

Senate Standing Committees on Foreign Affairs, Defence and Trade  
Parliament House  
Canberra ACT 2600

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## **SUBMISSION BY COLONEL MICHAEL GOODYER**

### **DEFENCE LEGISLATION AMENDMENT (MILITARY JUSTICE ENHANCEMENTS - INSPECTOR-GENERAL ADF) BILL 2014**

#### **Legal Issues – Immunity and Protections Afforded Inquiry Officers**

Based on my experience as an Inquiry Officer, my concern is that this Bill, as it stands, entrenches the powers and privileges of the Inspector General (IG) ADF at the expense of the statutory independence of Inquiry Officers whilst providing no material benefit to the ADF, or the Australian people.

I am currently serving as a Reserve Officer in the Standby Reserve and I have conducted several inquiries for Chief of Joint Operations into civilian casualty incidents that occurred in Afghanistan; most notably into an incident that occurred on 11/12 February 2009, involving Force Element Charlie of the Special Operations Task Group (SOTG) in Afghanistan.

My inquiry into this incident resulted in a complaint made to IGADF that my inquiry was flawed in several respects. The complaint led to me being placed under inquiry by IGADF and interviewed several times about the manner in which I conducted my inquiry, evidence I relied upon to make my findings and recommendations and my thought processes surrounding the conclusions I reached.

I considered myself duty bound to take part in the IGADF Inquiry in order to protect my own reputation and defend myself against the allegations, while at the same time based on legal advice given to me; I had serious misgivings concerning the power of the IGADF to conduct the inquiry into me.

I subsequently raised these concerns through a formal complaint to the Ombudsman

The response of IGADF to the Commonwealth Ombudsman in relation to my specific complaint is illuminating.

In its response to the Ombudsman IGADF argued that:

- (a) It had a broad power to investigate matters of Military justice which included administrative matters;
- (b) That it's right to investigate administrative matters included a right to investigate Inquiries conducted by Inquiry Officers;
- (c) *That the common law protection afforded Inquiry Officers should be read down, as it is a protection derived from the common law which is inconsistent with the statutory entitlement accorded to IGADF to inquire into the Inquiry Officer Inquiries.*

It is true that the protection accorded a High Court Judge is a common law protection.

However, that protection is expressly conferred on an Inquiry Officer by Statute; specifically by operation of Regulations 78 and 61 of the Defence (Inquiry) Regulations. The current approach taken by IGADF to interpretation of the legislation has the effect of robbing these provisions of their literal intent.

Accordingly, what we have is not a clash between a common law entitlement and a statutory entitlement which may allow the common law entitlement to be read down; but two statutory provisions of the same piece of legislation which are inconsistent given the interpretation of its' power that IGADF is urging on the Ombudsman.

The statutory protections afforded an Inquiry Officer are therefore inconsistent with the broad ambit to investigate matters afforded IGADF.

In the circumstances although IGADF regards the position as settled, I am of the opinion that there is still significant doubt in respect of protections actually accorded an Inquiry Officer conducting an Inquiry under the Defence (Inquiry) Regulations. To be clear, I am not arguing that IGADF cannot scrutinize an Inquiry Officer's report (which was the case with respect to the earlier IGADF Westralia Inquiry with Mr Giles QC). I am; however, arguing that an Inquiry Officer's immunity is breached if IGADF (under Inquiry Regulations) questions an Inquiry Officer about the manner in which he conducted the inquiry, the evidence relied upon and thought processes leading to the Findings and Recommendations. As far as I am aware the questioning of me by IGADF set a precedent.

If IGADF has any issues with an Inquiry Officer's report it should be dealt with through the Appointing Authority (in my case Chief of Joint Operations) in order to ensure the impartiality and independence of the Inquiry Officer is preserved.

This doubt needs to be clarified so that any Inquiry Officer tasked to undertake a particular Inquiry is fully informed of the protections afforded to him/her under the Act and, if appropriate, of the fact that they may be subject to investigation by IGADF (if indeed that is the case at law).

One of the key issues, as I see it, is potential interference with the impartiality of the Inquiry Officer to conduct his inquiry in the way he sees fit which will be created if that same officer is subject to oversight and 'second guessing' by IGADF in respect of both the way in which he has conducted his inquiry and the conclusions he has reached. I am not aware of any concerns that the current system is flawed or in need of IGADF oversight in order to function efficiently. Indeed further recourse to IGADF only delays the ultimate resolution of a matter by allowing a further level of administrative review.

There is a perfectly capable review system already available, should a member be aggrieved as a result of adopted findings and recommendations of an Inquiry Officer; that is review by the Federal Court.

Given the existence and accessibility of judicial review my concern about enhancing and extending IGADF oversight in this area goes to both the utility of a further level of administrative review and the damage that this might do to the functionality of the existing system.

I remain firmly of the view, based on my own experience, the IGADF exceeded his authority and compromised the integrity and independence of the Inquiry Officer system with the conduct of the Inquiry into me, and this matter requires resolution.

I urge the Committee to give due consideration to this matter given that Defence Inquiries are a growing area of Defence business.

**Colonel Michael Goodyer**