; they see it and they can learn vicariously in relation to how they should go about investigating. We have very good liaison with the headquarters at ADFIS, and their operations officer. I admit to still having some difficulties...<sup>33</sup>

...

Having said that, I think it has improved—certainly the quality. We still have a number of matters whereby we repace and seek guidance. That has been better received than it was initially. In the early stages when I asked for things to be redone or for evidence to be got in relation to certain matters, people were taking umbrage that I was being highly critical of their work. I think slowly but surely there is now a realisation that I am not being critical. They are making the same errors less often. Overall, I think their main problem is that they simply do not have enough. I do not know how you overcome that problem.<sup>34</sup>

3.14 The IGADF took the opportunity to inform the committee about the average time taken in the summary system. To bring matters to trial at the summary level in 2007–08 took 11 days for Navy, 15 days for Army and 28 days for Air Force. In the case of Air Force, about 60 per cent of those were actually handled in less than 21 days.<sup>35</sup>

### ***Committee view***

3.15 The committee notes the comments by the DMP and the IGADF indicating that the quality of investigations undertaken by ADFIS is improving. Nonetheless, as demonstrated by the committee's 2005 report and the more recent audit of the Report of an Audit of the Australian Defence Force investigative capability, the capability of the Service Police is starting from a low base. In particular, the committee notes the findings of the audit report that ADF investigative capability is in 'serious decline' and that, even if approached with 'unremitting resolve and commitment', remediation is likely to take no less than five years'.<sup>36</sup> The committee also notes that Defence has made a commitment to conduct a follow-up audit to determine the progress and effectiveness of the undertakings contained in the ADF's response to the audit report. According to Defence, this audit will form part of the broader independent review of the enhancements to the military justice system.

---

33 *Committee Hansard*, 26 June 2008, pp. 12–13.

34 *Committee Hansard*, 26 June 2008, p. 13.

35 *Committee Hansard*, 20 June 2008, p. 39.

36 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 3.

3.16 Although there have been many reviews of the ADF's investigative capability, the need for continuing monitoring and review is of the utmost importance. The committee supports Defence's intention to conduct a follow-up audit and also recommends a comprehensive and independent review after the 5-year remediation period (see recommendations 4 and 5 at paragraphs 3.34 and 3.35).

3.17 The committee would also like to see the IGADF assess progress and report in detail on the implementation of the recommendations contained in the audit report. The committee would also encourage the DMP to continue to draw on the experiences of her office to comment in her annual report on the quality of briefs produced for her office by the ADFIS.

### ***Scene of incident***

3.18 The criticism directed at the poor standard of investigations applies with equal force to administrative inquiries into serious accidents or sudden deaths. Based on evidence presented to the 2005 inquiry, the committee found that the immediate stage involving activities such as securing and examining the scene of an incident was one area of concern. At that time, a number of relatives of members of the ADF who had committed suicide were highly critical of the initial examination. Many believed that the investigation was flawed, for example, because the respective investigation was incomplete, that evidence was overlooked or important questions not asked.<sup>37</sup>

3.19 The audit into the ADF investigative capability supported the committee's findings. It recognised the need for all service police to have 'good crime scene skills in order to preserve and protect the scene and any evidence'. One of its many recommendations went to the basic skills required of service police:

SP and investigator training needs be reviewed to emphasise and reinforce the basic core skills and competencies of policing. These include the taking of statements from witnesses, interviewing suspects and offenders, and the rules governing the admissibility of evidence, including the value and use of exculpatory as well as inculpatory evidence.<sup>38</sup>

3.20 Despite repeated calls over many years for the appropriate care and management of incident scenes, the audit also found the urgent need for improvement in this area and recommended:

The proper care and management of incident and crime scenes, at least in terms of basic protection and preservation techniques, ought to be an

---

37 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 9.23–9.26. The report cited for example, Mrs Palmer, *Committee Hansard*, 1 March 2004, p. 75, who felt that there was 'not much of a military investigation with evidence discarded'. Mrs McNess, *Committee Hansard*, 28 April 2004, pp. 62–4.

38 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.1, paragraph 5.3, p. 49.

element of all pre-command training courses in the ADF and be reinforced periodically during career advancement.<sup>39</sup>

3.21 In response to the recommendations of the audit report, the ADF stated that it would include the proper care and management of incident and crime scenes as an element of all pre-command training courses in the ADF.<sup>40</sup>

3.22 The findings of the *Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco*, presented to the CDF on 27 October 2006, further underlined the concerns about the competence of investigating authorities in the ADF. It emphasised the need for immediate and decisive action by the ADF to rectify the many problems besetting its military police service. In particular, the report highlighted inadequate education and training of those undertaking the investigation, poor questioning techniques, recording of interviews and statement taking, and lack of process, monitoring or quality control.

3.23 To be more specific, the Report of the Board of Inquiry found shortcomings in ADF processes concerning the handling and preservation of serious incident sites and physical evidence and of the passage of information about the details of serious incidents.<sup>41</sup> For example, the inquiry found that the room in which Private Kovco died was not properly secured for the preservation of all evidence in the room. The Board stated, 'Put simply, there were too many ADF personnel entering Room 8 after the shooting'.<sup>42</sup>

3.24 In its second progress report tabled in March 2007, the committee was cautious in accepting that the ADF's undertakings to improve its investigative capability would be successful. Despite obvious progress, the committee's confidence was tempered by the repeated failures of the ADF to implement effective reforms following previous reports and reviews of the investigative capability of the military police service. It should be noted that recommendations to improve the investigative capability of the service police were made in 1998 by the Commonwealth Ombudsman; by the Joint Standing Committee on Foreign Affairs, Defence and Trade in 1999, again by the Joint Standing Committee in 2001; by Mr J. C. S. Burchett Q.C. in his 2001 report into military justice in the ADF; the IGADF's commissioned report into the East Timor SAS investigation (confidential document); the 2004 Ernst & Young Report; and by this committee in June 2005.

---

39 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, recommendation 5.8, paragraph 5.31, p. 49.

40 Defence Response to the Recommendations of the Audit of ADF Investigative Capability, response to recommendation 5.8.

41 Paragraph 285, Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco.

42 Paragraph 282(h), Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco.



3.25 Following each report, the ADF indicated that reforms were under way that would address the many problems plaguing the military police services. For example in January 1998, the Commonwealth Ombudsman stated:

Looking ahead, during 1998 the ADF is intending to commence a review into the tri-service investigation and policing capability for the ADF, which I understand will also address training issues. I am satisfied that every effort is being made to ensure that Service police will be adequately trained in the future, and that accreditation processes will promote adequate guidance and documentation for their investigative functions.<sup>43</sup>

3.26 The same inadequacies, however, remain. The committee notes the repeated failed attempts to improve the capability of service police and is looking for certainty that on this occasion definite and lasting improvements will be made.

3.27 Problems with the proper management of the scene of an incident, however, go beyond the capability of the service police and involve the activities ADF members before the investigators arrive. In May 2007, Defence informed the committee that:

Incident scene initial action and preservation training ('REACT') has been included as an element of all force preparation training for ADF personnel deploying on operations and will be included in relevant single-Service pre-command and career training courses.<sup>44</sup>

3.28 In December 2007, well after deficiencies with regard to management of evidence were brought to light following the death of Private Kovco, the inquiry into the death of Private Luke Worsley in Afghanistan also identified failures. The report found that Private Worsley's clothes and equipment had been destroyed prior to inspection by the Investigating Officer (IO). The inquiry stated:

Whilst not an issue in this case, care should be exercised for future matters where retention of evidence may be important. The IO was unable to identify a current policy detailing the management of personal equipment and clothing in the circumstances of this incident.<sup>45</sup>

3.29 While acknowledging that ADF members are acting with the best of intentions, it appears, from an investigation perspective, that the scenes of serious incidents are still being compromised.

3.30 The 2008 inquiry into the death of Sergeant Matthew Locke in Afghanistan also found breaches in post-mortem procedures that indicated 'a weakness in the

---

43 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, January 1998, paragraph 5.10.

44 Department of Defence, written answers to question on notice, W2, following hearing, 26 February 2007, May 2007.

45 *Inquiry Officer's Report into the Death of 8265028 PTE LJ Worsley in Afghanistan on 23 Nov 07*, paragraph 43.

knowledge levels of deployed personnel and possibly others preparing to deploy'. It stated:

It is conceivable that such a knowledge weakness could lead to a catastrophic loss of evidence in the event a criminal act is apparent. It remains a matter that warrants clarification to ensure force preparation and ongoing deployed force awareness of post-mortem procedures is sufficiently adequate.<sup>46</sup>

### ***Committee view***

3.31 The committee notes the high priority that the ADF has placed on improving the capability of its investigative services. The recent investigator's reports cited above highlight two important factors:

- much work remains to be done in training ADF personnel on the correct management of the scene of an incident, particularly the initial stage of an investigation including before the investigating officer arrives on the scene; and
- the value in making the investigating officer's report into a sudden death or serious incident public—although this reporting may expose deficiencies in the handling of an incident, it is an important accountability and learning tool.

### **Conclusion**

3.32 The standard of the ADF's investigative capability has come under serious, sustained and justified criticism for many years dating back at least to 1998. Over that time little progress has been made toward rectifying identified failings. If the reforms recently initiated and those still to be implemented are to take effect the ADF needs to refocus, develop a plan with clearly stated objectives for improving the ADF's investigative capability and make a concerted effort to achieve these objectives. Recruitment and training is a priority. The process of building the ADF's investigative capability should be monitored and assessed regularly.

3.33 The committee suggests that a senior officer or team similar to the MJIT have responsibility for reinvigorating the reform process by assessing progress in implementing change, reviewing the remediation plan and reporting to the CDF as soon as possible on the findings.

### **Recommendation 4**

**3.34 The committee recommends that in 12 months, Defence report to the committee on its progress implementing reforms to improve the ADF's investigative capability.**

---

46 *Inquiry Officer's Report into the Death of 8229246 SGT MR Locke in Afghanistan on 25 Oct 07*, paragraph 44.

**Recommendation 5**

**3.35 The committee recommends that the government commission an independent review of the ADF's investigative capability at the conclusion of the 5-year remediation period.**

3.36 In addition, the committee draws its concerns about problems with the ADF's investigative capability to the attention of Sir Laurence Street. It would welcome his advice on the approach being taken by the ADF to rectify these deficiencies and any suggestions his team might have on how the ADF's investigative capability could be improved.