

Chapter 5

Consolidating reforms

5.1 In light of the breadth of reforms that have been implemented over the past two years, the CDF emphasised the importance of allowing the new arrangements sufficient time to 'bed down' in order that any glitches could be identified and remedied. Overall, he was confident that the reforms in train would result in substantial improvements to the military justice system. In his view, they would better enable the ADF to achieve the correct balance between maintaining discipline and safeguarding individual rights.¹ The IGADF agreed with this assessment. After a recent visit to a number of overseas defence forces, he concluded that, allowing for the reform program to mature, the new ADF military justice system 'could quite likely represent best practice among comparable defence forces'.²

5.2 The committee recognises that 'substantial and commendable progress' has been achieved in improving Australia's military justice system.³ But as the implementation period draws to an end, the committee's main concern is that the reform program retains momentum. In this chapter, the committee looks at the measures taken to ensure that the gains made to date take hold.

Commitment to military justice system

5.3 Commitment by the government and ADF senior leadership is needed to ensure that the AMC and the summary trial procedures continue to work well. A similar commitment is needed to ensure that the Fairness and Resolution Branch and the Office of the IGADF maintain their key role in keeping the ADF's administrative system functioning fairly and effectively.

5.4 The CDF's commitment to the reform process has been one of the most notable features throughout the implementation phase. In presenting Defence's first progress report, the CDF stated:

Together with the Service Chiefs, we are committed to a fair and just military workplace and are personally driving the required changes. We are reviewing progress on a monthly basis as a standing item at the beginning of the COSC (Chiefs of Service Committee).⁴

1 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 70.

2 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 71.

3 Department of Defence, *Report on the progress to reforms to the military justice system*, 20 May 2008.

4 Department of Defence, *Report on progress of enhancements to the military justice system*, April 2006, p. 2.

5.5 On numerous occasions since then, he has re-committed to the reform process. In his October 2007 report, he indicated that he and the Service Chiefs would continue to monitor and review progress as a standing item at their Chiefs of Service Committee until the completion of the implementation of the reforms.⁵ The Defence Force Ombudsman also commented on the commitment at the senior levels within the Defence Force to ensure that matters are addressed:

I have had meetings personally with the Chief of the Defence Force, and it is clear to me that there is a strong personal commitment and strong personal leadership in ensuring that the problems exposed by the military justice inquiry and by some of our own investigations have been accepted and recommendations are implemented, and I have been impressed by the positive response that I receive. Finally, my experience generally as Ombudsman is that leadership is particularly important in getting an organisation to address serious problems of a systemic or cultural nature that are exposed by investigations.⁶

The committee notes and commends the CDF for his leadership in driving the reform program.

Adequate resources

5.6 Even so, the committee notes the importance of ensuring that sufficient resources are available to enable all elements of the military justice system to function properly. For example, the IGADF anticipated that as the reforms take effect and the system undergoes further refinement, the availability of appropriate resources is likely to be a continuing difficulty in some areas.⁷ He observed:

If we are to have an effective, fair and transparent military justice system to the standard that we all expect and that we all have been working to, there is a cost attached...As you know, the ADFIS...one of the new initiatives of the reform program, is up and running but is undermanned, so ways will have to be found and resources will have to be produced to make sure that it fills its complement and that its recruiting and retention are up to speed.⁸

5.7 The committee has already noted the concerns raised about the demand for increased resources with the operation of the AMC, current serious problems in staffing the ADFIS, and some slowness in appointing officers to the ODMP. In reference to the COIs, Captain Paul Willee stated that, although the Law Council had no current concerns about the process, there was the general problem of resources which 'are very stretched'.⁹ Furthermore, the committee recognises that staffing levels

5 *Committee Hansard*, 20 June 2008, p. 23.

6 *Committee Hansard*, 19 June 2006, p. 8.

7 *Committee Hansard*, 20 June 2008, p. 23.

8 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 77.

9 *Committee Hansard*, 20 June 2008, p. 42.

in the Fairness and Resolution Branch must be maintained at an appropriate level to prevent a return to the pre-2005 administrative system which was plagued by lengthy delays in processing complaints and ROGs.

Committee view

5.8 The committee notes that the government's commitment to securing a fair and effective military justice system must be supported by adequate funding and appropriate staffing. It believes that a robust reporting regime is required to keep both the government and the parliament apprised of any shortfalls in necessary funding or staffing for the elements that compose Australia's military justice system.

Maintaining the momentum

5.9 Mindful of the long history of repeated failures to secure lasting effects from reforms to the military justice system, the committee considers that there is a risk of the recent initiatives likewise failing. In this regard, it notes that many of the problems identified in the military justice system were 'manifestations of a deeply entrenched culture'. Thus, one of the committee's main concerns is to prevent the re-emergence of old attitudes and lax practices that run counter to securing an effective and fair military justice system. Improvements in process will not of themselves eliminate the underlying culture or deep-seated attitudes that allowed some of the abuses identified in 2005 to once again take root. As noted by the CDF:

The wrong sorts of behaviour can be very destructive to an organisation, but the right sorts of behaviour can be very productive and constructive. Whilst statements on values are fine in their own right, the real challenge that any organisation faces is to embed its values and its culture and to ensure that its values shape the behaviour of its people.¹⁰

5.10 The committee notes the CDF's commitment to a fair and effective military justice system. It believes, however, that the system should have inbuilt safeguards that do not rely on the commitment of any one person or group to ensure an effective and fair military justice system.

Visibility and scrutiny

5.11 In June 2008, the CDF acknowledged that maintaining the currency and health of the military justice system would be a vital task not necessarily ending 'once all the agreed recommendations have been finally implemented'. He was aware that it would be a requirement to monitor continuously the health and effectiveness of the system and to make changes as needed.¹¹ Nonetheless, he was confident that the measures taken in recent years to increase visibility and central oversight of the

10 *Committee Hansard*, Estimates, 2 November 2005, pp. 7–8.

11 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 10.

military justice system would ensure that the advances made will not be diminished.¹² The IGADF shared this view that the military justice system was now 'considerably more transparent' and 'more broadly accountable than it has been in the past'.¹³ He also argued that there needs to be ongoing scrutiny.¹⁴

5.12 Clearly, the CDF and the IGADF place a high reliance on visibility and regular scrutiny of the military justice system to ensure that the gains made in improving the system will not be lost. The committee now examines the oversight and monitoring regime in order to determine whether it is sufficiently robust to prevent any relapses. It considers the ADF discipline system first before examining the administrative system.

Discipline system

5.13 In large measure, the responsibility for providing the necessary visibility and oversight rests with the CMJ, the JAG, and the DMP. Their independent and critical voice is vital to the health of the system. They are well placed to identify and to issue early warning signals of problems in the discipline system. In particular, the requirement for the CMJ, the JAG and the DMP to provide an annual report to the minister for presentation to the parliament is an important means of upholding the integrity of the ADF's discipline system.

5.14 The committee is confident that the discipline system, with its independent military court; an independent chief military judge; a statutorily independent DMP; and a JAG, who is an independent senior civilian judge with oversight responsibility, provides a sturdy accountability framework. The requirement for the CMJ, the DMP and the JAG to provide an annual report to the minister for presentation to the parliament is an important safeguard. There are also a number of other means to improve the transparency and accountability of the discipline system.

Military justice reporter

5.15 The committee explored the matter of the AMC having a reporting mechanism such as 'a military justice reporter'. The Registrar of the AMC informed the committee that there was no military justice reporter, but that the establishment of a Defence intranet site was contemplated. This site would provide notifications of listings of the matters coming up for trial, trial outcomes and a decisions database that would give the reasons for rulings.¹⁵

12 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 10.

13 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 71.

14 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hansard*, 10 July 2008, p. 78.

15 *Committee Hansard*, 20 June 2008, p. 8.

5.16 According to the Registrar such a database would be closed to the wider public, including the parliament, because of 'privacy concerns'. He explained:

... the Australian Military Court, by virtue of not being a chapter 3 court, is not picked up as a federal court within the terms of that particular phrase within the Privacy Act. So we do not get the protections of the Privacy Act in terms of any disclosure of information that a federal court would normally undertake. That is an issue for us and it is why, in the absence of any clear legislative authorisation under either the Privacy Act or the DFDA, it creates difficulties in terms of public disclosure of information. Under the Defence Force Discipline Act, it is intended that our proceedings are open to the public and there is another provision that allows a military judge to give an order for the non-publication of certain parts of proceedings. By implication one could say that, if you add the two together, you may get an implied authorisation to publish material from the proceedings of the court. But we would prefer not to rely upon inferences or the implications that flow from those provisions and be given quite clear authorisation.¹⁶

5.17 He also indicated that the service chiefs would 'have to be consulted as to the wider publication of that as well'. He could not comment on this matter at the moment but, in his view, the wider reporting on the business of the AMC is 'a policy issue that will need to be addressed'.¹⁷ The DMP, however, had a different view about privacy concerns noting that the proceedings are public and people can attend whether or not the hearing is on defence land:

In the civil world, of course you can go to any court any morning and look at the list and see whose names are on it. I think we tend to get a little bit precious in relation to that. My view is that people will never know if we do not start to communicate what is happening. Particularly when it comes to prosecutions, if the concept of general deterrence is not communicated, if the issues are not out there and if they are not given to the general community as well as the defence community—bearing in mind that we are dispersed throughout Australia, overseas and the like—then we are not going to achieve the aim of general deterrence. So I do not share the view that we have to have the niceness of a definition of what privacy or a court is. I would very much like to see us publicly putting the lists in the Army, Air Force and Navy newspapers as to who is going to trial and I would like us very much to report what happened to them. I do not think that is a breach of privacy. I have opponents in relation to that, as you appreciate. In some respects I have deferred to their concerns. On my website, for instance, having regard to their concerns, I do not name the people who are convicted, but I give sufficient detail of the offending and the result.¹⁸

16 *Committee Hansard*, 20 June 2008, p. 10.

17 *Committee Hansard*, 20 June 2008, p. 10.

18 *Committee Hansard*, 26 June 2008, p. 7.

Committee view

5.18 The committee is strongly of the view that information about the operation and business of the AMC should be as accessible as possible: that information about process, procedures and practices be readily and easily available to the public. If the Registrar's concerns about privacy have substance, then the committee believes that the government should take whatever action is required to require the AMC to publish material such as court lists, transcripts and judgments. The committee understands that some material should not be published such as material deemed by a military judge to be private. This confidentiality should be respected. Otherwise, if the AMC is to instil public confidence in the administration of military justice, it must be accessible to the public.

5.19 To ensure that information about the AMC is readily available, the committee recommends that the government make sure that adequate funds are allocated to assist the AMC establish appropriate mechanisms for disseminating information. The committee is also of the view that establishing these mechanisms and making information available should not be left to the discretion of the CMJ but should be required under legislation.

Recommendation 8

5.20 The committee recommends that the government amend the DFDA to require the AMC to publish material such as court lists, transcripts of proceedings and judgments in a readily and easily accessible form.

5.21 On this issue of transparency and accountability of the AMC, the committee notes that the CMJ declined an invitation to appear before the committee to give evidence on the operation of the court and related matters. On behalf of the CMJ, Colonel Cameron, Registrar of the AMC, informed the committee that the CMJ believed that it would be inappropriate for him, or other military judges, to appear before the committee.¹⁹ The CMJ was concerned about maintaining proper independence from the executive and the legislature. Colonel Cameron also wrote the committee and, in support of the CMJ's position, cited the *Guide to Judicial Conduct (2nd edition)* published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration Incorporated. He explained further:

Aside from the issue of maintaining an appropriate distance between the judiciary and the Executive, the Guide also refers (at paragraph 5.6.1) to '...(the) risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or pre-judgement in cases that later come before the judge even in areas apparently unconnected with the original debate'.²⁰

19 *Committee Hansard*, 20 June 2008, p. 2.

20 Colonel G. Cameron, Registrar, AMC, to Standing Committee on Foreign Affairs, Defence and Trade, 16 July 2008.

5.22 As noted in Chapter 2, however, the now amended *Defence Force Discipline Act 1982* (DFDA) makes clear that the newly established AMC 'is not a court for the purposes of Chapter III of the Constitution'. It is 'a service tribunal'.²¹ The committee is strongly of the view that the CMJ should, when invited by the committee to give evidence on the operation of the court and matters raised in the AMC's annual report, accept that invitation.

5.23 The view reflects the Senate's understanding of the requirement for statutory authorities to be accountable to parliament for their expenditure of public funds. On a number of occasions the Senate has affirmed the principle that:

Whilst it may be argued that statutory authorities are not accountable through the responsible minister of state to Parliament for the day-to-day operations, they may be called to account by Parliament itself at any time and that there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise...²²

5.24 *Odgers' Australian Senate Practice* concludes that officers of statutory authorities 'so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees'.²³

5.25 More importantly, the committee also gave careful consideration to the relevant paragraphs contained in the *Guide to Judicial Conduct (2nd edition)* cited by Colonel Cameron. Paragraph 2.2.1 is concerned with the principle of the separation of powers, which according to the Guide 'requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government'. It states:

The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others (see par 5.6). An appropriate distance should be maintained between the Judiciary and the Executive, bearing in mind the frequency with which the Executive is a litigant before the courts.

Communication with the other branches of government on behalf of the judiciary is the responsibility of the head of the jurisdiction or of the Chief Justice.

It is not uncommon for the executive government, or even Parliament itself, in matters affecting the administration of justice generally, to want to use

21 Notes 1 and 2 to section 114, *Defence Force Discipline Act 1982*.

22 Procedural orders and resolutions of the Senate of continuing effect, *Standing Orders and other orders of the Senate*, September 2006, no. 44, p. 136.

23 *Odgers' Australian Senate Practice*, Harry Evans (ed), 11th edition, 2004, chapter 17–Witnesses, <http://www.aph.gov.au/Senate/pubs/odgers/chap17toc.htm>.

the expertise of judges other than in the exercise of their judicial duties. The fact that the High Court has recently held the conferral of certain non-judicial functions on judges to be invalid...does not necessarily mean that any such request for extra-judicial advice or service must be refused, but acceptance requires very careful consideration and appropriate safeguards.²⁴

5.26 The committee cannot see anything in this advice that would cause the CMJ to decline an invitation to appear before the committee to give evidence about the administration of Australia's military justice system. The committee notes, however, that the guide suggests that acceptance 'requires careful consideration and appropriate safeguards' and now turns to this matter.

5.27 Paragraph 5.6.1 of the guide takes the view that appropriate judicial contribution to public consideration and debate on the administration of justice and the functioning of the judiciary in the media, at public meetings and at meetings of a wide range of interest groups is 'desirable'.²⁵ It suggests that such involvement 'may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions'.²⁶

5.28 Nonetheless, it advises that 'considerable care should be exercised to avoid using the authority and status of the judicial office for purposes for which they were not conferred'. The guide highlights some points for judges to bear in mind when considering whether it is appropriate to contribute:

- A judge must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;
- The place at which, or the occasion on which, a judge speaks may cause the public to associate the judge with a particular organisation, group or cause;
- There is a risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or prejudice in cases that later come before the judge even in areas apparently unconnected with the original debate;
- A distinction might be drawn between opinions and comments on matters of law or legal principle, and the expression of opinions or attitudes about issues or persons or causes that might come before the judge;

24 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 2.2.1.

25 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

26 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

- Expressions of views on private occasions must also be considered carefully as they may lead to the perception of bias;
- Other judges may hold conflicting views, and may wish to respond accordingly, possibly giving rise to a public conflict between judges which may bring the judiciary into disrepute or could diminish the authority of a court;
- A judge, subject to the restraints that come with judicial office, has the same rights as other citizens to participate in public debate;
- A judge who joins in community debate cannot expect the respect that the judge would receive in court, and cannot expect to join and to leave the debate on the judge's terms.

If the matter is one that calls for a response on behalf of the judiciary of the State, Territory or court collectively, that should come from the relevant Chief Justice or head of the jurisdiction, or with that person's approval. Subject to that, and bearing in mind the points made above, care is called for before contributing to community debate using the judicial title, or when it will be known that the contribution is from a judge.²⁷

5.29 Again nothing in this guidance suggests that the CMJ, even if he were a judge of a court properly constituted under Chapter III, should not appear before a parliamentary committee. To the contrary, the guide clearly contemplates, and indeed endorses, the contribution of a chief judge to consideration or public debate that 'would add to the public's understanding of the administration of justice and to public confidence in the judiciary'.

Recommendation 9

5.30 The committee recommends that the CMJ appear before the committee to give evidence on the operation of the AMC and matters raised in the CMJ's annual report when invited by the committee to do so. The CMJ has a vital role, through his or her appearance before the committee, to contribute to the public understanding of the administration of military justice and to build public confidence in the system.

5.31 Aside from the failure of the CMJ to appear before the committee when invited, the committee's main concern, with regard to scrutiny and accountability of the discipline system, is with the future role of the JAG.

Judge Advocate General

5.32 In reviewing the former JAG's 2005 annual report, the committee considered that the JAG's report was an invaluable tool for providing independent and expert systemic insight into the operation of the military justice system. It believed that the JAG's statutory independence provided an effective mechanism necessary to identify

27 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, (2nd ed), 2007, paragraph 5.6.1.

concerns with the Defence Force discipline system. The committee cited his report as an example of how independence and impartiality in the reporting regime can improve the overall function and accountability of the military justice system. The committee welcomed and supported the JAG's proactive stance in using his annual report to identify problems in the military justice system; suggest improvements to the system; and provide public information regarding the operation of particular aspects of the military justice system. The former JAG's 2006 annual report and the current JAG's 2007 annual report similarly demonstrate the value of having a strong independent civilian judicial oversight of the operation of the DFDA and related legislation.

5.33 The creation of the AMC has meant, however, that many of the former functions of the JAG are now performed by the CMJ.

Future of the JAG

5.34 Consistent with the views of his predecessor, the current JAG, Major General Richard Tracey, strongly supported the retention of the office as an important means for achieving 'a just and transparent military justice system'. He traced the history of the office of the Judge Advocate General noting its evolution over time to 'reflect changes in the military discipline system'. He was of the view that the JAG could have a continuing important role especially through the JAG's annual reports to parliament which 'provide an independent judicial insight into military discipline within the ADF'.²⁸

5.35 Both the CMJ and the DMP are permanent military officers, while the JAG is a senior civilian judicial officer. In contrast to the reports of the CMJ and the DMP on particular aspects of the discipline system, the JAG's report provides oversight and assessment of the operation of the military discipline system as a whole and any related legislation within the reporting year. The JAG is also well placed to make comparisons between the ADF military discipline system and any relevant developments in military discipline overseas.²⁹

5.36 The JAG noted that his role need not be limited to a reporting function. He suggested that the experienced senior civilian judicial standing and independence of the JAG could be used to enhance the fairness, quality, efficiency and effectiveness of the Australian military discipline system into the future. For example, the JAG could:

- play a role in ensuring the quality of appointees to the positions of CMJ, military judges, the DMP and the Registrar of the AMC; and
- be available to the CDF as a sounding board, a source of advice about military discipline issues and, in particular, to be able to advise the CDF about

28 *Committee Hansard*, 20 June 2008, pp. 14–15.

29 *Committee Hansard*, 20 June 2008, p. 14.

developments in the civilian system that may have implications for the military justice system or could highlight problems.³⁰

5.37 In his view, an advisory role need not compromise the independent oversight role of the JAG. He explained:

It depends what sort of advice. Certainly, the CDF gets his day-to-day legal advice from the department, and I would not envisage that the Judge Advocate General would intrude on that at all. But it may be that issues of policy arise where he is presented with competing views as to how he might deal with a particular situation and he might feel he needs a sounding board. I do not think this is the sort of thing that could be legislated for. I simply think that, if the office is there, then the option is available to the Chief of the Defence Force if he needs it at any point.³¹

5.38 He was of the view that legislation could be 'cast with sufficient generality to provide the legal foundation for the office to so act without in any way encumbering the CDF's discretion as to whether he seeks advice or whether he does not'.³²

5.39 The CDF recognised that the JAG has been a very important part of Australia's military justice system but noted that it was time to consider the role and function of the JAG under the new system. He advised the committee that he would like the review team of Sir Laurence Street and Air Marshal Fisher to look at how the JAG could be used in the future—'if indeed we need a JAG in the future'.³³

Committee view

5.40 For a number of years, the committee has commended the JAG's annual report as an important means of providing the necessary judicial oversight of the DFDA. With the creation of the AMC and the appointment of a CMJ, the committee urges the government to ensure that the level of independent civilian oversight of Australia's military justice system continues. It is of the opinion that the JAG has a vital and valuable role to play in providing this oversight and that this critical oversight work continue. Nevertheless, the committee supports the CDF's proposal to refer the matter of the JAG to the newly created review team.

Funding arrangements for the Office of the JAG

5.41 The JAG noted that if the office were to be retained then it would need to be separate from the Military Court to avoid a perception of influence. He indicated that his office would 'probably need to be established within another part of the Defence Force—one possibility is the office of the Vice Chief of the Defence Force'. The JAG

30 *Committee Hansard*, 20 June 2008, pp. 14–15, 18.

31 *Committee Hansard*, 20 June 2008, p. 18.

32 *Committee Hansard*, 20 June 2008, p. 18.

33 *Committee Hansard*, 20 June 2008, p. 31.

also suggested that his office should be staffed by at least one senior officer who would be in a position to do the day-to-day work necessary 'to collate all the relevant material and keep me briefed about developments within the Defence Force so that I can make judgements and prepare the annual report'.³⁴

Committee view

5.42 The committee notes the JAG's concern regarding staff and sources of funding for his office. The committee believes that in consultation with the JAG, the government should address his concerns. In considering the role and function of the JAG, the review team should also consider these matters.

Administrative system

5.43 Unfortunately, the same level of independent scrutiny of the discipline system does not apply to the administrative system. In this regard, the Defence Force Ombudsman reports annually on Defence matters submitted to him. The committee believes, however, that while it supports the continuation of the Ombudsman's reporting obligations, the Office of the Defence Force Ombudsman is not sufficiently immediate to the administrative system to provide the appropriate level of monitoring, analysis and review. The IGADF is ideally placed to fill this role.

Inspector General Australian Defence Force

5.44 The IGADF became a statutory officer under the Defence Act in December 2005. Having regard to recommendations made by the CDF, the Minister by written instrument appoints the IGADF for a period that must not exceed five years. The appointment is renewable.³⁵ The IGADF monitors the implementation progress of the reforms to Australia's military justice system.³⁶ He provides independent internal oversight of, and audits, the military justice system. The functions of the IGADF are:

- to inquire into or investigate matters concerning the military justice system;
- to conduct performance reviews of the military justice system;
- to advise on matters concerning the military justice system; and
- to promote military justice values across the Defence Force.³⁷

34 *Committee Hansard*, 20 June 2008, p. 17.

35 Sections 110 E,F,G, *Defence Act 1903*

36 *Committee Hansard*, 20 June 2008, p. 21. Under section 110 of the *Defence Act 1903*, the IGADF is a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

37 Section 110C, *Defence Act 1903*.

5.45 According to the IGADF, the inquiry and audit activities of his office provide 'better oversight about what is happening in the system than ever before'. He noted that previously there was 'little central visibility, oversight or analysis of the system as a whole on any routine basis'.³⁸ He informed the committee:

While many of the recent reforms to the military justice system, such as the establishment of the permanent Military Court and the new joint investigative service, are relatively visible high-profile initiatives, other important, if less obvious, systemic changes are also being made. These are changes which should materially help to improve the quality of the military justice system by enabling a more constant and consistent surveillance of its components so that flaws in potential areas for reform can be identified and rectified more easily. For example, we now have in place far more effective recording systems for disciplinary and adverse administrative action and for tracking administrative inquiries and the implementation of recommendations arising from them.³⁹

5.46 In its first progress report dated August 2006, the committee commended the work of the IGADF. It noted that his office bears a heavy responsibility for ensuring that many of the reforms then being implemented would 'in fact result in an effective and fair military justice system'.⁴⁰ The committee was firmly of the view that his success would in large measure depend on winning the trust and confidence of ADF members and of being seen as independent from the military chain of command.⁴¹

5.47 This responsibility is more apparent with the completion of the reform implementation phase. The IGADF told the committee that he has a 'broad oversight role of the ADF military justice system and, since the closure of the Military Justice Implementation Team, a monitoring role now attaches to the IGADF in relation to the implementation of those reforms'. He explained his office's role in monitoring the daily operation of the military justice system including through an audit program, which, in his view, is 'proving very successful':

We have audited something like 167 of the 500 or so units in the ADF. They have not all passed, by the way—a small number have not. But...the availability of the reporting systems, plus the scrutiny afforded by my office on a routine basis together with the periodic checking and validation of these processes by external teams means that it is not an entirely internal matter.⁴²

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

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

40 Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system: First progress report*, August 2006, paragraphs 4.77–4, 784.97–4.98.

41 Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system: First progress report*, August 2006, paragraphs 4.77–4, 784.97–4.98.

42 *Committee Hansard*, 20 June 2008, pp. 26–27.

5.48 The IGADF also informed the committee that the case management system for recording police investigations had been upgraded and a new system for monitoring complaint handling was under development. He explained:

The information collected, together with other proactive actions, such as the rolling unit Military Justice Audit Program conducted by my office, will allow the health and effectiveness of the ADF military justice system to be continuously monitored to an extent that was not previously possible. In this respect, I might also mention in passing the interesting development of an entirely new system for the analysis of military justice data being undertaken now, with the help of some quite clever consultants, by the Performance Management Section of my office. It is still in its pilot stage but, if it works as planned, it will break some new ground in the always difficult area of assessment of health and effectiveness of military justice systems.

I am very hopeful that the visibility of military justice issues afforded by the new reporting systems, the ongoing scrutiny of the system through the enquiry and audit processes or activities of the office of the IGADF, together with the periodic checking and validation of these processes by external teams, such as that now being undertaken by Sir Laurence Street and Air Marshal Fisher, will enable necessary reforms to the military justice system to be identified more quickly and made more systematically in a way that can, where necessary, better respond to changes in the law and community expectations as they happen.⁴³

5.49 The committee, and indeed the parliament, will depend on the IGADF's frank and honest reporting to keep it informed about the timeliness of investigations or the processing of complaints, standards of investigations, staffing requirements and shortfalls in the ADFIS, the Fairness and Resolution Branch and the OIGADF and any other relevant section. It will look to the IGADF to identify emerging patterns of unacceptable behaviour or failings within the military justice system. It is for this reason that the committee once again urges the government to strengthen the independence of the IGADF, for example, by placing the office under the same reporting regime as the CMJ and the DMP.

Reporting regime

5.50 The committee notes that the IGADF is a statutory appointment but, unlike the CMJ, JAG and DMP, is not required to report separately to parliament. Under section 110R of the *Defence Act 1903*, the IGADF 'must prepare and give to the Chief of the Defence Force such reports on the operations of the Inspector-General ADF as the Chief of the Defence Force directs'.

5.51 Furthermore, the *Defence Act 2003* makes clear that the IGADF is to provide the CDF with:

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

- a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and
- an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.⁴⁴

5.52 The only interpretation that the committee can place on this provision coupled with the IGADF's reporting obligations is that the independence of the IGADF is curtailed. While the IGADF is to provide the CDF with a mechanism for internal audit and review independent of the ordinary chain of command, his reporting obligations are nonetheless confined within the chain of command. Clearly, the intention of the legislation is to make the IGADF a key advisor to the CDF without any obligations to make public or inform the parliament about his findings or any recommendations on the military justice system.

5.53 In its 2005 report, the committee argued that a reporting regime that is transparent and promotes accountability would greatly improve the perceived independence of the Office of the IGADF. It noted, however, that there does not appear to be any adequate avenue for the IGADF to air his or her concerns about the military justice system to any authority other than the CDF. It appeared to the committee that this constraint was a sound reason for providing the IGADF with effective reporting procedures.⁴⁵

5.54 At that time, the committee also argued that adequate measures should be in place that would hold the CDF publicly accountable should he or she fail to act in part or in full on a recommendation by the IGADF.⁴⁶ It suggested that there should be a requirement for the CDF to provide written explanations to the IGADF for rejecting recommendations that would enable the IGADF to comment on any concerns related to such matters and which would be recorded, for example, in the Annual Report.⁴⁷

5.55 When asked about having the legislative independence to report through an annual report to parliament through the minister, similar to CMJ, JAG, and DMP, the IGADF responded:

...the IG ADF was a creature envisioned and created, I think legislatively, to help the CDF. So, unlike the DMP and the AMC, my reporting function

44 Section 110A, *Defence Act 1903*.

45 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. 219.

46 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 11.10 and 11.11.

47 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 11.10 and 11.11. See also Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, p. 36.

is to the CDF. I provide him with a comprehensive annual report each year, extracts of which are published in the Defence annual report. But the difference is, I suppose, that I do not report directly.⁴⁸

5.56 Again this statement highlights the inconsistency in the legislative approach taken for the IGADF and that for the CMJ and the DMP. Unlike the CMJ and the DMP, the IGADF is too closely associated with the chain of command to be seen to provide independent oversight of the military justice system.

5.57 If the IGADF is to earn the trust of members of the ADF and more broadly of the Australian community, he or she must be independent and impartial, and be seen to be so. The independence and impartiality of the IGADF is also paramount if the office is to function as a credible and effective oversight body, able to investigate and report findings free from the limitations imposed by the chain of command. Furthermore, there must be legislative mechanisms that would allow the IGADF to carry out this oversight function effectively. The committee cannot be satisfied, and is not satisfied, that the IGADF's disclosure regime and level of independence is appropriate. The committee believes that the IGADF needs legislative provisions that protect the integrity of the office similar to those for the CMJ and DMP.

Committee view

5.58 The IGADF monitors Australia's military justice system and has oversight of the completion of outstanding implementation actions.⁴⁹ The committee believes that the administrative system needs to be independently and critically monitored and any failings identified early and drawn to the minister's and the parliament's attention. The committee recognises that the IGADF should fill this role but believes that the independence and impartiality of this office needs to be strengthened. The committee recognises that at this stage there is strong justification for further legislative change to enhance the independence of the IGADF which, in the committee's view, needs to be addressed as a matter of priority. The committee suggests the IGADF be required to present an annual report to the minister for tabling in parliament according to the same reporting obligations that apply to the CMJ and DMP. It would allow the IGADF the opportunity to make objective and frank assessments of the health of Australia's military justice system.

Recommendation 10

5.59 The committee recommends that the *Defence Act 1903* be amended to include in section 110 the requirement for the IGADF, as soon as practicable after each 31 December, to prepare and give to the Minister, for presentation to

48 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Committee Hansard*, 10 July 2008, p. 78.

49 Department of Defence, *Report on the progress of reforms to the military justice system*, 5 June 2008, p. 1 (see appendix 5).

the Parliament a report relating to the functions of his office as set out in section 110C(1).

5.60 This recommendation is a necessary first step in restoring credibility to the office of the IGADF when it comes to his independence and function as an effective oversight authority. Other measures should also be considered using the provisions that apply to the CMJ and DMP as a model.

Recommendation 11

5.61 The committee recommends that the government consider additional measures to strengthen the independence of the IGADF using the provisions governing the CMJ and the DMP as a template.

5.62 COIs now form an important part of the ADF administrative system. They inquire into serious and complex matters, often where the death of an ADF member is involved. In some cases they inquire into highly technical matters that may have severe political implications. Public expectations of such inquiries are generally high and next of kin look to such an inquiry to answer questions that sometimes cannot be answered. As noted in the previous chapter, the committee would like to see the regulations governing the operation of the commissions changed to provide greater transparency such as the presumption that commissions would be conducted in public. Furthermore, where proceedings are to be private, the committee suggests that the regulations require the president to make a statement outlining the reasons for this decision. These measures would improve the transparency of the investigation and help instil public confidence in the integrity of the process.

Recommendation 12

5.63 The committee recommends that the regulations governing the establishment of COIs be amended requiring COIs to be conducted in public except in circumstances where the president deems there to be a compelling reason for privacy. In cases where the president makes such a decision, the regulations should require the president to issue a public statement containing the reasons for this decision.

Implementation of reforms

5.64 As noted earlier, Former Chief Justice of New South Wales, 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. They are to report to the CDF by 10 February 2009. The CDF has asked this review team 'to report on whether the many reforms to the military justice system are appropriate and effective and to identify whether any further enhancements are required'.⁵⁰

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

5.65 The committee welcomes the establishment of this review team. There are a number of matters that the committee would like to draw to the attention of this team. Some concerns go back to the committee's initial 2005 report and, although discussed since then at public hearings, the committee remains uncertain as to whether reforms have adequately addressed these matters.

Chain of command influence

5.66 One of the strongest messages coming out of the committee's 2005 report was the actual or perceived chain of command influence in investigations. The committee has discussed the COIs and the ADFIS. It has not discussed in detail the routine investigations undertaken under the administrative system.

5.67 In 2005, the committee recommended a number of changes to the Defence (Inquiry) Manual which have in large measure been made. These included measures to enhance the transparency, accountability and impartiality of administrative inquiries by requiring an investigating officer to produce a written statement of independence before commencing an investigation. The committee suggests that the review team consider the effectiveness of these amendments to the *Administrative Inquiries Manual* and whether they are sufficiently binding on investigating officers to ensure impartiality and prevent undue command influence.⁵¹

5.68 The committee suggests that the review team also look at the changes that have been made to the *Administrative Inquiries Manual* to assess whether they could be strengthened for example by promulgating them as regulations. While inadequate or unclear guidance in the ADF's investigation manuals was of concern in 2005, the committee was also concerned about the lack of compliance with such guidelines. The committee suggests that the review team consider whether there are provisions in the administrative inquiries rules and regulations to ensure an appropriate level of compliance.

Tracking system

5.69 Defence's annual report contains statistics for the year on: unacceptable behaviour complaints in the ADF (653); claims for detriment caused by defective administration (CDDA) (40); redress of grievance (265); submissions to the IGADF (45); and whistleblower reports (168). The Defence Force Ombudsman also received 252 approaches from members of the ADF.

5.70 An important aspect of effective monitoring involves the implementation of recommendations coming out of investigations. The committee's 2005 inquiry found a failing in the system whereby in some cases recommendations 'appear never to have

51 For relevant changes see answer to question 6, taken on notice 19 June 2006. The paragraphs in the *Administrative Inquiries Manual* are 4.3–4.6 and 5.7 and 5.28–5.34.

been considered by anyone with appropriate authority'.⁵² The committee is strongly of the view that the ADF's monitoring system must also include an assessment of any follow-up action required by an investigation. The committee suggests that the review team investigate the effectiveness of the tracking system that the ADF uses to monitor the progress of complaints.

Claims for detriment caused by defective administration scheme (CDDA)

5.71 Defence's annual report stated that although the CDDA scheme had not been developed specifically to deal with ADF personnel disputes, it is a means by which ADF members can seek compensation, whether or not their redress of grievance has been upheld. It stated further:

The restrictive criteria that apply under the scheme mean that compensation cannot be awarded in many instances, although the person may have grounds for complaint.⁵³

5.72 The annual report states further that:

While the CDDA scheme may be available to pay compensation where the redress of grievance has been upheld in full or in part, it is not an appropriate avenue through which to reopen matters where the member remains dissatisfied with the outcome of the grievance process.⁵⁴

5.73 The committee has received correspondence from some ADF members dissatisfied with the administration of this scheme. It believes that this aspect of the ADF's administrative system warrants consideration by the review team.

Defence Force Discipline Act 1982 (DFDA)

5.74 *The Report of an Audit of the Australian Defence Force Investigative Capability* found there was a common view among ADF members that the *Defence Force Disciplinary Act* (DFDA) had 'simply had its day'. They describe the document as 'outdated and anachronistic' and suggested that it 'does not match modern disciplinary, legal and policing requirements'.⁵⁵ The audit noted that the DFDA had not undergone a fundamental review for over a quarter of a century.

5.75 The call for a review of the DFDA, however, is not new. The audit finding that the DFDA needed to be updated is consistent with those of previous reports dating back to the 1989 Report of the Defence Force Discipline Legislation Board Review. It noted the importance of ensuring that the DFDA was in line with

52 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraphs 6.31 and 8.89

53 Department of Defence, *Annual Report 2006–07*, p. 166.

54 Department of Defence, *Annual Report 2006–07*, p. 167.

55 Department of Defence, *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paragraph 4.8, p. 31.

comparable and more modern legislation in relation to 'the need to extend the proscription of evolving classes of illicit drugs which are now widely available and used in society and from which the ADF is unlikely to be immune'.⁵⁶

5.76 The 2001 *Report of an Inquiry into Military Justice in the Australian Defence Force* (the Burchett Report) also noted the need to update the DFDA. This review recommended, *inter alia*, that consideration be given to reviewing the nature of the punishments that may be imposed under the DFDA in the light of contemporary standards.⁵⁷ The committee's 2005 report on Australia's military justice system was particularly concerned about the grey areas that had developed between the disciplinary and administration systems. It concluded that:

...it appears that a review of the penalties imposed under the military justice system is long overdue. The time for review is also fortuitous in that a significant body of work has recently been done by the Australian Law Reform Commission on criminal, civil and administrative procedures and penalties.⁵⁸

5.77 It recommended that, building on the report by the Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Federal Jurisdiction*, the ADF commission a similar review of its disciplinary and administrative systems. It recommended further that this review of the offences and penalties under the Australian military justice system also include in that review the matter of double jeopardy. In its response to this proposal, the government recorded its intention to 'continue a more detailed review'.

5.78 Since its 2005 report, the committee recognises that a number of major pieces of legislation and other reforms to Australia's military justice system have been implemented. In response to a question on notice regarding the DFDA, the Department of Defence stated in 2007:

The discipline system is continuously reviewed and reformed by Defence. Changes recently implemented and those under consideration will, when completed, represent a comprehensive revision of the DFDA. Since the commencement of the DFDA, it has been substantially amended, including:

- the establishment of the Discipline Officer scheme for dealing with minor disciplinary infringements (DFDA, Part IXA Special Procedures Relating to Certain Minor Disciplinary Infringements);
- amendments to DFDA Part VI Investigation of Service Offences, including amendments to the requirement to caution persons and access to legal practitioners, tape recording of

56 See Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 13.13.

57 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 32.

58 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 13.17.

- confessions and admissions and the requirements for medical examination or the taking of a specimen for the purpose of obtaining evidence; and
- the creation of new offences;
 - the extension of the limitation period on certain charges from 3 to 5 years; and
 - the application of the Criminal Code to the DFDA.⁵⁹

5.79 The committee is not satisfied, however, that a review taking account of both the discipline and administrative system as a whole has taken place. In other words, while it believes that the reforms have been significant, they have focused on particular aspects of the DFDA or the administrative system. In light of the findings of the inquiries referred to above, the committee suggests that the review team look at the DFDA and the administrative system.⁶⁰ This review could consider, for example, the class of offences set out in the DFDA and their punishments and the provisions governing people found unfit to stand trial or not guilty of an offence on the grounds of mental impairment.

Other matters

5.80 The CDF and the IGADF have noted the importance of allowing sufficient time for the reforms to 'bed down'. The committee agrees that as the implementation phase moves forward teething problems may emerge. Indeed, the CMJ and the JAG have drawn attention in their annual reports and during the committee's recent public hearing to certain matters such as refinements to recent legislation which they believe are required. For example, in his annual report, the JAG raised concerns about the restriction placed on the automatic right to elect trial by the AMC by the creation of a class of 'non-elective' offences.⁶¹ and 'the practicality and utility of the internal review process which the *Defence Legislation Amendment Act 2008* retained in conjunction with the appeals to the AMC.⁶²

5.81 The Law Council has also identified some concerns, notably the right of the DMP to appeal interlocutory points and its continuing concerns about the simplified rules of evidence for summary proceedings. The committee suggests that the review team look at these matters.

Consultation

5.82 In its consideration of the Defence Legislation Amendment Bill 2006, the committee held serious misgivings about a number of provisions in the proposed legislation. It identified 11 areas that it believed required close attention. In its report,

59 Answer to written question on notice W9 following public hearing 26 February 2007.

60 See also Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system, second progress report*, March 2007, p. 34.

61 Judge Advocate General, *Report for the period 1 January to 31 December 2007*, paragraph 28.

62 Judge Advocate General, *Report for the period 1 January to 31 December 2007*, paragraph 30.

the committee made plain that the government needed to reconsider the proposed legislation. It stated:

Before preparing the final draft of the bill, the committee believes that a thorough consultation process needs to be undertaken on the proposed changes to the military tribunals. Open and frank debate is vital to the success of such reforms.⁶³

5.83 The amended bill was introduced into parliament without a comprehensive process of consultation. Moreover, the same approach was evident in preparing the Defence Legislation Amendment Bill 2007. In this case the committee found:

...although Defence consulted with people such as the Judge Advocate General, the Inspector General-ADF and the Director General of Military Prosecutions, and government agencies including the Solicitor General, it did not consult with external bodies such as the Law Council of Australia.⁶⁴

5.84 In her annual report, the DMP commented on the drafting arrangements for the Defence Legislation Amendment Bill 2006 and the Defence Legislation Amendment Bill 2007. She wrote:

I was concerned, however, that such consultation often occurred late in the drafting process. Equally, greater opportunities and more time to comment on the initial drafting instructions may have saved significant time and effort.⁶⁵

5.85 In 2006 and again in 2007, the committee made clear its intention when it recommended that the government undertake a comprehensive consultation process on any future proposed legislation that would make significant changes to Australia's military justice system. It cited in particular the importance of consulting with the Law Council of Australia. This recommendation has been disregarded. For example, with regard to DLAB 2008, the DMP was of the view that there were some fundamental difficulties with the proposed legislation, particularly with the different classes of offences. She explained:

I was getting the impression that there was a real misunderstanding about how fundamental it was that we could have disparate elections; that we could have co-accused going all over the place; that I could have this and I could have that. So we actually met with the parliamentary draftspeople to explain just what we perceived as our difficulty. I think that that was a remarkably helpful afternoon. They understood, I think, for the first time

63 Standing Committee on Foreign Affairs, Defence and Trade *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006, paragraph 1.29.

64 Standing Committee on Foreign Affairs, Defence and Trade *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007, paragraph 3.36.

65 Director of Military Prosecutions, *Report for the period 12 June 2006 to 31 December 2007*, 2008, paragraph 86.

just how fundamental and necessary it was that the DLAB be amended—as it was very late in the piece—to incorporate these changes.⁶⁶

5.86 Captain Paul Willee, from the Military Justice Group, Law Council of Australia, was highly critical of the approach taken by the Department of Defence to consultation on important military justice matters:

My concern is that in some senses it would have been better if we had gone with the old adage, 'More haste, less speed.' When these deadlines are so tight, they almost invite error. Perhaps it is time to move towards more acceptable deadlines so that the situation that happened with the legislation being passed on the last occasion...does not happen again. We could not address it beforehand because we did not know about it until the day it came forward.⁶⁷

5.87 He explained further:

...we are unable to be an effective contradictor, unless we have some timely indication of what is going to be brought before the committee. As far as I know, we are the only civilian—external, fully non-dependent or obliged to the military for anything—carrying out this role...

We do not seek to impose upon the military a full consultation process. We understand perfectly the speed and compass which they have covered and we admire them for it. But it is not beyond the wit of a competent administrator to organise a situation where, if you have got timelines you put one that says, 'Please send a draft copy to the Law Council of Australia' so they at least have 24 hours notice of what it is that is going to be covered—48 would be better because we could then address it with some sensibility.⁶⁸

In defence of the ADF's consultation process, the CDF noted:

Our people have been working flat strap for two years on the reform of the military justice system. Just about everything we have done has been done to very tight deadlines. We want to consult with as many people as possible but, at the end of the day, you cannot consult until you have got something to consult with.⁶⁹

5.88 He acknowledged that 'because of that workload, 'the consultative process may be a little later than would be ideal'.⁷⁰ Mr Cunliffe, Head Defence Legal, stated:

I can assure you that, in relation to legislation that was affecting the DMP or relating to the DMP, we would consult. On several policy proposals that

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

67 *Committee Hansard*, 20 June 2008, p. 44.

68 *Committee Hansard*, 20 June 2008, p. 41.

69 *Committee Hansard*, 20 June 2008, p. 31.

70 *Committee Hansard*, 20 June 2008, p. 31.

step has already been taken internally before we get to the drafting. The drafting, at least for internal consultation, is arguably a bit too late. It is at the policy development stage that the first step requires that because bad policy is what leads to bad drafting by and large. The drafters do a good job.⁷¹

Committee view

5.89 This report is the fifth in a series of reviews of Australia's military justice system. It reinforces its recommendation from previous reports that the government undertake a comprehensive consultation process on any future proposed legislation that is intended to make significant changes to Australia's military justice system. Indeed, the committee is most concerned about Defence's failure to consult with external and independent experts when considering reforms. This attitude indicates that Defence is not only reluctant to be open and receptive to constructive criticism and new ideas but does not appreciate that wider consultation produces better legislation and ultimately a more effective military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia. It notes that this approach should also apply to any significant changes to subordinate legislation.

5.90 In light of the repeated failures of Defence to consult widely before preparing legislation and the subsequent need for amendments, the committee believes that a consultation process needs to be formalised. It suggests that Sir Laurence Street's review team assess the effectiveness of the processes employed by Defence when preparing legislation for presentation to parliament and make suggestions on how it could be improved. It also suggests that the government consider creating a legislative requirement for Defence to consult widely with experts in military law such as the Law Council or for the Minister to issue a directive requiring an adequate consultation process during the drafting phase of legislation. To underline the importance of wide consultation the committee repeats its recommendation contained in two previous reports but apparently ignored.⁷²

Recommendation 13

5.91 The committee recommends that the government undertake a comprehensive consultation process on any future proposed legislation, including subordinate legislation, that is intended to make significant changes to Australia's military justice system. The committee cites in particular the importance of consulting with the Law Council of Australia.

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

72 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Defence Legislation Amendment Bill 2006 [Provisions]*, October 2006, paragraph 1.32 and *Defence Legislation Amendment Bill 2007 [Provisions]*, September 2007, paragraph 3.38.