

# AUSTRALIAN SENATE

## INQUIRY INTO MEMBERS OF PARLIAMENT STAFF(MOPS)

### Submission by Ex-Major Allan Warren 24 July 2003

1. The Sydney Morning Herald (SMH), News Review section, page 28 of 5-6 July 2003, article 'The Silent Service' gives insight into the cause for and nature of this Senate MOPS Inquiry. Quoting Visiting Fellow at ANU, Alison Broinowski, the SMH in parts read:

*"People (bureaucrats) are "scared shitless" of the Government...."*

*The cowing of the public service....began with the Hawke government's changes to the structure of government which gave greater power to ministerial staff and cut the independence of the public service heads by making them sackable (effectively 24 hours notice as Barratt's dismissal a few years ago proved)."*

2. The Children Overboard Affair (COA) features prominently in the minds of most people who have raised their concerns over how ministerial decisions are made and the role played by Members of Parliament staff (MOPS) in it. This affair has forced Australians to draw their own legitimate and serious conclusions that the Prime Minister and his ministers are irrelevant to the rule of law in Australia.

3. Faking evidence, such as in the COA is the worst crime that can be committed by any key government official from the Prime Minister down, including MOPS, who are only answerable to him or his ministers.

4. Any pleas by a responsible minister that allege initial errors were made in the COA affair and were "made in good faith" are forfeited once the minister or his/her staff fail to immediately rectify the error(s) when discovered. This certainly did not happen in this affair.

5. It certainly did not happen in the long standing ex-Major Warren case. This case is now well documented in the history records of government and in written submissions Nos 5 to 5.4 to the Joint Standing Committee on Foreign Affairs, Defence and Trade - Defence Sub Committee 1998 Inquiry into Military Justice Procedures in the Australian Defence Force, Volumes 1 to 5.

6. The ex-Major Warren case is also detailed on the world wide web at search engine 'Google', subject: Allan Warren.

7. It ought to be of concern to those people who are interested in the outcomes of this MOPS inquiry that there are at least three compelling cases that are now well documented involving Defence, its ministers and generals and MOPS staff. These are:

(i) Children Overboard Affair

- (ii) The Prime Minister's misleading reasons for his war on Iraq
- (iii) The ex-Major Warren case by virtue of its compelling chronology of documented evidence of corrupted ministerial decision-making.

8. This Senate inquiry risks using MOPS as scapegoats when the core issue is the constitutional tenet of ministerial responsibility and accountability. This inquiry will lack public credibility if it is seen as intending to supplant that law by arguing that the abuse of power lie not with the responsible minister but with MOPS. The Terms of Reference (T of R) for this inquiry is easily interpreted to achieve this end. This would have the desired political outcome of quarantining ministers from any wrongdoing. Yet historical evidence clearly demonstrates that MOPS, acting on behalf of ministers and/or as their representatives, have been intimately involved in government decision-making for years.

9. It is a self evident truth that Ministers of the Crown who seek to avoid responsibility or accountability for their decisions by blaming subordinate staff do so knowing that they are inflicting grievous harm on our Constitution and the rule of law. And the higher the office the more cowardly is the act.

10. Abuse of authority in high office is the most powerful weapon to threaten, with intent to destroy, a liberal democracy such as the Australian society. It's potential harm far outweighs any conceivable damage that could be inflicted by any terrorist strike on Australia.

11. Serious are the concerns held by many Australians that parliamentary committees of inquiry are wittingly or unwittingly impotent to address grave matters about the way we are governed by politicians and their MOPS. Everybody knows that Defence is incapable of investigating itself. Would anyone now believe that politicians are capable of investigating their own, especially when it comes to Members of Parliament investigating those who hold seniority over them?

12. This submission addresses the T of R of the inquiry by establishing the rule of law linkage between Ministers for Defence and their MOPS. It gives substantive case history evidence of the process of abuse of MOPS/ministerial responsibility and power by specifically addressing in those T of R:

- (b) the role and functions of MOPS staff in assisting and advising their employers and interacting with the Australian Public Service and other stakeholder groups
- (d) the means by which MOPS staff are accountable to government, the Parliament and the public
- (e) suitable means by which the accountability of MOPS staff could be enhanced
- (f) the merits of introducing a code of conduct for MOPS staff.....should be developed and introduced
- (g) suitable means by which the accountability of the Government for the

employment of MOPS staff can be enhanced

(h) the role of departmental liaison officers and their interaction with MOPS staff and departments; and

(i) appropriate amendments to the MOPS Act following from the above.

13. Defence has been subject to several parliamentary inquiries in recent years on a range of serious matters. Examples are: Military Justice Procedures, Examination of the Defence Department's Annual Report, Black Hawk disaster to mention only a few. Defence also managed to bring upon itself, perhaps being a first in any western world democracy, a Royal Commission into its lack of integrity during the proceedings of a previous Royal Commission. (i.e. HMAS Voyager Disaster 1964) The revelations of the lying and cowardice of senior service officers at the time was breathtaking. The three armed services ought to have learned from their errors by now. Seemingly they have not; hence this inquiry triggered by the COA.

14. Recently the former Chief of Defence Force, Admiral Barrie, was finally forced to apologise for his lying in his failed attempts to cover-up for the Howard Government in the Children Overboard Affair. Howard's search for scapegoats amongst MOPS and service officers was ruthless. Howard protected his then Minister for Defence, Peter Reith and Admiral Barrie protected both Reith and Howard. In doing so, it is my opinion that Barrie betrayed the Officer Corps.

15. If, as demonstrated by their actions, key officials, including parliamentarians and the service chiefs, do not really believe in the rule of law, or in the checks and balances of democratic order, or in parliamentary representative democracy, or in the power of the Constitution, why should anyone else?

16. To bring balance to this submission the following quotes are relevant. They are from 'Parliament and Bureaucracy' edited by J R Nethercoate, Chapter 4 titled 'Scrutiny of the Executive by Parliamentary Committees', by then Senator Gareth Evans. Senator Evans wrote in part:

*"...my own favourite description of a committee is a 'cul de sac into which good ideas are lured and quietly strangled'*

*"There is tremendous pressure on all parliamentary committees, constructed as they are, on a cross-party basis, to preserve their unity by avoiding matters likely to generate partisan controversy. This tends to narrow quite spectacularly the field of potential inquiry, particularly when government expenditure programs or the quality of ministerial administration (and decision-making) are at issue. Patrick Weller has thus referred to the:*

*paradox of parliamentary committees....they can usually be specific when the issue under consideration is not politically important or partisan, but they must be general - often describing process when it is a live political issue. "*

(NOTE: Doesn't this now signal alarms given that this MOPS Inquiry seeks to review process whilst the issues that gave rise to it are amongst the most dangerous threats to the security of this nation and are highly political?)

*"The most potent weapon the present government has used to deal*

*with committees is simply to ignore them....such shabby treatment tends to lower the morale of those who work to produce the reports, and dissuade them from further effort. Perhaps this is what the government has in mind."*

17. If politicians, MOPS and other decision-makers have been able so easily to belittle, subvert or brazenly abuse due process in their decision-making, why pretend that stronger laws are needed? The problem has been there for years. The Constitutional Laws have been in place for over a 100 years. And the problems have been written about in textbooks, political science books, professional journals, newspapers and the like in abundance over time. If the Prime Minister and his ministers and their MOPS are above the existing laws they will certainly remain above any new laws made by this parliament.

18. What is needed is not more policies or more legislation or more codes of conduct for MOPS and public servants. What is needed is more enforcement against key official's abuse of power. Focusing on more legislation for MOPS, as a solution to the dangers that are now active in subverting our rule of law is a political diversion and Professor Patrick Weller was alive to this decades ago!

19. What the Constitution and its dependent civic order makes mandatory is accountability.

To quote from 'Bad Government' by Bob Browning:

*"Accountability depends on.....effective accountability depends on the capacity of the electorate through Parliament to call the responsible minister and the government to account over waste or misuse of public resources (and power)*

*It depends on the capacity of individual citizens to complain effectively and obtain redress when treated unfairly or negligently.*

*Today's bureacracy is not a servant of the state. Rather it has been perverted to become a threat to the proper functioning of parliament and of democracy itself."*

20. Failed complaints mechanisms are a key indicator of the lack of honesty and integrity of the responsible minister and if he or she fails then that of the Prime Minister. It is a crime against the state for these key officials not to act against maladministration. What is alarming is that the escalation in maladministration within our government appears to be driven by these very same officials who are charged with the legal responsibility to arrest it.

21. In the past, failure in complaints mechanisms brought about the creation of the Administrative Appeals Tribunal (AAT).

*"The Administrative Appeals tribunal (AAT) was created to ensure that the rule of law is effectively brought into administrative decisions. It was introduced in response to dissatisfaction of the community and the parliament with the failure of the courts and their lack of ability to bring the rule of law to the level of primary decision-makers."*

Justice Manson 1994.1

22. Thus Manson reasons that neither the courts nor the parliament can arrest the corruption of authority by ministers of the crown. This can be extended to the AAT.

23. If the ex-Major Warren case is taken into account nor could the AAT arrest corruption of authority when it came to covering up for one of its own members who, 13 years previously, as a Brigadier in the army, had abused process as part of a systemic pattern to destroy Warren's career. The AAT was willing to make an appropriate adverse finding against then Senator G Evans in the Warren case but not against one of its own members against whom the evidence was far stronger and more direct.

24. The problem with the courts has been their resistance to re-examine factual findings of primary decision-makers. Instead the courts have attempted to dress up these findings as 'error in law'. Thus 'corruption' becomes 'error' and opens the door further to more intense corruption which simply becomes more 'error'. This is similar to the guise used by parliament to focus attention on 'process' and hence avoid focus on 'abuse of power' by primary decision-makers (i.e. the Prime Minister and his ministers). It is no wonder that these primary decision-makers seek to extend the limits of their abuse of power knowing that neither the courts nor parliament can restrain them.

25. Neither Parliament nor the military are capable of investigating one of their own. Nor is the AAT. Yet these are allegedly the avenues of appeal or review for individuals to seek redress from unfair treatment by public officer holders.

26. On www. Google search engine, subject: Allan Warren is to be found a few case study articles on the ex-Major Warren case. One such article "More Vicious Than Virtuous", exposes in detail, how ministerial controlled investigations and decision-making have recoiled from, and repressed, evidence and factual findings seeking procedural or administrative fairness (i.e. natural justice). Both evidence and findings were treated with contempt and corruptly handled by all ministerial decision-makers to date.

27. These several ministerial investigations of the ex-Major Warren case by, and the ensuring decision-making by the responsible Defence Minister(s), the Prime Minister and the Governor-General were perverse applications of the laws of our Constitution. Many of these replies to ministerial representations from ex-Major Warren were made by MOPS. Sometimes they wrote that they were responding on "behalf" of the minister. Other times they simply dismissed representations without reference to the Minister.

28. To date all ministerial decisions, including the most recent made by former Minister for Defence, Science and Personnel, Bronwyn Bishop, made in the wake of the Lieutenant Colonel B Salmon RDF QC investigation, have repulsed the mandatory Constitutional obligation that all ministerial decisions should be based on proper information and fair consideration.

29. What the ex-Major Warren case demonstrates is the bald manner by which the above decision-makers hold the rule of law in contempt. All the falsehoods of decision-making by the Governor-General, the Prime Minister and successive Defence Ministers 1982 to date, were

easily exposed by Warren for their lies and fabrications once he was able to access, under FOI Act, most, if not all, Department of Defence files of his personal history records.

30. The last formal decision given against ex-Major Warren's representation to have his case properly investigated and be granted redress against the corruption and abuse of due process involved in his case was given by Aldo Borgu, Senior Adviser (MOPS) to the then Minister for Defence, Industry, Science and Personnel, Bronwyn Bishop, on 22 October 1997. It is probably the most evil and provoking decision yet made by the Australian Government against Warren. It is by far the most clever at deceit. Borgu in part wrote:

*"In my letter of 2 April 1997, I advised you that, as the Department of Defence has acknowledged that there was unfair administration and an ex gratia payment has been made to you as compensation, I consider the case to be closed. There is nothing in your latest correspondence to cause me to alter that view."*

31. A copy of the above letter is printed in full in Defence Sub-Committee - Inquiry into Military Justice Procedures in the Australian Defence Force; Submissions Volume No 4, page 731.

32. At page 730 of the same reference is a copy of Senate Questions On Notice of 31 October 1997, put by then Senator Dee Margetts to ask the Minister representing the Minister for Defence, Industry, Science and Personnel (B Bishop), in part reads:

*"4. Has the Minister received correspondence from the Australian Army with regard to ex-Major Warren? If so, how has the Minister responded to the Army's position on this matter given the issues raised by ex-Major Warren in his correspondence?"*

33. Bishop's reply was to seek to put blame for the years of Defence corruption in the handling of this case at the feet of then Senator G Evans, being one of the earlier decision-makers in Labor's time in government. She did not go back further to Liberal Party decision-makers Killen and Sinclair which is where the real abuses of process started.

34. Meanwhile Bishop's senior adviser, A Borgu continued to flog off ex-Major Warren's further ministerial representations that his case be handled honestly and fairly by Bishop. He simply regurgitated his previous decisions. All Warren received was a photocopy of his earlier letter of 22 October 1997 that claimed Defence unfair administration had been acknowledged and the case was closed.

35. The above so called "unfair administration" was allegedly identified by Lieutenant Colonel B J Salmon RFD QC in his investigating officer's report for the Minister via the then Chief of Army.

36. In 1982 the then Minister for Defence, Ian Sinclair gave decision against ex-Major Warren that Army had no case to answer in that "its administration in your case was strictly in accordance to the letter of the law" and "natural justice had prevailed." Senator G Evans deciding on behalf of then Prime Minister Hawke made a similar decision, as did subsequently the then Governor-General, B Hayden and a succession of other Ministers for Defence. All decisions were rooted in abuse of power, lies, fabrications and cover-ups. But none so clever as that done on behalf of Bronwyn Bishop's authority.

37. Chief of Army had directed that Terms of Reference (T of R) be raised for an investigation of ex-Major Warren's termination of career. Lieutenant Col Salmon QC was appointed to do the investigation. It was to be an Army investigation of itself. The T of R included examination of any "unfair, misleading or improper Defence administration." Warren had already provided substantial evidence of numerous incidents of Army's corruption of "due process" or "improper administration" and specific army officers were identified to these abuses. Salmon QC had all this evidence at his disposal.

38. The Salmon QC report found none of these abuses and found no one had acted improperly against Warren. But Salmon QC, according to his hand written note to a legal officer in the Directorate of Army Legal Office (DALs), conducted no such investigation into "unfair administration" The Salmon QC handwritten note to "Tom" in DALs is given in full below:

*"Tom -  
"Unfairness" is not a legal term, though it might be a judgement value  
  
I cannot sign the report (on Warren) making the distinction between "legal unfairness" and moral "unfairness"  
  
The terms of reference mention "unfair Defence administration " "unfair " in the general sense not as part of a decision-making process."*

39. On 8 December 1994 Salmon QC followed through this minute to confirm with Col Harvey, Director of Army Legal Services, that he had not investigated issues of "procedural fairness" in his investigation of the ex-Major Warren case. FAX No 2656609 from Salmon to Col Harvey read:

*"3. I have given some further thought to some amendments to the draft suggested by Lt Col Berkely, distinguishing between "legal fairness" and "moral fairness". I think the distinction he is drawing was between "procedural fairness" in the course of decision-making and the concept of fairness in a more general sense. As I was inquiring into the propriety and fairness of "Defence administration, I was not called upon to make decisions concerning the strict application of the rules of "procedural fairness".*

40. Salmon's handwritten note and fax is an indictment of his decision not to adhere to the Terms of Reference of his brief in the legal sense. Instead Salmon choose another path. He investigated whether or not there was unfair administration in the general moral sense. This is why he was not prepared to sign off on his own report as having made the distinction between legal and moral unfairness. The FAX is tantamount to a disclaimer by Salmon QC to disown any knowledge of the evidence at hand with him of abuse of procedural fairness by Warren's superior officers, including those within Army Office.

41. In the wake of the December 1994 Salmon Report and several months after the original Terms of Reference had been raised, Col. J A Harvey, in April 1995, sent a brief to the Chief of General Staff - Army, titled 'Investigation into Allegations by Mr A K Warren'. It read

*"1. Following a complaint to the Minister for Defence (Flag A) about unfair, misleading, or impropriety Defence administration which ultimately*

*caused Mr Warren to lose his career and livelihood, you appointed an IO (Flag B) to investigate the allegations made by Mr Warren."*

42. Harvey's brief created the illusion to the Chief of General Staff - Army, that Salmon QC

had investigated Warren's allegations of improper procedural fairness. Armed with the Salmon FAX, he misrepresented the report and deceived the Chief of General Staff - Army. Warren raised these concerns in his ministerial representations against the Salmon report to the Prime Minister, Mr J Howard, on 9 January 1997.

43. Prior to obtaining copies of the 'Tom note' and FAX from Salmon, Warren's submissions against the Salmon report detailed the documentary evidence of unfair administration in the legal sense that Salmon, by choosing to look at the evidence in a general 'moral sense' had cleverly sidestepped. Salmon's report had effectively protected the chain of command involved in doing the documents, handling the documents and making decisions against Warren.

44. On 2 April 1997 and again 22 October 1997 decision-making by a MOPS staff to Bronwyn Bishop, on her behalf, has again destroyed ex-Major Warren's right to have his case against unfair Defence decision-making against him 1981 to date, fairly handled by the responsible minister.

45. On 18 May 1998 Senator Jocelyn Newman tabled in the Senate 'Answers to Questions on Notice' asked on 31st October 1997 by then Senator Dee Margaretts, re the ex-Major Warren case. The relevant question reads:

*"2) Is the Minister aware of any investigations into, or information existing with regard to, the role of Ex-Brigadier J A Hooper in the termination of Ex-Major Warren's armed services career? If not, can the Minister detail the history of any such investigations?"*

46. The Senator's response, as advised by then Minister for Defence, Science and Personnel, Bronwyn Bishop, reads:

*"There has been no investigation into ex-Brigadier Hooper's role in the termination of Ex-major Warren's Army career."*

47. Brigadier Hooper, then Military Secretary, had played a key role in bringing about the termination of Warren's officer career. This answer, identifying Hooper's omission from any investigation had effectively removed him from any involvement in the abuse of procedural fairness.

48. What can be clearly identified in Col Harvey's brief, which illuded to procedural fairness in Salmon's investigation to the Chief of General Staff - Army, following Salmon QC's clever interpretation of his brief to avoid procedural fairness, then MOPS Borgu's subsequent decision to close the case, followed by Senator Newman's answer in the Senate, is the effect of making the ex-Major Warren case disappear within the process of MOPS/ministerial responsibility and accountability to the Parliament. In face of the evidence, this can only be described as abuse of power and abuse by omission or failure to act, particularly in light of Warren's Prime Ministerial

representation to Howard on 9 Jan. 1997 about the Lt Col Salmon report and its feigned investigation.

49. Feigned stupidity has put ministerial decision-makers above the law. But by this behaviour three things are certain. They have:

- . rendered the laws that they have abused to be meaningless
- . destroyed any right of politicians to hold any form of power over other Australians.
- . created a climate of evil that dwarfs that of any would be terrorist.

50. And it is amazing that Parliament has given MOPS a free hand in the spreading of this evil.

51. Perhaps the most sobering warning in all of this is to be found in the USA 1928 opinion given by Justice Louis Brandels:

*"Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."*

52. Fundamental rights of the Australian people are at the heart of our Constitution and parliamentary democracy and not the protection of abuses of power by primary decision-makers be they Ministers of the Crown and/or MOPS.

53. In response to the duplicities of the Salmon QC investigation into ex-Major Warren's case, and prior to his obtaining FOI Act access to the Salmon note to "Tom " and FAX to Col Harvey, Warren made Prime Ministerial representation to John Howard on 9 January 1997 re the Salmon QC Report. A full copy of that representation is printed in Military Justice Procedures into the Australian Defence force Submissions Volume 4 pages 752 to 759

The relevant extract reads:

*" The Salmon report is poor. It*

*(i) concedes that which has already been identified by the AAT*

*(ii) fails in its internal cohesion to substantiate the statement*

*"Examining the records in 1994, and taking into account everything I have learned during my investigation, it is quite impossible to find any deliberately unfair or improper behaviour by those involved in the events."*

p.9 para 48

*(iii) violates fundamental investigative procedures in that Salmon is prepared to make assertions based on heresay to find 'T-Scores'and their gradings correct*

*(iv) fails to identify Department of Defence deliberate and malevolent administration as exempfied up to and inclusive of Maj Gen Carter's testimony before the AAT as late as December, 1993*

*(v) fails to expose 'motive' by those determined to get Warren out of the system but*

*internally identifies those elements who succeeded in using administrative procedures to achieve this end.*

*(vi) deliberately edits relevant material in favour of material that is out of context thereby reducing persons and events to a farcial pettiness.*

*(v) fails to recommend the four basic requirements of Redress of Wrongs demanded by natural justice and understood by ordinary people:*

- 1. the righting of the wrong*
- 2. proper and just compensation for the injuries perpetrated*
- 3. punishment of those officials who by their actions or inactions cause or aggravated harm*
- 4. take genuine administrative action to prevent occurrences of such bureaucratic wrongdoing.*

54. The above insights into the deceit and malevolence of the Salmon QC report would have been well understood by the Prime Minister.

55. The Prime Minister's Office kicked this representation around to the Minister for Defence's Office. MOPS staff then kicked it around to Bronwyn Bishop's office. In due course MOPS Senior Advisor to Bishop, Aldo Borgu sent Warren a copy of his previous letter of 22 October 1997 which had informed Warren that Salmon QC had investigated the case in 1995 and had found "unfair administration" and He (Borgu) considered the case closed.

56. If a member of the public is dissatisfied with the way he/she is being treated by a minister then that person has the right to make representation to the Prime Minister. Warren had made representation to the Prime Minister against Bishop's incompetent or indifferent handling of his most grave case.

57. No one official, especially MOPS, has the power to control the input into the actions and decisions of the responsible minister.

58. Superiors up the bureaucratic chain of command test and vet the quality of the information given to the minister. This is what government is. Notions of the rule of law become meaningless when responsible ministers or their MOPS act (including non-action) to interfere with these mechanisms of checks and balances.

59. An article published in the Canberra Times on 19 February 2002 by Professor of Political Science, Allan Patience titled 'Debauching Ministerial Responsibility' deserves attention by this MOPS Inquiry.

*"The searching for scapegoates for the lies about children being thrown into the sea by asylum seekers is as morally repugnant as the lies themselves.*

*...(The) doctrine (of ministerial responsibility) demands that a Minister accept full administrative responsibility - including moral responsibility - for the administration of his/her department. A Minister's resignation is the only publicly acceptable course of action if grievous errors of judgement, significant mistakes, or miscarriages of justice occur because department officers provide incompetent advice. The doctrine provides direct and effective*

*political accountability for the actions of the executive. It is one of the central components of the doctrine of the separation of powers which is itself a cornerstone of democratic and responsible government."*

60. This MOPS Inquiry has focused on "accountability". In theory accountability is the safeguard against maladministration. In MOPS Submission No 4, co-authored by Professor Patrick Weller and Ms Anne Tiernan, they state in part:

*"We note the genesis of this Inquiry is the Senate Select Committee on a Certain Maritime Incident (CMI) (i.e. the Children Overboard Affair or COA)....*

*greater numbers of 'political types' are attracted to (ministerial) staff positions, because they are seen as a career enhancing move....*

*Our research has identified a pervasive atmosphere of uncertainty and mistrust between ministers and the public service.*

*We believe that the Australian people should be able to discover how they are governed. "*

61. MOPS Inquiry Submission No 2, from the Director General of National Archives of Australia, urges this committee to be mindful of MOPS accountability re the maintenance of the history records of government.

62. In the early 1990s ex-Major Warren attempted to discover through FOI Act law, just how had successive Ministers for Defence and the then Prime Minister, Bob Hawke, mismanaged or 'governed' his ministerial representations re the deliberate and perverse destruction of his career, reputation and livelihood. Warren's FOI application caused the Department of Defence to collapse into a state of provocative corruption. It went to exhaustive efforts to destroy or feign destruction of ex-Major Warren's personal history records relating to the evidence and records of his forced termination from Army.

63. The above included the records of the then Senator Gareth Evans' decision-making process against Warren in 1986. The Department of Defence certified under FOI Act law that the relevant file containing the evidence of the 'due process' followed in the Senator Evans' decision-making had been accidentally destroyed by Defence Archives in January 1990.

64. But six months later, in June 1990, Defence used this file during its investigation of Warren's representation to the then Governor-General, Bill Hayden. Warren had been forced to make representation to him because he was aware that his representation to Prime Minister Hawke was being unfairly dealt with by Defence. And indeed, in 1994 the AAT gave decision that this was strongly the case.

65. In Defence Sub-Committee Inquiry into Military Justice Procedures in the Australian Defence Force, Submissions Volume 4 at page 714, ex-Major Warren wrote inter alia:

*"...on 20 July 1990 then Acting Chief of the General Staff, MAJGEN P M Jeffery certified that he was aware Warren's personal history records were destroyed. Mr Warren challenged MAJGEN Jeffery's decision only to be obstructed by a similar certification one month later by his superior officer*

*the Chief of the General Staff, LTGEN J Coates that he too was aware these records were destroyed and hence technically denied to Warren under FOI Law. Both general lied. These records were subsequently exposed to exist and were used by Army against Mr Warren in the 1990 erroneous decision by then Governor-General, Mr B Hayden.*

*25. In 1993 there was sufficient documented evidence available to leave the Administrative Appeals Tribunal in no doubt that the Department of Defence investigations of Warren's forced resignation in disgrace were neither objective nor thorough. Senator Evans' decision was a lie based on endemic military corruption. Evans' decision was reactionary, improper and an abuse of power. This is not the only time Senator Evans has been associated with corrupt ministerial investigations. Hence there is a motive to explain why the 'Evans' documents' would have gone missing or alleged to have been "accidentally destroyed" from Governemnt archives.*

66. Both MAJGEN Jeffery and then LTGEN Coates attempted to deny Warren the right to discover how he was being 'governed'. The governance that they attempted to conceal from Warren is one of continuing Defence systemic abuse of power or corruption or both. These abuses have a direct linkage from the Department of Defence, through ministerial staff to the Minister. At the heart of this linkage is corrupted ministerial decision-making.

67. MOPS Inquiry Submission No 9, by Dr Don Russell in part states:

*"Our Constitution also proves for a Governor-General to take an active role in the operations of the Australian Government, a role most clearly set out in Section 58 and Sect 62" and*

*"...a consensus could develop that the Govenor-General or an Australian head of state could use the black-print oversights of our Constitution...to take a more active interest in good government."*

68. Dr Russell clearly sees an important duty that can be exercised by the Governor-General to bring accountability for the acts and decisions of MOPS back to where they properly belong - i.e. under the control and responsibility of the relevant minister, who usually personally appoints them in the first place.

69. The powers of the Governor-General to protect Australians and their Constitution from abuse of power by primary decision-makers are extensive. But this protection will ultimately depend upon the moral quality and integrity of the person appointed as Governor-Genearl. In the past 30 years Australians have suffered poorly by some of these appointments - By Kerr in 1975 and just recently by Hollingworth. Ex-Major Warren definitely suffered badly by the hand of Hayden.

70. However, taking from Kerr's book 'Matters of Judgement' and to put Dr Russell's point to this MOPS inquiry into perspective, Kerr wrote:

*"The Crown is the embodiment of the interests of the whole people, the indispensable centre of the whole parliamentary democratic order, the guardian of the Consitution, ultimately the sole protector of the people if Members of Parliament or Ministers forget their duty and try to become masters not servants. The Crown's reserve power to refuse the advise of the minister when that advice imperils the Consitution still remains....and if*

*parliamentary government is to survive it must remain."*

71. Kerr's words ought to be a grave warning to members of this MOPS Inquiry about just what it is they are examining. Or more pointedly what this Howard Government is attempting to debase.

*"A Prime Minister, in order to get his own way and subvert the Constitution would appoint a Governor-General who would act as a rubber stamp."*

Professor West

72. A Prime Minister would appoint an individual with a known or demonstrated willingness to abuse process or power.

73. Dr Russell's MOPS Inquiry Submission No 9 tells us that:

*"the checks and balances on executive power are to an important extent self imposed and dependent on the Prime Minister of the day"*

and

*"There is a tendency in our system for people (Ministers) to explore the limits of convention and due process"*

and

*"Informing a staffer (MOPS) is no longer the same as informing a Minister...We have entered a world where staff can carry out much of the authority of the Minister but can be disowned if necessary. "*

74. The Howard Government has already taken Australians beyond the limits of convention and due process. Now Australians risk having this MOPS Inquiry recommend new legislation to bring these abuses of power under the protection of new laws and so called "codes of conduct". This would effectively take ministerial responsibility for the conduct of his office away from the minister.

75. It is a bit like saying because there has been an increase in the incidents of rape of women by men, we need to recognise this trend as part of the new order. In order to accommodate this trend we need to make new laws to protect the rapists from any legal action against them. This way they can be removed from any sanctions and it will allow them to continue to rape. Q.E.D., this government is raping our rule of law and we risk having this MOPS Inquiry giving sanction to it.

76. Dr Russell develops the argument that abuse of power by a Prime Minister or his Ministers could be arrested if Australians had a Governor-General who was willing to use "the black-print oversight powers our Constitution". His submission No 9 doesn't use these words but this is where his reasoning takes us if we are to take them out of his theory model and put them in context of our real world.

77. Kerr also stated:

*"The central role of the Governor-General is to prevent illegal conduct by ministers...It is the duty of the Governor-General to ensure that what is done is in conformity with the Constitution, its laws of the Commonwealth and established practices."*

Is it that this Parliament seeks to bring the Government's rape of the Constitution under the protection of the Constitution's laws? Wrong MOPS Act legislation would achieve this evil.

78. On 11 November 1975, the day of Australia's gravest constitutional crisis, Malcolm Fraser stated:

*"There are circumstances when the Governor-General may have to act as the ultimate protector of the Constitution."*

79.

*"The legal power to govern is vested in the Governor-General with the advice of the Executive-Council."*

80. There are no changes to the Constitution to alter the powers of the Governor-General. They are as alive today as in the past. These are the "black-print oversights" Dr Russell implies are there to protect us from a Minister's corruption of power through his/her use of MOPS so as to evade personal accountability for any such abuse of power.

81. The entire cognitive structure of our Parliament, and now especially including MOPS, is based on its collective moral integrity. This acts in tandem with our Constitutionally derived laws. But corrupt one and the other will be destroyed.

82. Nor is there a distinction between political rules and moral rules. Moral conduct is not a matter of obeying rules. Therefore it is useless to say that political rules depend upon moral rules. Members of Parliament are no different from say school teachers, nurses, or process workers. Thus the distinction between 'statesman' and ordinary people is wholly artificial. It is Commonwealth Laws of probity that supposedly protect Australians from abuse of power.

83. Hence the merits of introducing a code of conduct for MOPS are weak to say the least. Howard's code of conduct for his ministers has not stopped the growth in avoidance of responsibility for misuse of power by his ministry. Self regulating codes of conduct simply provide the fog and mist that confuses moral, albeit political conduct, with a lawful duty to act with probity. Any codes of conduct for MOPS will only produce results consistent with the wishes of those at the centre of political power who make and enforce such codes. This is clearly what has happened to the Public Service Act 1999 code of conduct which this Senate MOPS Inquiry seeks to model. Yet this goes in the face of Howard's public comment reported in SMH 18.7.03 that in the lead up to the Iraq War his bureaucratic advisers

*" were sort of coward into...not giving unpalatable advise."*

So why would this inquiry use this Public Service model to achieve impartial and fearless advise?

84. What Australians are witnessing is the process of how the law and political codes of

conduct are being massaged to facilitate greater exercise of dutiless power over the civic body by elected members of parliament. It is a gradual and deliberate decline toward insidious violence and subversion.

85. Collectively MOPS Inquiry Submissions Nos 1 to 9 are sounding the alarms that this decline away from the rule of law must be reversed.

86. Australians are deeply disturbed by the systemic maladministration, deceit and abuse of power that appears to be taking hold of our Government. Current information in the public domain evidences that the decline in the rule of law is emanating from the Office of the Prime Minister and from the Department of Defence. Focus has been on Tampa, Children Overboard Affair and the Howard Government's lies that took this country to war. These are all matters of serious national security and labelled as such by the primary decision-makers involved.

87. Tragically, it is these same politicians who now attempt to evade responsibility for their abuses of power and substitute MOPS in their place, that is MOPS who are only accountable to their ministers.

88. By virtue of instigating this Senate MOPS Inquiry the public does have the impression that the maladministration involved in the Children Overboard Affair is the responsibility of MOPS and not the responsibility of the primary decision-makers (i.e the responsible ministers). The logic being that there is now a need for Parliament to look at ways of tightening the rule about how MOPS exercise power in their own right.

89. If the final outcome from this MOPS Inquiry is to give recognition to these pseudo powers of MOPS then the ultimate result is that the Constitution, the rule of law, and parliamentary scrutiny of the executive did not safeguard Australia against known and provocative abuses of power by our political leadership.

90. This is a case of Members of Parliament investigating themselves if one accepts that MOPS are an extension of themselves. It is akin to Army investigating itself - that process has repeatedly been exposed to be a totally meaningless exercise. As the then Governor-General Sir William Dean has stated:

*"The past is absorbed into the present and future. It stays to shape what we are and what we do."*

SMH, Spectrum 25 Jan'97

Sir William then continued on to appeal to the basic fairness of Australians.

91. What is fair is that Australians do not have their rule of law subverted or otherwise threatened by self-serving politicians who seek to extend their abuses of power. Evidence in the ex-Major Warren case to date exposes that this path is being pursued by our primary decision-makers.

92. It would be interesting to know if Sir William Deane shares the concerns of other Australians that perhaps we are witnessing a Senate Inquiry into Members of Parliament Staff that, wittingly or unwittingly is subverting our Constitution and replacing it with an emperor

dressed in clothes made of MOPS?

#### Recommendations

1. Make enforceable and genuinely accountable, controls on breaches of fidelity to duty by responsible Ministers to the Crown, the Parliament and the public.
2. Made enforceable and genuinely accountable, controls on maladministration involving the commissions and omissions of MOPS to the relevant minister.

Mr A K Warren  
24 July 2003