

DEFENCE WATCHDOGS SEMINAR

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Administrative Oversight of Military Justice

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Distinguished guests, colleagues, ladies and gentlemen, good afternoon.

When the office of the Inspector General ADF (IGADF) was first established in 2003 very few people had much of an idea about what the role of the IGADF would actually involve.

The concept of an Inspector General with specific responsibilities for military justice matters was new to the ADF and, naturally, many people were curious about it. I recall however, feeling slightly uncomfortable at being described as the 'military justice watchdog' in some of the blurb about the position that appeared at the time. I'm not sure why that was really – perhaps because it tended to conjure images of having to do a lot of barking when what seemed to be required was to have a bite that would be worse than the bark which, of course, is the canine equivalent of speaking softly and carrying a big stick.

As a result I avoided using the term 'watchdog' wherever possible and instead usually tried to explain the role as being a sort of cross between an ombudsman and an internal affairs bureau or audit office.

Now that nearly six years have passed and we have had quite a bit of experience in doing the job, I've come to think that the 'watchdog' label in many ways isn't a bad descriptor of what we do.

In any event I am very happy to be associated with this seminar on '*Defence Watchdogs and the Administrative oversight of Military Justice*'. May I take this opportunity to add my congratulations and those of my staff to Professor McMillan and his colleagues on the great contribution the Defence Force Ombudsman has made in this area over the past 25 years. I am very pleased to say that an excellent working relationship has developed between his office and mine.

As you will see from your program, this session is entitled 'Rights of Service Personnel' so it might well be assumed that the IGADF is included under this heading because of the role my office performs in dealing with complaints about military justice. And while that is so, it is not the only reason that the IGADF might be directly associated with the rights of Service members.

As Peter Leahy reminded us this morning, military justice is about achieving a proper balance between the maintenance of discipline on the one hand and due regard for

individual rights on the other. For those who are at all mathematically inclined (which I am not) this simple proposition could be portrayed as a sort of equation where military justice (MJ) equals the maintenance of discipline (MD) plus individual rights (IR) hence ($MJ = MD + IR$). Actually this little formula works quite well algebraically; if you do some simple transposing then $MJ - IR = MD$ think 'guantanamo bay'; $MJ - MD = IR$, think 'hippie commune'.

If what I've just said still does not make any sense to you then you will understand why I am not mathematically inclined!

The trouble with looking at military justice too strictly in such terms is that it can lead to a view that the maintenance of discipline is primarily a requirement of the organisation and that regard for individual rights is primarily a need of Service members. In other words, that there is a natural tension between these two components of military justice – meaning that one has to be at the expense of the other.

In the past this was undoubtedly true – strict discipline was valued above all else. Individual rights interfered with this so there weren't many. The Naval Articles of War of 1757 consisted of 35 Articles or clauses which listed the rights and obligations of Royal Navy personnel. Twenty two of these provided for the death penalty to be imposed for various transgressions. Only two provided for what we might now regard as individual rights and only one of these related to the rights of members of the Navy – the other referred to the rights of captured prisoners. The member's sole right, interestingly, was to be permitted to make a complaint about the wholesomeness of the victuals, or upon some other just ground, provided he did it "quietly". The Army Articles were much the same.

Of course, as most of you here today would appreciate, a modern military justice system, at least in a democracy such as ours with volunteer armed services, must recognise that the organisation, that is, the Defence Force, also has a vital interest in respecting individual rights and that the Service member has an equally vital interest in the maintenance of an effective discipline system.

This duality of interests is reflected in the role of the IGADF. That role is not only to inquire into complaints about the military justice system, which is clearly a matter to do with the rights of Service personnel, but also to provide the Chief of the Defence Force with a means of audit and review of the health and effectiveness of the military justice system. This second limb of the IGADF role is not only an organisational requirement but is also a matter directly affecting the rights of Service personnel. Why? Because ADF members have a right to expect that the justice system they have agreed to submit to by volunteering to serve is administered fairly. And, since their lives might one day depend upon it, they have a right to expect that the disciplinary regime will be effective. An armed Service that cannot enforce a satisfactory standard of discipline is unlikely to be operationally effective and will probably become a danger to all, including themselves.

The particular focus on military justice issues inherent in the role of the IGADF seems to be unique. So far we have not discovered a specific equivalent position amongst comparable Defence forces elsewhere in the world. There are of course many other Inspectors General and military Ombudsmen equivalents overseas and some of them also deal with military justice issues, but usually this is a relatively minor part of a wider range of responsibilities that may incorporate capability and operational standards. The span of responsibilities can also be a function of size – my office for example regularly uses up to 35 full time and part time staff; the Inspector General of the US Army, who I visited recently, has a permanent staff of over two thousand.

The need for an ADF Inspector General with a specific focus on military justice arose out of the audit of the military justice system conducted in 2001 by former Federal Court Justice Jim Burchett QC. Mr Burchett was appointed by the then CDF to investigate whether a culture of what was termed ‘rough justice’ existed in the ADF. This followed what seemed like an epidemic of bad publicity in the media about allegations of brutality that initially involved one of the Army battalions and later spread further afield across the ADF.

After a comprehensive investigation lasting six or seven months in which some hundreds of written submissions were examined and several thousand ADF members interviewed, Mr Burchett concluded that no embedded culture of rough justice existed across the ADF. He did find however that isolated incidents of rough justice or bastardisation did occur from time to time. Typically this tended to happen where leadership at unit level failed to intervene either through ignorance of what was happening or, more rarely, through implicit tolerance of it.

Given the size of the ADF and the constant turnover of personnel he recommended that a Military Inspector General be appointed to provide an ongoing scrutiny of the military justice system and a means of investigating complaints about it independently of the normal chain of command. Mr Burchett’s recommended Military Inspector General was eventually established as the IGADF in 2003.

It is of interest to note that although Mr Burchett recognised the need for an independent administrative oversight of the military justice system, he did not recommend that this should be completely independent of the Defence Organisation in the sense of being external to it as is the case with the Defence Force Ombudsman. He recommended that the Inspector General should be able to exercise his functions independently of the normal chain of command but that he should be responsible to the CDF as a discrete but essentially internal agency. There were good reasons for this and I mention it because there have been suggestions from time to time that the IGADF would be better placed as an external agency.

The task of exercising a constant scrutiny or oversight of the military justice system would be very difficult, if not impossible, from outside the Department. This is because the oversight role, to be effective, has to be exercised proactively. Access to Defence information systems and relevant data banks in real time is essential as is direct access

to units across the ADF without having to do this through formal Departmental points of contact. The rolling military justice audit program of ADF units and the monitoring and statistical analysis of military justice data undertaken by the IGADF would be impractical without such access.

Complaint investigation on the other hand, is more often a reactive activity and is less reliant on real time access to data reporting systems and face to face contact with units. Complaint investigations are more easily capable of being conducted externally, particularly if they are done 'on the papers' as a desk top review. Typically, however, complaints that come to IGADF for inquiry require active formal inquiries involving personal contact with witnesses. Again, this type of inquiry action is very much assisted by the IGADF being located within the Defence Organisation.

Independence of action, and the perception of independence, are obviously important features of any 'watchdog' role. Mere independence though is not, of itself, necessarily a guarantor of an effective outcome. Other factors, such as those I have referred to are also important. The structural positioning of the IGADF as an entity independent of the normal chain of command but within the broader Defence umbrella as recommended by Mr Burchett has, in my view, proven to be effective. I might also add that I have never been given any occasion to believe that my independence of action to carry out my role was being impeded or that any particular outcome was sought or expected.

The establishment of the office of the IGADF as an impartial watchdog of the ADF military justice system was a significant addition to the rights of Service personnel, particularly those for whom the normal channels for redress are for some reason inappropriate. The office has inquired into over 350 submissions from Service members and former members where failures in military justice have been alleged. The rate, incidentally, at which failures of military justice, whether individual or systemic, have been found to exist, seems to hover around the 30 % mark.

The IGADF military justice unit audit program is also an increasingly important means of providing a level of reassurance both to the chain of command and to unit personnel that the military justice arrangements in their units meet required standards. The audits provide Service personnel at all ranks with an opportunity to bring military justice matters to attention, either individually, or by completing a short questionnaire. We aim to conduct audits of about 50 units per year but we have noticed that the mere possibility of being audited appears to have a multiplier effect that tends to improve the overall standard of military justice arrangements over a much wider group.

Administrative oversight of military justice is not just important to meet organisational and individual needs. It can also provide a useful reality check when perceptions of military justice become too lopsided one way or the other. Most people would agree that the military justice system has suffered from bad press in recent years, some of it quite extreme. Much of this seems to have been the result of generalisations based upon a relatively small number of notorious cases which may well have been badly handled. This can quickly undermine confidence in the system and can be quite damaging.

This probably reached a nadir a couple of years ago when a commentator in a national newspaper described the military justice system in these terms:

There seems little doubt that the military justice system is a major disincentive to recruitment. Some ten years of rolling inquiries have failed to do more than tinker at the margins of a grotesque system that manifestly sets out to destroy the lives and reputations of service personnel who fall foul of the system and challenge it.

(Geoffrey Barker, AFR 22 Jun06)

The work of the independent watchdogs in inquiring into complaints, conducting audits, own motion studies and analysing military justice data, represents an important source of data that can do much to provide a more balanced and realistic view of the military justice as well as assisting in maintaining public confidence in the military justice system.

While I do not necessarily set about to be either an advocate or a critic of the military justice system, in fairness I can say that the view that I have just quoted is certainly not supported by the evidence available to the office of the IGADF.

Thank you.

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