

Military Administrative Inquiries

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It seems appropriate in this first session on Defence administrative inquiries, to give an overview of existing inquiry mechanisms within Defence. I shall examine the structures set up to handle complaints from an administrative perspective, but I will not be dealing with redress of grievance or disciplinary inquiries. I have taken as my starting point, the recent history, structure and proposals for reform of the military administrative inquiry system.

This presentation is divided into 3 parts:

- Part I provides a brief overview of the key military inquiry bodies, and of the key reports that led to the current system of military administrative inquiries, with some brief reference to outcomes;
- Part II focuses on the key themes and recommendations made by those reports; and
- Part III concludes with some comments on the findings, provides brief investigation of the response to the themes and recommendations raised in the reports, focusing particularly on the 2007 amendments to the *Defence (Inquiry) Regulations 1985* (Cth) (the **Inquiry Regulations**).

Part I: ADF Military Inquiries: Their Structures and Movements for Reform

Military inquiries have been the subject of intense external scrutiny over the past decade or so by among others ‘the Senate, complainants, HREOC and [the Ombudsman’s] office’.¹ This paper looks only at four of these reports: the *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences* in 1998 (the Ombudsman’s report); the *Procedures in the Australian Defence Force* report in 1999 (the Joint Standing Committee report); the report in 2001, *Military Justice Procedures in the Australian Defence Force* (the Burchett report); and the

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¹ Commonwealth Ombudsman *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences* (1998) [21] (Ombudsman’s report). The other reports are: Parliament of Australia Joint Standing Committee of Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, Report No 89 (1999) (Joint Committee report); JCS Burchett QC, *Report of Inquiry into Military Justice in the Australian Defence Force* (2001) (Burchett report); Parliament of Australia, Senate, Foreign Affairs, Defence and Trade References Committee *The effectiveness of Australia’s military justice system* (2005) (Military Justice report).

Senate Committee *Report of Inquiry into Military Justice in the Australian Defence Force* in 2005 (the Military Justice inquiry report).

The recommendations of the first of these reports are relatively benign. However, the recommendations have progressively increased in specificity and in the level of criticism. This suggests that the inquirers are becoming impatient with inaction on the part of defence management, a growing awareness of the depth of the issues, a greater sensitivity to administrative law standards, and heightened pressure from those affected including family members.

Military inquiries into maladministration, and incidents involving injury, death and loss of property, have long been an aspect of the military justice system.² In order to respond to complaints arising from these incidents, Defence has progressively implemented a hierarchy of inquiry bodies. The current structure of these bodies is as follows:

- **A Routine Inquiry:** an informal inquiry into simple matters of maladministration;
- **An Investigating Officer Inquiry:** a more formal inquiry into more serious matters;
- **A Board of Inquiry:** a full quasi-judicial inquiry into very serious matters concerning serious injury and significant loss of property;
- **A Combined Board of Inquiry:** same as a Board of Inquiry, but where the defence forces of another country are involved in the inquiry;
- **A Chief of Defence Force Commission of Inquiry:** a full quasi-judicial inquiry, presided over by a civilian lawyer with judicial experience, into matters that concern the accidental death of an ADF member.³
- **General Court of Inquiry:** a quasi-judicial inquiry into extremely serious matters with wide ramification for the Defence forces.

In other words there are six layers of inquiry processes specific to the ADF.⁴ No other area of Commonwealth activity has such a comprehensive specialist framework of inquiry bodies. Even social security, often said to be the Rolls Royce of review systems, only has three levels of specialist review body, if you count the SSAT, albeit an external review body. The professional services review scheme under the *Health Insurance Commission Act 1973* that decides whether doctors have claimed Medicare benefits for

² For a comprehensive review of the precise status of military justice within a civilian legal system see Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28 *University of New South Wales Law Journal* 364. For a view from near antiquity see G Rubin, 'Parliament, Prerogative and Military Law: Who had Legal Authority over the Army in the Later Nineteenth Century?' (1997) 18 *Journal of Legal History* 45.

³ Commissions of Inquiry were only added to the *Defence (Inquiry) Regulations* in 2007.

⁴ That is, excluding review by the general court and tribunal systems, and various investigatory bodies including the Ombudsman, the Privacy Commissioner and the Australian Human Rights Commission.

an excessive number of services—the over-servicing problem—has only some four stages leading up to a decision by the Minister.⁵

What does this suggest? Is it that Defence as the largest Commonwealth agency needs a greater number of bodies to manage its review processes? Is it that Defence has more problem cases to manage? That would be surprising in a disciplined force and is not borne out by the statistics. It is more likely that the answer is in part historical, that the development of the inquiry system has been ad hoc and that, as with other review structures, elements have been added without an overall analysis of the actual needs or level of review required.

Whatever, the reason, the facts are that during the 1980s and 1990s a series of heavily publicised incidents, concerning physical abuse and death of members of the forces, served to draw attention to the military justice system. A series of reports were commissioned to investigate shortcomings of the system and possible avenues of reform.⁶

The first such report—the **ADF Ombudsman report** was conducted by the Commonwealth Defence Force Ombudsman in response to a sexual assault case in a Defence establishment and general concern about how Defence responded to ‘allegations of serious incidents and offences’.⁷

Before the Ombudsman reported, however, the Commonwealth Parliament referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade an inquiry into ‘the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and ADF disciplinary processes.’⁸ This **Joint Committee report** handed down in 1999, made extensive recommendations in respect of the reform of military inquiries.

The third report, the **Burchett report** (colloquially known as the Rough Justice report),⁹ was commissioned in response to complaints about bastardisation within A Company 3 RAR battalion and other disciplinary matters. Although its principal focus was on disciplinary issues, the Burchett report too dealt with administrative inquiries.

⁵ *Health Insurance Act 1973* (Cth) s 80. See also *Edelsten v Health Insurance Commission* (1990) 27 FCR 56.

⁶ A number of other reports were prepared dealing primarily with reform of the military discipline system. These reports were predominately concerned with the system of military prosecutions and discipline, as opposed to inquiries. As such, they are beyond the scope of this presentation, but for the interested reader see, The Hon AR Abadee, *A Study into Judicial System under the Defence Force Discipline Act* (1997); on redress of grievance reports are, similarly outside the scope of this presentation, but see, Commonwealth Ombudsman, *Review of Australian Defence Force Redress of Grievance System 2005: A Joint Report by the Department of Defence and the Office of the Commonwealth Ombudsman*, report no 1 (2005); Commonwealth Ombudsman, *The Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, report no 4 (2007).

⁷ The own motion investigation is a procedure authorized by s35A of the *Ombudsman Act 1976* (Cth).

⁸ Joint Committee report, 1.8.

⁹ JCS Burchett QC, *Report of Inquiry into Military Justice in the Australian Defence Force* (2001). (Burchett report).

The final report, the **Report of the Military Justice Inquiry**, by the Senate Foreign Affairs, Defence and Trade Review Committee, appeared in June 2005.

Part II: Themes and Recommendations for Reform

Each of the reports is extensive and this paper will not attempt to cover all the recommendations. Instead it will focus on some of the themes which emerged. The recurring themes from the four reports are:

1. The need to ensure the independence and impartiality of the inquiry process;
2. The overlap between the various forms of inquiry;
3. The problems which arise from a failure to accord natural justice and legal representation;
4. A need to improve the competence and integrity of the ADF members conducting inquiries; and
5. The necessity to provide greater protection in the inquiry process for close relatives of deceased ADF members affected by an inquiry.

Independence and impartiality

The overriding concern of all the reports is the importance of ensuring that military inquiries remain independent and impartial. Hence, the Ombudsman report noted that ADF members charged with organizing and presiding over inquiries (whether a Routine Inquiry, an Investigating Officer Inquiry, or a Board of Inquiry) were often not sufficiently independent from the chain of command and were occasionally directly involved in the matters they were charged with investigating. Similar concerns were raised in the reports of the Joint Committee, the Burchett inquiry, and the Military Justice inquiry.

Ombudsman report

In one respect the report of the ADF Ombudsman contains the least radical of the recommendations. Its focus was both educative and structural. On the educative side the report recommended that existing ADF policy documents be amended expressly with a view to eliminating two perennial issues for military inquiries: (1) conflicts of interest and (2) a lack of impartiality caused by inquiries being conducted within the chain of command. The recommendation included that those conducting inquiries should be required to make a declaration of any actual or potential conflict of interest.

This resulted in the creation of a new policy manual: the *Administrative Inquiries and Investigations in the ADF* manual (ASFP 202), a move which has gone a considerable way towards explaining how the various forms of inquiries are intended to operate.

The recommendation for structural change led to the setting up of the Complaints Resolution Agency, the operation of which is discussed in other papers at this seminar. For the most part, the recommendations were accepted by Defence.

Joint Committee report

In contrast to these relatively mild recommendations, the Joint Committee report adopted a more robust approach. For instance, the first two of its recommendations were:¹⁰

1. That a Court of General Inquiry should be *mandatory* for all inquiries into the accidental death of an ADF member in peacetime; and
2. That a Court of General Inquiry should be the *preferred* form of inquiry into matters ‘involving major capital loss’.

The first of these recommendations was not accepted; the second was.

At the time these recommendations were made the Court of General Inquiry was at the apex of the Defence administrative inquiry hierarchy and the recommendations reflect the need for the highest degree of independence for matters which would be of such seriousness as to warrant a hearing at this level.

The rationale for these recommendations was that these steps would remove ‘the Department of Defence from the investigation process’, would negate ‘any conflict of interest’ and would ‘ensure independence in the investigation of a serious matter.’¹¹ To underscore these suggestions, the report recommended the tabling in Parliament of any report of a Court of General Inquiry.¹² This requirement, if adopted, would replicate the similar obligation on other independent investigative bodies such as the Ombudsman, and the Auditor-General for matters of equivalent public importance. It should be noted that no Court of General Inquiry has ever been constituted.

The report made a number—59 in all—of specific recommendations designed also to ensure independence and impartiality. They included that:

- The investigating officer for an Investigating Officer Inquiry should be appointed from outside the chain of command;¹³
- All correspondence between the Appointing Authority and the inquiry body should be in writing and disclosed to the legal representatives of all parties;¹⁴
- Specific guidance should be provided to Appointing Authorities warning against any direct involvement with the inquiry;¹⁵ and
- Within the bounds of privacy and secrecy limitations, the ADF should publicly account for its discharge of a Board of Inquiry by releasing the recommendations of the Board of Inquiry, and noting the response to the recommendations, including

¹⁰ Joint Committee report, 3.15, 3.16.

¹¹ Joint Committee report, 3.14.

¹² Joint Committee report, 3.94, recommendation 25.

¹³ Joint Committee report, 3.28, recommendation 8.

¹⁴ Joint Committee report, 3.105, recommendation 31.

¹⁵ Joint Committee report, 3.118, recommendation 33.

where the recommendations were rejected, the reasons for doing so.¹⁶ A similar public accounting was recommended for a General Court of Inquiry, but with the addition that all this information be tabled in Parliament.¹⁷

Although, as mentioned, the government did not implement the recommendations to broaden the role of the Court of General Inquiry, it did implement some 97 per cent of the remaining recommendations, either wholly or in part. However, the experience of inquiries held subsequently, does not suggest that the recommended improvement to practices have consistently been followed. The recommendation for better communication of outcomes in the case of inquiries by Boards of Inquiry has been heeded, and an expurgated version of reports of Boards of Inquiry is now available on the Defence website.

Burchett report

The solution proposed by the Burchett report to redress the problems of lack of independence and impartiality was to set up an Inspector General of the Australian Defence Force (ADF) (an IGADF), independent of the chain of command, and answering directly to the Chief of the Defence Force (CDF). As the report stated, this ‘would provide greater assurance of independence for those cases where complaints do need to be brought forward’.¹⁸ The IGADF would investigate matters either on request or on the office’s own motion, receive complaints and investigate them when necessary, act as appointing authority for administrative investigations excluding BOARD OF INQUIRYs or Courts of Inquiry, maintain a register of suitable investigators, and monitor key indicators for systemic issues.¹⁹

The IGADF position has been established and how comprehensively the government responded to the Burchett inquiry recommendations will be discussed by the IGADF in his paper. Indeed, all the recommendations of the report were agreed to by the government.

Military Justice Inquiry report

The recommendations of the Military Justice Inquiry report went even further than its predecessors.²⁰

The most controversial of its recommendations, the creation of a wholly external administrative tribunal (the Australian Defence Force Administrative Review Board or ADFARB) was the centerpiece of its proposals and pivotal to the remainder. The ADFARB, modeled on the Canadian Forces Defence Grievance Board, was to be notified of any incident of such seriousness as to warrant a Board of Inquiry, and would

¹⁶ Joint Committee report, 3.119, recommendation 34.

¹⁷ Joint Committee report, 3.121, recommendation 35.

¹⁸ Burchett report, [70].

¹⁹ Burchett report, [55].

²⁰ The full text of the key recommendations of the Military Justice Inquiry report can be found at Appendix I.

choose what form of inquiry to establish - an Investigating Officer Inquiry or a Board of Inquiry, providing reasons for its choice.²¹

In addition the report recommended the creation of a Military Division of the Administrative Appeals Tribunal which would conduct inquiries referred to it by the ADFARB.²² The Military Division was to operate within the AAT's regular structure, but there would be special rules for disclosure of decisions.²³

In essence, the ADFARB was to replace the CDF as the Appointing Authority for notifiable incidents,²⁴ and the proposed Military Division of the AAT was to replace ad hoc Boards of Inquiry.²⁵

Key structural features of the ADFARB included its statutory underpinning; and a non-military permanent full-time chairperson (appointed for a fixed-term) with 'proven administrative law/policy experience' assisted, as needed by services members appointed by the CDF;²⁶ and there should be strict conflict of interest rules for membership of the ADFARB;²⁷ and the ADFARB would take over from the IGADF the responsibility for training Investigating Officers.²⁸ This pivotal recommendation was not accepted, although some 75 per cent of the less significant recommendations were agreed to by the government.

Other recommendations were:

- Once again, that the *Administrative Inquiries Manual* should be amended 'to ensure direct and clear advice is given on the selection of a independent and impartial Investigating Officer';²⁹ and
- Once again, that an investigating officer should complete a written declaration asserting no conflict of interest prior to the appointment to conduct an investigation.³⁰

The repetition of these suggestions suggests that problems continued in this area, despite recommendations from earlier reports which made the same points.

Overlap between various forms of inquiry

A second theme of the reports—a problem identified by the Ombudsman's 1998 report - was the vagueness of the boundary between an Investigating Officer Inquiry, and a Board of Inquiry and how best to assess whether to conduct an inquiry under the

²¹ Military Justice Inquiry report, 11.67, recommendation 29.

²² Military Justice Inquiry report, 12.120, recommendation 34.

²³ Military Justice Inquiry report, 12.115, 12.118.

²⁴ Although the Minister for Defence retained authority to appoint a Court of Inquiry: recommendation 34.

²⁵ Military Justice Inquiry report, 12.119–119 and see recommendation 29.

²⁶ Military Justice Inquiry report, 11.67, recommendation 29.

²⁷ Military Justice Inquiry report, 11.67, recommendation 29.

²⁸ Military Justice Inquiry report, 11.67, recommendation 29.

²⁹ Military Justice Inquiry report, 8.78, recommendation 27.

³⁰ Military Justice Inquiry report, 8.81, recommendation 28.

Defence Force Discipline Act 1982 (DFDA) or an administrative inquiry. The absence of any clear criteria for choosing which form of inquiry to set up meant that members involved in inquiries often believed serious matters were not being investigated by the appropriate body, and vice versa.³¹ For example, where the choice was between a discipline inquiry and an administrative inquiry, the administrative inquiry option was often taken because a discipline inquiry could ‘have a serious impact on the offender’s career progression prospects’ and must be conducted according to the formal rules of evidence.³² On occasion, this meant that a less appropriate form of inquiry—the administrative inquiry—would be relied on.

These practices led to the key recommendation of the Ombudsman report, namely, that it should be made clear in internal policy documents which type of inquiry was appropriate for which events.³³ Similarly the Joint Committee recommended that the ADF provide more extensive guidance to commanders in choosing between the various types of inquiry.³⁴ The Burchett report, as mentioned earlier, recommended that decisions on these issues should be for the IGADF; and the Military Justice Committee recommended that, rather than leave this important decision to the commanders, the choice of inquiry type should be for ADFARB, which would provide written reasons to explain its decision.³⁵

Natural justice and legal representation

All four inquiries expressed concern about the extent to which principles of natural justice were respected in the inquiry process. That is not surprising. The handling of inquiries using service personnel increases the possibility of conflicts of interest occurring. In addition, it is difficult to avoid perceptions of bias by commanders in relation to those under their command.

The Ombudsman again recommended internal policy documents be amended to clearly stipulate principles of procedural fairness, in particular, the various aspects of the hearing rule.³⁶ The relevant instruction manual was amended to implement this recommendation.

The Joint Committee made extensive recommendations as follows:

- The president of a Board of Inquiry should have an express responsibility to ensure that lines of questioning are relevant to the Terms of Reference and do not include unnecessary personal questions or the pursuit of personal theories;³⁷
- Legislation be passed to ensure that there is no privilege against self-incrimination for evidence given to an Investigating Officer; but a statement or disclosure made to

³¹ Ombudsman report, 2.54–2.56.

³² Burchett report, [159].

³³ Ombudsman report, 2.68.

³⁴ Joint Committee report, recommendation 9.

³⁵ Senate Committee report, recommendation 29.

³⁶ Ombudsman report, 8.70.

³⁷ Joint Committee report, recommendation 14.

an Investigating Officer should not be admissible as evidence in any civil or criminal proceedings;³⁸

- Boards of Inquiry should be held in public where a case is serious and of legitimate public interest;³⁹
- An ADF members should be promptly informed of any complaint or allegation against them where any action is taken under Inquiry Regulations. The only exception being where an individual is suspected of committing an offence and where forewarning may result in destruction of evidence;⁴⁰
- A report that is critical of an ADF member should not be made to an Appointing Authority without the member being given an opportunity to appear before the inquiry and make submissions (oral or written);⁴¹
- A member against whom action is to be taken should have access to any evidence relied upon in making a decision or taking any action which affects them, save where the release of evidence given by another witness may constitute a threat to the safety of the witness;⁴²
- Members who may be adversely affected as a result of an inquiry's report should be afforded access to that report within the provisions of the *Privacy Act*;⁴³
- Witnesses should be informed of their rights to review;⁴⁴
- Guidance on confidentiality and privacy should be included in the proposed manual for inquiries under the Inquiry Regulations;⁴⁵
- The appointment of a Counsel Assisting a Board of Inquiry should be strongly recommended in guidance to Appointing Authorities;⁴⁶
- Guidelines be adopted to ensure that ADF members who make knowingly false, malicious or vexatious accusations against other members are held accountable and that suitable action is taken against them; ADF members should be made aware of those guidelines; and any action taken should be transparent and where an accusation is found to be false, malicious or vexatious, action should be taken, as transparently as possibly, to put right any detriment to the member falsely accused.⁴⁷

The Joint Committee also recommended that all ADF members affected by a Board of Inquiry should have a right to be represented by a legal practitioner at the cost of the

³⁸ Joint Committee report, recommendation 15.

³⁹ Joint Committee report, recommendation 17.

⁴⁰ Joint Committee report, recommendation 18.

⁴¹ Joint Committee report, recommendation 19.

⁴² Joint Committee report, recommendation 20.

⁴³ Joint Committee report, recommendation 21.

⁴⁴ Joint Committee report, recommendation 22.

⁴⁵ Joint Committee report, recommendation 23.

⁴⁶ Joint Committee report, recommendation 29.

⁴⁷ Joint Committee report, recommendation 40.

Commonwealth.⁴⁸ The report also recommended that the right be extended to the immediate family of a deceased ADF member affected by a Board of Inquiry.⁴⁹

The Burchett report focused on natural justice and the command prerogative, that is, the right of a commander to remove an officer from a command position for safety, operational or other reasons where there is a loss of confidence in the capacity of the officer to perform the duties of their relevant command. Such actions often precede or may take place during an administrative inquiry.

The Military Justice report recommended that the Defence (Inquiry) Regulations be amended to ensure that:

- An affected person is informed of their rights to appear and to submit a reply;⁵⁰
- A person who comes before a Board of Inquiry late has a reasonable opportunity to familiarise themselves with the evidence already given before appearing;⁵¹ and
- A person (and the family of a deceased) affected by a Board of Inquiry be permitted to appear before the board, and be legally represented.⁵²

All these recommendations were accepted.

Competency and Integrity of ADF Member Conducting Investigations

The competency and integrity of inquiry members was discussed in each report. All reports concluded that in the past certain ADF members conducting Investigating Officer Inquiries and sitting on Boards of Inquiry were not sufficiently qualified to be acting in their position.

The Ombudsman recommended that an integrated training system be established to ensure that officers who conduct investigations were sufficiently qualified to act in that capacity.⁵³ The ADF Ombudsman also recommended that no officer should be appointed to conduct an inquiry without proof of training or other expertise.

The Burchett report suggested improved training and the setting up of a register of suitable persons who could act as Investigating Officer, the schemes to be administered by the IGADF.⁵⁴ The Joint Committee made similar recommendations to ensure that officers acting as inquirers had sufficient training.⁵⁵ The report of the Military Justice inquiry acknowledged the recommendations made by earlier reports, but decided that any expertise gaps should be filled by the creation of an external review body — the ADFARB⁵⁶ — rather than by officer training.

⁴⁸ Joint Committee report, recommendation 27.

⁴⁹ Joint Committee report, recommendation 28.

⁵⁰ Military Justice inquiry report, recommendation 31.

⁵¹ Military Justice inquiry report, recommendation 32.

⁵² Military Justice inquiry report, recommendation 33.

⁵³ Ombudsman report, 5.57.

⁵⁴ Burchett report, recommendations, 39, 41, 55.

⁵⁵ Joint Committee report, recommendations 41, 42, 43.

⁵⁶ Military Justice inquiry report, recommendations 29 and 34.

The Rights of Close Relatives of Deceased ADF Members

Unsurprisingly, given that many of the reports were instigated by public interest in the deaths of ADF members, the rights of close family members of deceased ADF members features prominently in the reports.

As mentioned earlier, the Joint Committee and the Military Justice Inquiry recommended that close family of a deceased ADF member be given a right to be heard and represented by a defence lawyer.⁵⁷ The Joint Committee further recommended that :

- Next of kin and immediate relatives of a deceased ADF member who is the subject of the inquiry should *always* be permitted to attend (whether a public or private hearing is held), and if national security requires an exclusion, it should only be temporary;⁵⁸
- Next of kin and immediate relatives should be provided with a copy of the inquiry report (subject to the *Privacy Act 1988 (Cth)*) and where a recommendation made in the report is not implemented, should be provided with reasons underpinning the decision;⁵⁹
- Next of kin and immediate relatives should be warned prior to release of information to the press regarding the inquiry;⁶⁰
- The ADF should establish processes to ensure that counseling services are available, if required, to witnesses to a military inquiry and to next of kin and immediate relatives of dead ADF members subject to the inquiry.⁶¹

Part III: ADF Responses to the Reports and the Current State of Defence Inquiries

The response by the Department of Defence was received later that year, and amendments to the Inquiry Regulations came into effect in 2007.

The Commonwealth Government's reaction to the Military Justice report was swift. In October 2005 it outlined its response.⁶²

Most prominently the Government rejected the recommendation to create an external review body—the ADFARB. The Government was of the opinion that the ADFARB 'would not support the relationship between command and discipline, would reduce contestability and introduce duplication.'⁶³ The Government also addressed the Canadian analogue, the Canadian Defence Force Grievance Board, commenting that it 'only deals with about 40 per cent of Canadian Defence Force grievances, is highly

⁵⁷ Text accompanying fn 39 and 42.

⁵⁸ Joint Committee report, recommendation 24.

⁵⁹ Joint Committee report, recommendation 25.

⁶⁰ Joint Committee report, recommendation 26.

⁶¹ Joint Committee report, recommendation 30.

⁶² Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005.

⁶³ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 18.

resources intensive and does not replace the Canadian internal complaints resolution body, or the Canadian Forces Ombudsman.⁶⁴ In effect, the Government response was that the proposed ADFARB would cause the same levels of duplication without any compensating benefit.

Independence and Impartiality: The Government's Response

Importantly in rejecting the ADFARB, the Government also rejected the Military Justice Inquiry report's preferred method of ensuring the inquiry system respect basic principles of independence and impartiality.

The response did, however, acknowledge that 'there is a need to demonstrate that ADF inquiries into...suicide, accidental death or serious injury are independent and impartial.'⁶⁵ To satisfy this need the Government preferred the creation of a new inquiry body—to be titled the 'Chief of Defence Force Commission of Inquiry.' This new body was to be recognized in the Inquiry Regulations and was to include a civilian with judicial experience on the Commission.

The Government implemented their proposal by inserting Part 8 into the Inquiry Regulations. Under regulation 109(1)(a) the Chief of Defence Force *must* appoint a Commission of Inquiry to inquire into a death or suicide of a ADF member. However, under regulation 109(2) the CDF does not have to appoint a Commission of Inquiry if the Minister of Defence has made a written direction to not appoint the Commission.

Under regulation 112 the President of a Commission of Inquiry must (a) have judicial experience; and (b) be a civilian; and (c) not be a Permanent or Reserve member of the Defence Force. This regulation is a crucial implementation of a strategy for ensuring that Commissions of Inquiry uphold the principles of independence and impartiality that so concerned the authors of the various reports.

The Government has also amended the *Administrative Inquiries Manual*⁶⁶ so that it better expresses the principles that govern the appointment of an Investigating Officer, particularly the expected independence and impartiality of the officer in question.⁶⁷

Procedural Fairness: The Government's Response

The Government agreed to implement, without reservation, the Military Justice Inquiry's recommendations concerning procedural fairness.⁶⁸

⁶⁴ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 18.

⁶⁵ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 20.

⁶⁶ The successor to the *Administrative Inquiries and Investigations in the ADF* manual.

⁶⁷ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 6.

⁶⁸ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: 'Report on the Effectiveness of Australia's Military Justice System'*, October 2005, 11.

Amendments were made to the *Administrative Inquiries Manual* to ensure that:

- ‘a copy of relevant evidence is provided to a person whom the President considers is an affected person, but who is not at the hearing.’⁶⁹
- A ‘reasonable opportunity for familiarisation’ is guaranteed to a person who comes late before a Board of Inquiry.

Amendments were made to the Defence (Inquiry) Regulations to ensure that a person affected by a Board of Inquiry has a right to:

- Appear before a Board of Inquiry and make submissions to it; and
- Be represented by a legal practitioner, and if the person chooses an ADF service lawyer the cost will be born by the Commonwealth.

The above rights are now enshrined in regulations 33 and 121.

The Government agreed in part to the recommendation that Investigating Officers ‘be required to produce statements of independence and make known any potential conflicts of interest.’ It did not, however, agree that the statement should be included in the final report—noting that it is more efficient to resolve conflicts at the outset of the inquiry process, rather than after its conclusion. It agreed to amend the *Defence (Inquiries) Manual* to reflect this practice.⁷⁰

The Competence and Integrity of ADF Members Conducting Inquiries

As the Military Justice Inquiry report’s key recommendation in this area was rejected, that is, the establishment of the ADFARB, the Government’s response to concerns about the competence and expertise of officers conducting inquiries is unclear. However, it should be noted that the report did acknowledge that the Government had responded favorably to the concerns raised in the Joint Committee report concerning officer training,⁷¹ although it maintained reservations in this regard.⁷²

The Position of Close Relatives of Deceased ADF Members: The Government’s Response

The Government adopted the recommendation that family members of a deceased ADF member be permitted to appear, make submissions and be legally represented at the ADF’s cost before Boards of Inquiry. Regulation 33 was amended to include this provision, and the same right exists in regards to Commission of Inquiry under regulation 121.

⁶⁹ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: ‘Report on the Effectiveness of Australia’s Military Justice System’*, October 2005, 7.

⁷⁰ Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade Reference Committee: ‘Report on the Effectiveness of Australia’s Military Justice System’*, October 2005, 10.

⁷¹ Joint Committee Report, 8.86 — 8.94.

⁷² Joint Committee Report, 12.76–12.87.

Conclusion

Notwithstanding the criticism over the last decade of the existing system and continuing complaints along the lines of the themes covered in this paper, Defence has chosen to maintain its internal system. There are clearly good reasons for doing so. Indeed at the lower level, a quick and effective inquiry is an essential element of maintaining an efficient and disciplined force. Indeed, the Ombudsman's report noted that the preliminary or lower level inquiry serves a useful purpose and administrative investigations 'under the DIRs is generally quick and inexpensive'.⁷³ The Burchett report too concluded that 'the great majority of complaints have been handled responsibly by the chain of command'.⁷⁴

However, just as internal review generally is shackled by the need to comply with internal policy, and alone lacks 'independence and credibility',⁷⁵ so too Defence inquiries must be diligent if they are to escape these criticisms. Appointment of an independent head of Defence Commissions of Inquiry has gone some way to meet that criticism, but this cannot be said of reviews at lower levels in the hierarchy. Further steps need to be taken to ameliorate some of the systemic issues uncovered by these reports. There are signs that the public's tolerance of Defence systems of administrative inquiry is waning. Specific issues which need further attention are:

- Defence has been slow to accept recommendations for change. Although change has occurred over this last decade, as a report of Ernst and Young in 2006 on ADF investigative capability noted 'reviews did not seem to have produced decisive, measurable reforms or improvements'.⁷⁶
- Amendments to manual alone are insufficient to calculate change. Incentives, both positive and negative are needed as well.
- Consideration is needed of the retention of the multiple layers of administrative inquiries;
- Speedier responses, particularly at the Board of Inquiry level. As Burchett noted complainants are more likely to accept even an adverse result with grace 'had it been obtained more promptly. Delays may prove fertile ground for dissatisfaction'.⁷⁷
- Many of the shortcomings identified in the reports, particularly in respect of independence and impartiality, remain crucially important to resolve. An inquiry composed of biased and/or incompetent members is unlikely to provide a report that assists command in resolving the systemic flaws that lead to major incidents, be those incidents serious injury or loss of life or property.

⁷³ Ombudsman's report [10].

⁷⁴ Burchett report, [241].

⁷⁵ J Uhr 'Accountability Without Independent External Review?' (1997) 84 *Canberra Bulletin of Public Administration*, 7.

⁷⁶ Ernst & Young *Report of audit of ADF Investigative Capability* (2006) [2].

⁷⁷ Burchett report, [240].

- Equally if a perception exists among ADF members that inquiry bodies are not ‘fair’ then the members are unlikely to provide the cooperation required for an efficient hearing and report. Ensuring that the various inquiry bodies are composed of disinterested and well qualified members, and that the procedures followed by such inquiries observe natural justice standards is a vital part of ensuring that military inquiries provide the best information and recommendations to senior command to rectify any shortcomings in existing practices.

Overall, however, it should never be forgotten that the primary objective of military inquiries is to enquire into the facts surrounding a serious incident with a view to making recommendations to command on possible methods of ensuring that future incidents are not repeated. The inquiry process is not a court, nor is it a disciplinary tribunal. Certainly, ADF members who are the subject of adverse findings may suffer damages to their reputation and, possibly, their career. However, the various inquiry vehicles, be they the Routine Inquiry or the Court of General Inquiry, are designed as bodies charged with rooting out maladministration.

It is encouraging to see that many of the criticisms have been heeded by Defence. This is clear from the Department of Defence’s response to the Military Justice Inquiry report and its consequential amendments to the Defence (Inquiry) Regulations, that the ADF are committed to pursuing an agenda reform. I look forward to observing the future developments that that agenda will, I am sure, entail.

Appendix I: Key Recommendations of the Foreign Affairs, Defence and Trade Review Committee (2005)

Recommendation 27

The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

Recommendation 28

The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.
- A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.
- The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.
- The investigating officer's report to include his or her stat

Recommendation 29

- a. The committee recommends that:
 - the Government establish an Australian Defence Force Administrative Review Board (ADFARB);
 - the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;
 - the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;
 - the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;
 - all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;

- the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;
 - the CDF be required to give a written response to ADFARB findings/recommendations;
 - if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
 - the ADFARB be required to make an annual report to Parliament.
- b. The committee recommends that this report
- contain information that will allow effective scrutiny of the performance of the ADFARB;
 - provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
 - comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.
- c. The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:
- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
 - where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.
 - The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.
 - The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:
 - the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any

- documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and
- although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.
- d. The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:
- improving the training of investigating officers;
 - maintaining a register of investigating officers, and
 - developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.
- e. To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:
- the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;
 - the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or
 - the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.
- f. The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.

Recommendation 34

The committee recommends that:

- all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;
- the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);
- the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;

- the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and
- the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.