

ADMINISTRATIVE INQUIRIES IN THE AUSTRALIAN DEFENCE FORCE

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Introduction

Good morning ladies and gentlemen. The purpose of my presentation is to provide an introduction to administrative inquiries in the Defence Force and discuss the military context in which they exist. I will begin with an explanation of the general purpose and characteristics of military inquiries and then outline the different types of military inquiries most commonly used in the Australian Defence Force. From there, I will make four brief observations about military inquiries, and probably challenge some commonly held views in doing so.

I will commence by observing that there are almost no inquiries—civilian or military—that are immune from potential criticism on a range of grounds; including cost, excessive legalism, delay, unfairness, bias and overall usefulness. Indeed, it was once said of Canadian Commissions of Inquiry that they are:

totally ad hoc; it arises suddenly, like a mushroom; it will flourish (or languish) for a time, the length of which it, itself, will determine and then it will vanish leaving behind as its sole legacy, a report, emitting a more or less musty aroma.²

It is notable that Lord Saville's 'Bloody Sunday' inquiry is now in its 10th year, having expended £181 million to date—half of this on lawyers fees. That's almost half a billion Australian dollars. The inquiry report is not expected until late next year³.

Aim and Characteristics of Military Inquiries

The principal aim of military inquiries is to inform internal decision-making in the Defence Force⁴. In this sense, military inquiries serve a practical purpose and are not

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² Hallett, LA. *Royal Commissions and Boards of Inquiry: Some legal of procedural aspects* (1984), p.9.

³ TimesOnline, <http://www.timesonline.co.uk/tol/news/uk/article5098399.ece>, 7 November 2008.

⁴ Richard Tracey, Legal Report to General Peter Cosgrove concerning an inquiry into 'Redress of Grievance—322067 LTCOL L Collins', dated 4 February 2004, downloaded from the internet on 30 September 2007 from

<http://www.defence.gov.au/publications/COL_Traceys_report_into_ROG_for_LTCOL_Collins.pdf>, p.3.

ends in themselves. They are one part of a broader decision-making process and it would be artificial to disconnect military inquiries from the military decisions they are intended to inform. Without a clear focus on this practical foundation and purpose, many military inquiries—and formal inquiries in particular—would become little more than an expensive job creation scheme for lawyers.

Military inquiries are ‘administrative’ in the sense that they find facts to inform decisions within the **executive arm of government**⁵. Even when conducted by judges, they are **not an exercise of judicial power**. Rather, they are inquisitorial in nature and, as such, engage in an **active** search for the **truth**⁶—they do not and cannot adjudicate disputes between parties. Military inquiries are also **non-determinative**⁷; in the sense that they do not directly determine rights and liabilities of individuals⁸. Their primary task is to furnish a report to an appointing authority⁹.

For all military inquiries, the appointing authority determines its scope and composition by issuing terms of reference. This ability of an appointing authority to determine an inquiry’s scope and composition means that military inquiries are essentially internal to Defence.

The Defence Force makes a practical distinction between **Inquiries** on the one hand, and **Investigations** on the other. **Inquiries** are administrative inquiries of the type I am discussing here today. Their conduct is governed generally by administrative law principles and rules, as well as applicable regulations and policies.

In contrast, the term **investigation** is taken to refer to criminal or disciplinary investigations such as those conducted by civilian and military police. Such investigations are designed primarily to ascertain whether offences have been committed and are part of a broader criminal justice or disciplinary system. They are governed principally by rules and principles underpinning the criminal law—rather than administrative law.

Types of Commonly Used Military Inquiries

Military Inquiries can take a number of forms, each with a different legal basis and varying degrees of formality or procedural complexity. The most common military inquiries encountered nowadays are **Routine Inquiries**, **Inquiry Officer Inquiries** and **CDF Commissions of Inquiry**.

Routine Inquiries are relatively informal inquiries conducted under general powers of military command. That is, the inherent authority of a commander, or indeed any manager, to ask questions about matters affecting their sphere of responsibility. The conduct of Routine Inquiries is guided by policy contained in the Administrative Inquiries Manual and, like all military Inquiries, are governed by applicable principles

⁵ Hallett, LA. *Royal Commissions and Boards of Inquiry* (1982), p.8.

⁶ Narelle Bedford & Robyn Creyke, *Inquisitorial Processes in Australian Tribunals* (2006), pp.4-5.

⁷ JRS Forbes, *Justice in Tribunals* (2nd Ed. 2006), pp.342-3, 351.

⁸ Donaghue, S. *Royal Commissions and Permanent Commissions of Inquiry* (2001), [7.17].

⁹ JRS Forbes, *Justice in Tribunals* (2nd Ed. 2006), p.3.

of administrative law. They have no special statutory powers to compel evidence from witnesses or to protect such witnesses regarding any evidence they provide. They are conducted in private and, all things being equal, are the least complex type of military inquiry.

Inquiry Officer Inquiries are quite similar in form to Routine Inquiries in that they are conducted in private and without formal hearings. However, they have a statutory basis under the *Defence (Inquiry) Regulations* which adds a degree of procedural complexity so far as their appointment and conduct is concerned. Significantly, Inquiry Officers are permitted generally to compel evidence from Defence Force members, who in turn are granted protections under the *Defence Act* regarding evidence they provide.

Amendments to the *Defence (Inquiry) Regulations* to enable the appointment of Chief of the Defence Force **Commissions of Inquiry**, or COIs, came into force in June 2007; making them the newest form of administrative inquiry in the Defence Force¹⁰.

COIs are required generally to be appointed into deaths of ADF members which appear to have arisen out of, or in the course of, a member's service. COIs have strong safety focus. They ascertain the facts and circumstances surrounding a death, primarily so that informed decisions may be made by the Defence Force to reduce the possibility of a similar recurrence. COIs may also be appointed into incidents involving serious injuries or other matters as determined by the CDF. To date, there have been nine COIs appointed by the CDF—all of which have involved deaths. COIs have largely superseded traditional **Boards of Inquiry** (BOIs) as the primary internal mechanism for inquiring into the deaths of ADF members.

The Minister for Defence may dispense with the requirement to appoint a COI where a death occurs in circumstances in which he determines that a COI is not required. To date, this has occurred on five occasions—in respect of the deaths in combat of Sergeant Locke, Trooper Pearce, Private Worsley, Signaller McCarthy and Lance Corporal Marks.

The regulations explicitly provide that only civilians with judicial experience may be appointed as COI Presidents. ADF members—including Reservists—are not eligible to perform this role. The appointment of such civilian presidents enhances COI impartiality and creates a degree of separation from the normal chain of command. Their legal skills and experience with formal legal processes also facilitate the expeditious and fair conduct of formal hearings, particularly those involving lawyers. Civilians and military personnel may be appointed as members and conduct the inquiry with the President.

¹⁰ This part of the presentation is based on a letter from the Chief of the Defence Force, Air Chief Marshal A.G. Houston AC AFC to the Chair of the Senate Standing Committee for Foreign Affairs, Defence and Trade, Senator M. Bishop, dated 5 June 2008. This letter is published at Appendix 5 of a report of the Senate Standing Committee for Foreign Affairs, Defence and Trade titled *Reforms of Australia's Military Justice System—fourth progress report of September 2008*.

COIs involve formal hearings for the testing of evidence. Persons deemed affected by a COI are entitled to free legal representation by a Defence Force Legal Officer. As formal inquiries, COIs tend to be relatively expensive, protracted and legalistic when compared to Routine Inquiries and Inquiry Officer Inquiries. It is now CDF's general practice to appoint COIs as public inquiries, subject to considerations of security and the exercise of legal discretions by COI Presidents. This is done principally to promote public confidence in the integrity of Defence inquiry processes.

General Observations

Having provided a general introduction to military inquiries, I will now make some observations about them.

1. The importance of inquiries as a foundation of military decision-making

My first observation is that military inquiries are vitally important to the Defence Force. While inquiries involving deaths and personnel complaints seem to attract most public attention, commanders in the Defence Force use internal inquiries to assist them in making decisions on an almost limitless range of issues associated with their command responsibilities. These include a broad range of matters associated with the conduct of military operations and capability, as well as issues concerning safety, resource allocation, equipment, training and policy. The ability of commanders to obtain relevant information in a timely manner is vital for the proper functioning of the Defence Force, the safety of Service personnel and the maintenance of Defence capability which is a foundation of Australia's security. Without the ability to appoint inquiries, military commanders would be denied the most fundamental ingredient of good decision-making—the capacity to obtain accurate and timely information.

In recent years a number of commentators have suggested that it is somehow improper for the military to inquire into itself. I believe this suggestion is misconceived for two principal reasons:

Firstly, military commanders at all levels are responsible for making a myriad of internal decisions—day in, day out. Particularly in war-zones, many decisions can and do involve matters of life and death. If commanders were denied the ability to obtain information by appointing internal inquires, their capacity to make decisions—as well as their overall quality—would be severely degraded. Such a result would be perverse.

Secondly, any perceived risks associated with the military conducting its own inquiries are more than counter-balanced by the capacity of external government agencies to scrutinise pretty well every facet of the Defence Force. Defence Force personnel and activities can, and have been, the subject of review and investigation by Federal, State and Territory Police Services, State and Territory Coroners, Parliamentary Committees, the Defence Force Ombudsman, the Australian Human Rights Commission, the Australian National Audit Office, the Privacy Commissioner, the Inspector General of Intelligence and Security and COMCARE. The Defence Force works cooperatively with such agencies and does not attempt to avoid their scrutiny. In this context, military

inquiries should be viewed positively—as a valuable complement to such external scrutiny of the Defence Force.

If a person is dissatisfied with the outcome or conduct of a military inquiry, there is no shortage of places for them to seek independent scrutiny of the issues under inquiry, or even the inquiry itself.

2. Inquiries are established for internal Defence Force purposes

My Second observation is that, as internal inquiries, military inquiries are not carried out for the purpose of meeting the requirements of any organisation or person outside of Defence¹¹.

That said, Defence is particularly mindful that families of deceased members often draw a measure of comfort from being involved with COI processes where they can learn more about the circumstances surrounding the death of a loved one. Defence is therefore committed to supporting the families of deceased ADF members throughout COI processes, and beyond.

Notwithstanding that military inquiries are conducted separately from the other government agencies, Defence cooperates with such agencies when they conduct investigations into aspects of the same incident which a military inquiry is looking into. Such cooperation can reduce wasteful duplication of effort and can yield benefits for both the military inquiry and the relevant external agency, which may not be familiar with the intricate and complex workings of the Defence Force.

3. Systemic focus, not blame focus

My third observation is that military inquiries do their best work when they focus more on systemic issues—that is, causes and solutions—than on questions of individual blame. While military inquiries can require individuals to explain and give account of their actions, they are not well suited to the task of dealing with individual culpability for three principal reasons.

Firstly, military inquiries can produce little more than a report—they have no power to directly punish individuals for misconduct or poor performance.

Secondly, military inquiries are not a useful precursor to the initiation of criminal or disciplinary prosecutions because evidence provided by inquiry witnesses cannot generally be used against them in courts and disciplinary tribunals.

Thirdly, the use of military inquiries as a punitive discipline tool could discourage individuals from being as open and frank in their evidence as they might otherwise be and promote a more adversarial approach to proceedings. More significantly, such an approach could compromise military safety by undermining Defence's attempts over many years to create a just safety culture based on open reporting of incidents and reflective learning.

¹¹ Ministry of Defence & Ministry of Justice (UK), *Boards of Inquiry and Coronial inquests—Information for bereaved families* 2006, p.3.

Questions of individual culpability are best dealt with through disciplinary or criminal processes whereby individuals accused of misconduct are provided with appropriate rights and safeguards and where proven wrongdoing can be suitably punished.

4. The need for fairness

My final observation concerns the importance of military inquiries being conducted fairly. While it might be true that military inquiries do not directly determine a person's rights and liabilities, they are capable of making adverse findings of fact which can have a devastating effect on a person's personal and professional reputation, as well as their future prospects. This is a potential consequence that should never be taken lightly.

Conclusion

With all of this in mind, I would conclude by again emphasising the internal nature of military inquiries and by offering the following benchmark for judging their success or otherwise. To my mind, a good military inquiry should be conducted in way that is fair, impartial and thorough—and should strive to provide a timely report containing useful information which assists military decision-making.