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PERCEPTIONS OF MILITARY JUSTICE

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Almost every Defence submission on the reforms to the military justice system contains the central comment that it is important to achieve the correct balance between the maintenance of discipline within the ADF to achieve operational effectiveness and the proper regard for individual rights and fairness. The submissions have also referred to the fact that military justice is a core function of command at all levels.

Command means something special to the military. It is about rights, responsibilities and obligations and extends beyond management and leadership. It is about efficiency, effectiveness, discipline and morale. Importantly it involves an exchange of trust between soldiers and commanders.

These are very important words and we would do well to remind ourselves continuously that the primary purpose of the ADF is to engage in combat operations. This is the unique task that the Nation asks of its defence force. If it is to do this task properly the defence force needs a military justice system that supports it in an appropriate manner.

I had some difficulties with aspects of the initial report on the effectiveness of Australia's Military Justice System.

I thought it did not adequately comprehend the essential links between command, discipline and operational effectiveness. The series of recommendations that proposed the automatic referral of offences to civilian authorities indicated to me that the review had underestimated this point.

I was pleased that these recommendations were not accepted.

The report did not sufficiently recognise the unique nature of service in the ADF and the implementation of these and other recommendations civilianising the system would have hindered the function of command in ensuring the readiness, preparedness, morale and effectiveness of the force.

I think that every soldier would agree that the military justice system has to be accountable and transparent. But they would also agree that it has to be part of the overall system of command and not separate from it. Breaches of the military justice system need to be dealt with speedily and effectively within the chain of command. Importantly justice as well as being done needs to be seen to be done.

Why did the report take the approach of seeking to civilianise the system?

My perception is that the authors of the report took this approach due to the fact that the fundamental rationale behind the report was reactive rather than seeking a fundamental review of the military justice system.

There had been a number of high profile cases which attracted significant media, public and political attention. Individuals and families were wronged, mistakes were made by the military, poor judgement was exercised in a number of cases and in aggregation they were damaging to the military and embarrassing to the government. At the time I acknowledged that Army had made mistakes. Something had to be done.

In my perception and remember this session is about perception, the inquiry assumed the worst from the submissions that were presented to them. To the best of my knowledge there were about 150 submissions provided to the inquiry. In a military justice system where there are thousands of transactions a year you could take the view that 150 is not a large number. The extrapolation of these submissions to the view that the system was fundamentally broken was, in my view, unwarranted.

I was concerned with the implicit view shown by the recommendations that the military could not be trusted with the military justice system and it needed to be taken from us.

I am willing to recognise the failings of the military justice system and right now I would say that I think the recommendations of the inquiry as accepted and as amended through implementation have created a much better military justice system. To this extent the inquiry has performed a valuable service to the military, its soldiers and the Nation.

We should thank them for their work.

Senator Bishop I suspect you and I are going to disagree on this issue but I do want to make the point that in almost all other respects the work of the inquiry has significantly improved the military justice system.

Before I consider the reforms in some more detail let me talk a little bit more on perceptions. What I would like to do is to try and give a soldiers view of military justice. This is very much an operational view and I acknowledge that there are many other dimensions of military justice but operations are the hardest one to get right.

Soldiers do not think of military justice all of the time. Their motivation to perform and to do the right thing is not out of some fear of the disciplinary system. It is more about belonging and contributing to the team and doing the right thing. The military justice system is just one way of building and at times reinforcing the team.

I found, particularly as a commanding officer, which is where command is at its most intense that soldiers wanted the military justice system to reinforce the integrity and cohesiveness of the team. They were very judgemental themselves and expected that the CO would be able to support them through the operation of the military justice system.

Transgressions that were of the most consequence to them would seem of little consequence to others who were not part of the team. I well remember three instances where inexperienced lawyers did not grasp this essential point. I was informed that three offences relating to theft, sleeping on sentry and an unauthorised weapons discharge were of little consequence. Well they are of the utmost consequence because any such transgression directly threatens the safety, cohesion and integrity of the team.

I will make the point again, I think the most important aspect of any military justice system is that it directly reinforces the team. As such it should be primarily exercised by command, be seen, be understandable, be transparent, be swift and soldiers need to be able to understand what is going on and know that the system is open and fair and that those exercising justice are knowledgeable and accountable.

It is against these measures that we should assess the operation of the military justice system.

Clearly, where offences are of such a magnitude and complexity that they are beyond the capacity of the commanding officer there needs to be reinforcing system that can provide support. The system emerging now with the Australian Military Court and the Director of Military Prosecutions will, I think, be a very valuable addition to the overall operation of justice in the ADF. But it should not do too much. It needs to adhere to a well thought out and publicised threshold of cases and allow the summary system to work.

Well how are we going with the reforms to the military justice system?

Let me start by saying that I am now a few months out of date so I will not indulge in any detail but will as you have asked provide you with some perceptions in the main areas of reform.

Summary Arrangements

I think this is the success story of the current reforms. I know they weren't part of the formal report but this is the area where the most transactions are carried out and it is the area where there is a direct impact on command and operations. The simplification of this process, the right of election and appeal, the re-write of manuals and procedures and the enhanced training provided has produced a significantly better system. I know that the revised system was due to commence on 20 September. I hope that it has started on time and I have high expectations that the revised system will serve the ADF well.

Police Investigative Capabilities

Reform was drastically needed here.

Army identified this and had instigated a review of the Military Police capacity well before the inquiry began. Army was concerned that the MPs were not up to scratch and changes were needed. This was always only going to be one service acting alone so I am pleased to see that the reforms have produced a much more professionally competent capability available across the ADF. I support the actions to deploy

investigative personnel to major ADF operational activities and the maintenance of a short notice deployable investigative team.

My only concern is that with the creation of the ADF Investigative Capability is that the individual services have been left short of independent capabilities to investigate the more routine matters at unit level. It will take some time to re-establish these capabilities and in the interim the ADF capability will need to do as much as they can to cover the gap.

Director of Military Prosecutions

As I was leaving I had formed the view that this area was having difficulties in processing the large number of cases that were being presented. I suspect that this was the start up phase and I hope that things have settled down.

A specialist prosecutor independent of the chain of command is required.

Australian Military Court

An independent permanently established court is another one of the important and far reaching changes brought about by the inquiry. Its arrival and operation independent of the chain of command is to be commended. I trust that the difficulties in getting juries up and running have been overcome and all is functioning smoothly.

CDF Commissions of Inquiry

I think this area has been handled well and has done much to restore the public faith in the military. The public nature of the inquiries, the involvement of civilians with judicial experience, the expertise of the inquiry officers and very obvious efforts to focus on determining the facts of what happened to avoid any recurrence are commendable.

It is also important that the current processes relating to inquiries into combat deaths are maintained. The conduct of a preliminary assessment into combat deaths is a sensible approach and in my view should be maintained. I know they have been received positively by deployed forces and I think this is a real measure of their usefulness.

IGADF Unit Audits

One aspect of the ongoing monitoring of the military justice system that is often overlooked is the regular audits conducted by the IG ADF. As Chief of Army I received these reports regularly and I found them a valuable way of assessing unit conformity with administrative and regulatory requirements. Over time these reports, which were nearly always positive, provide a valuable snapshot of the performance of the military justice system.

What was particularly useful was that they included qualitative comments from unit personnel received as part of focus groups. This allowed unit members another avenue to provide feedback and make complaints if required.

These audits are a very valuable way of assessing the ongoing health of the military justice system and I hope are being constructively reviewed and utilised.

Street and Fisher Review on the progress of the reform program and the health and effectiveness of the ADF military justice system

As well as the IGADF routine audits more formal, extensive and less frequent reviews are required. I support the review by Street and Fisher on the progress of the reform program and the health and effectiveness of the ADF military justice system.

The reforms introduced into the ADF were extensive and in many cases ground breaking. It is sensible to review them to determine their continued appropriateness and hopefully to indentify if further changes are required.

Conclusion

I have appreciated the opportunity of providing my perceptions of the military justice system. There are many areas that I have not covered. We might be able to cover them in discussion. What I have tried to cover are those areas that I think are most important for the proper functioning of the ADF and its ability to generate combat forces.

While I am supportive of the reforms and the impact they are having on military justice I think they are a range of challenges that need to be confronted.

These include:

- How to ensure that the system is responsive and timely. Nobody likes to see soldiers on the appeals treadmill while they thumb their noses at their commanders.
- Will a fear of command influence generate an unnecessary and unhealthy separation of lawyers and the legal system from commanders?
- How to ensure that the career management of lawyers provides an appropriate balance between operational and administrative aspects of a career and a working understanding of the combat focus of the ADF.

Thank you.