

# DEFENCE WATCHDOGS SEMINAR

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## Perceptions of Military Justice

### Senator Mark Bishop

*Senator for WA & Chair of the Senate Committee on Foreign Affairs,  
Defence & Trade*

Thank you Brig. Andrew Gunn, Deputy IGADF.

At the outset let me take this opportunity to congratulate the three bodies who are responsible for the organisation of today's seminar, appropriately titled Defence Watchdogs 'Administrative Oversight of Military Justice'.

- Inspector General of the Australian Defence Force,
- The Australian Centre for Military Law and,
- The Australian National University

The Commonwealth Ombudsman, Professor John McMillan, suggested I speak on the perceptions of military justice:

- what perceptions are held now and historically,
- why they are important, and
- the problems that differing perceptions can cause.

In addressing that context—upfront I should lay out that my own perceptions have come from three main sources.

Firstly, I have had a high level of personal contact with members of families in the Defence Force—both servicing and retired.

They came to see me whilst I had responsibility for a range of veterans and Defence matters over the last six or seven years.

Secondly, my own reading of classical military and historic matters back to ancient sources where discipline and justice was commented upon.

In passing, I note a number of great military leaders over the millennia

- Julius Caesar,
- his adopted son the Emperor Augustus,
- many of the Flavians,
- Constantine the Great

wrote on such issues.

Their recorded remarks are not greatly different from expressions made to me, publicly and privately by contemporary military leaders. Mainly, the concerns that these officers and leaders had were for their men.

Thirdly, my exposure in numerous enquiries, my reading of reports and their recommendations on matters associated with reform of military justice.

Today, I would like to address three matters. Firstly, I will speak a little about history and context of military justice. Secondly, I will make some observations on the progress of reform to date. Indeed my own perceptions on reform to date. Thirdly, I will offer some suggestions for making reform permanent. So that we not only have first class armed forces—but we have first class critical support measures.

Turning firstly to history and the context of military justice.

I think in this community the intellectual underpinning and practical significance of military justice is well understood. From earliest Roman times through to significant reforms during the 19<sup>th</sup> century of the British Army and the Royal Navy.

One of the key drivers of reform has been attempts by government to ensure that the instruments of military justice—in our case the *Defence Force Discipline Act of 1982*—reflects as closely as possible contemporary Australian political legal and social values.

Indeed the search for an effective modern military discipline system has been a long time in gestation. The DFDA, which came into effect on 31<sup>st</sup> July 1985, replaced a system inherited originally from the United Kingdom and varied in Australia. That pre-existing legislative framework was summarised by a parliamentary committee as comprising the following;

- three UK Acts—2 of which had ceased to operate in UK;
- four sets of UK rules and regulations—all which had ceased to operate in the UK;
- three Australian Acts; and
- nine sets of regulations under the Australian Acts.

This complex, outmoded and separate Navy, Army and Air Force legislation of yesteryear was finally discarded on 3 July 1985. It was replaced by the DFDA a single reform discipline code intended to reflect as closely as possible Australian political, legal and social values. That is a most useful guide to today's discussions because we do impose significant obligations upon members of our armed forces.

Halsbury's Laws of England puts that context in a legal framework. Halsbury explains:

*... that a soldier does not by enlisting in the regular forces cease to be a citizen so as to deprive him of any of his rights or exempt him of any of his liabilities under the ordinary laws of the land.*

*He does however, in his capacity as a soldier, incur additional responsibilities for he becomes subject at all times and in all circumstances to a code of military law contained in the Army Act, the Kings Regulations and Order for the Army and Army Orders.*

In our case of course substitute the DFDA and appropriate regulations. But it seems to me it is those additional responsibilities in the context of contemporary political, legal and social values which are critical. Those values guided the fortunes and favours of many who participated in the military justice debate in more recent years.

Indeed it's that proposition that underpins the fourth and final report of the Senate Committee for Foreign Affairs, Defence and Trade. Of which there has been some criticism at the most highest level. But that is the dominant sentiment as we go forward and which underlines the rationale of that final report. More on that later.

So let me now turn to my second point and offer some commentary on the reform to date. To some extent in this debate members of parliamentary committees are both observers and analysts. We hear from the families. We see the parents break down and cry in our offices. We receive correspondence. Sometimes making the most horrendous allegations and often times making the most heart rendering pleas for assistance.

We receive submissions. We study the evidence. We hear the explanations as to the intent of the Act. We come to understand the critical role that military justice plays in the discipline system. We appreciate the value of discipline in the field, particularly in operations. We then make recommendations to government as to a particular way forward.

Government then goes through its own intense internal negotiation process to achieve a sound, workable and modern outcome. An outcome, that fits in with the mores of both the Defence forces and the wider community.

Let me say upfront there has been significant worthwhile reform. It has been led by CDF and implemented by Chiefs of the Services down through each of those services.

- There has been major institutional reform,
- There has been significant administrative improvement, and
- There is major change to the ADF discipline system. This is still settling down.

There is no doubt in my mind that progress to date has been significant. There are, I believe, still significant concerns attached to the ADF investigative services. These are noted and documented in the fourth and final progress report by the Senate Foreign Affairs, Defence and Trade Committee. I won't discuss them in detail except to note it has been acknowledged that further urgent work is needed.

I don't believe you can say you can have an effective military justice system when there are still glaring deficiencies in the investigative services. The best court in the world, well trained legal officers in the DMP, will not count for much if the investigatory work at first instance is compromised.

As a general proposition those who have been at the coal face

- in creating the Australian Military Court,
- in organising the office of the Director of Military Prosecutions,

- in implementing the hundreds if not thousands of recommendations from dozens of reports,
- in addressing cultural and behavioural issues, and
- devising systems to monitor change,

can feel justly proud that their labour in the vineyard—in the view of this observer—is bearing fruit. I say that for a particular reason. When I first had portfolio responsibility and committee workloads in a range of defence matters, I received significant amounts of correspondence. The letters alleged a whole range of breaches of military discipline. Most of those complaints have been documented over the years. A lot of that correspondence was detailed. But it was regular, it was varied and it came from all over Australia. It referred to literally dozens and dozens and dozens of matters.

- some of this was constituent generated;
- some portfolio related;
- some arising from committee inquiries; and
- some from forums that I attended.

The key point is that the correspondence was regular, continuing and seemingly without end. In the last 18 months that high level of correspondence has not dropped off completely but its volume is much reduced. What was once the norm—is now the exception. A number of conclusions are clearly apparent. I have thought about this a lot.

My own view is the incidences of reported offence numbers and consequently the serious nature of some matters are much reduced. Fewer members of the armed forces are complaining to people like myself. This is because either the offences no longer occur—that is cultural and behavioural reform.

Alternatively, if the offences do occur, the redress of grievance processes are carrying out their assigned tasks. They are redressing grievances—that is reform of the administrative system and the ADF discipline system.

So, having made those comments let me now turn to the third point I wish to address today, the way forward.

The fourth progress report into military justice by the Senate Committee was the subject of both extensive and intensive internal committee debate. In some respects we are fortunate. Committee membership is relatively constant. On both sides of the parliament long standing members and successive Chairs have maintained their interest in this issue over many years. They have developed a body of knowledge and have some historical understanding of the issues driving the reform process.

So that body of members and Chairs brings not a partisan or political perspective to its deliberations, but an interested, informed and purposeful approach. The overview makes three critical observations in its first two paragraphs.

Firstly, the committee recognises the ADF has embarked on an intensive reform programme to improve the system.

Secondly, the committee recognises the positive contribution that the reforms have made to the system.

Thirdly, and arguably, the most important.

The committee's primary concern is ensuring the reform programme maintains its momentum and the gains made to date are not lost.

That these gains are kept and momentum continues is really the rationale of the set of thirteen reforms spelt out in the various chapters of the report.

Putting flesh on the bone, ensuring momentum is not lost we believe, is guaranteed by erecting a set of safeguards that should guide the efforts of future reformers.

Those safeguards are what we call four pillars:

- transparency,
- accountability,
- independence, and
- scrutiny.

Those four pillars reflect the view of the committee.

- Not only is institutional, cultural and behavioural reform necessary;
- Not only is there a need to upgrade investigatory services;
- Not only is there a need for competent officers like DMP;
- Not only is there a need for internal monitoring and review of change.

We believe all reforms are immeasurably strengthened by the glare of public examination. It would be a brave government that relied solely on the integrity of CDF. Or for that matter the hard work of his office, or the commitment to reform of a particular set of service chiefs or senior officers.

Leaders change and organisations as we know often reflect the drive values and priorities of a particular leader or leadership group. We believe something harder and more permanent is critical to ensuring the reform to date, is neither lost nor dissipated because of other developments.

Hence we suggest the CMJ of a service tribunal should regularly report to parliamentary oversight committees. He is not a Chief Justice of a traditional court and both the DFDA and the High Court recognise this distinction.

Hence we suggest IGADF as a first step be given the same degree of independence and be subject to the same degrees of parliamentary assessment as the Director of Military Prosecutions or the Judge Advocate General. We appreciate the important role IGADF applies, and how this works within the chain of command. We listened with interest as he chose to provide parliamentary committees with some outline of his work in all the units of the ADF.

We think however, reporting to parliament, as does the AMC, the DMP and the JAG, will lead to a quadrella of thoroughness in reporting.

Those four pillars of transparency, accountability, independence and scrutiny, along with the associated set of secondary recommendations, we believe will make that military reform permanent.

Finally, committee members are politicians with all the demands made upon our time. Particularly getting into government or getting the other mob out of government. An enormous range of important matters that are part of the ongoing military justice reform process need ongoing considered scrutiny.

- Some are technical matters.
- Some are legal matters.
- Some arise out of new concerns.
- Some arise out of teething experiences.
- Some arise out of a misunderstanding of the act or the role of particular individuals.

The Senate committee, instead of offering detailed commentary on each of the matters, thought it better if they were properly reviewed by the expert committee headed by Sir Laurence Street and Air Marshall Fisher. The work of that committee, as I understand will report to government in February next year.

They will be able to consider the utility of further reform and consider in quiet isolation the merit of the construct of four pillars recommended by the senate committee as a way forward. In due course we will read with interest the report of that committee.

So, Mr. Chairman, today I have attempted to provide some background and some context of a group of minor players who have participated in the military justice reform process. There is no doubt in my mind progress to date has been significant and worthwhile. It has been ably led by CDF.

A simple test this politician applies is of the limited number of complaints in more recent times suggesting we have done well to date. The real issue now is not blame for sins of the past, real or imagined. The real issue now is the way forward and how a process of reform well under way can be concluded satisfactorily.

To all those who have attended today and in one form or another are members of the defence community and participated in this process

I wish you well and I hope for a speedy conclusion of that reform agenda.